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*Cape of Good Hope. Supreme Court.*  
"CAPE TIMES" LAW REPORTS

OF ALL CASES DECIDED



# IN THE SUPREME COURT

OF THE

## CAPE OF GOOD HOPE,

DURING THE YEAR 1899

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

J. D. SHEIL, Q.C.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, ADVOCATE OF THE SUPREME  
COURT, AND ASSISTANT LAW ADVISER TO THE CROWN.

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VOL. IX.

1899

CAPE TOWN :

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S STREET,  
1900.



**JUDGES OF THE SUPREME COURT DURING THE  
YEAR 1899.**

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**THE RIGHT HONOURABLE SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice).**

**HON MR. JUSTICE BUCHANAN.**

**HON. MR. JUSTICE MAASDORP.**

**HON SIR JACOB BARRY (Judge-President of the Eastern Districts Court) sat during January.**

**HON. MR. JUSTICE LAWRENCE (Judge-President of the High Court of Griqualand West) sat during January.**

**HON. MR. JUSTICE SOLOMON sat during January.**

---

*Attorney-General.*

**HON. R. SOLOMON, Q.C.**

## ERRATA.

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- PAGE 2.—In headnote to *Burton v. Rhodes and Hill*, line 3, read "Act 21 of 1859" for "Act 21 of 1852."
- PAGE 71.—In *Regina v. Goedeman*, line 4, read "Section 75" for "Section 26."
- PAGE 77.—In *Sonnenberg v. Pennell*, line 18 of the judgment, omit "to"; line 19, for "have" read "who has"; line 23, for "he" read "who."
- PAGE 81.—In *Watkins v. Bacon*, line 36 of the judgment, for "away" read "always have."
- PAGE 142.—In 7th line from bottom of right-hand column, for "petition" read "partition."
- PAGE 214.—In 27th line from top of left-hand column, for "of" read "on."
- PAGE 216.—In *Regina v. Naudé*, line 9, for "Act 42 of 1885" read "Act 43 of 1885."
- PAGE 454.—In *Wiggins v. Colonial Government*, line 3, for "defendant" read "plaintiff"; line 4, for "plaintiff" read "defendant."
- PAGE 459.—In 5th line of right-hand column, for "the rights in future." read "that rights in future"
- PAGE 477.—In 14th line of left-hand column for "to" read "that."
- PAGE 485.—In last line of left-hand column, for "plaintiff" read "defendant's father."
- PAGE 518.—In 30th line of left-hand column, for "6 E.D.C." read "5 E.D.C."
- PAGE 527.—In 3rd line from bottom of left-hand column, for "Stanford" read "Stanford."
- PAGE 535.—In last line of right-hand column omit "he."



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D. obtained an order for the attachment of goods <i>ad fundandam jurisdictionem</i> in an action against H. C. applied for the discharge of the writ on the ground that he had become security for £70 to the manufacturers of the goods and was the owner thereof.		On the case being called at the Criminal Sessions V. failed to appear, and application was then made to estreat the bond.	
The Court ordered the attachment to be discharged unless the plaintiff paid £70 to the Registrar within seven days.		Buchanan, J., refused the application on the ground that service of process had not been effected in terms of the bond or personally as required by Rule 73.	
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Bail-bond—Application to estreat refused—Rule of Court 73.		Held, that it was intended that the line of demarcation should be a line from G., to a point somewhere about the centre of the line E.D).	
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<i>Held, that the defendant did not, by retaining the note, render himself liable for the brokerage.</i>	
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<i>Held, in an action brought by the Liquidators of the Society to have</i>	

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<i>A person whose life was insured in the M. Company executed a deed by which he ceded the policy to the plaintiff upon certain trusts in favour of his wife and children, but the cession was not indorsed on the policy, nor was it notified to the M. Company, and the policy was not delivered to the plaintiff. A brief notification was, however, registered in the Deeds Office to the effect that the policy had been assigned to the wife. Subsequently the insured ceded and delivered the policy for value to the defendant, the cession was indorsed on the policy, and due notice was given to the M. Company. The wife and the insured having both died, Held, that the plaintiff was not entitled, on behalf of the children, to claim a cancellation of the cession made in favour of the defendant.</i>	
<i>Held, further, that the registra- tion of the cession in favour of</i>	

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<i>By a charterparty, executed in England, the defendants' agents chartered a ship to proceed to the port of P., and there to load a cargo of timber and lumber to be shipped by the charterer's factor to Cape Town. The cargo was to be delivered alongside the ship at merchants' risk and expense, and to be then at ship's risk; the stowing was to be done by the shippers, for which and other services they were to be paid by the ship-owner at a certain rate per load, and the stevedore was to be approved by them. The factors employed at P. were K. &amp; Co., by whom the goods were shipped and consigned to the order of the shippers or their assigns. The timber was wet when shipped, and part of the lumber was in a damaged condition, and a protest against the condition of the cargo was lodged by the master with the shippers. The ship was seaworthy, but owing to the generation of steam in the tropics from the wet timber, some additional damage was done to the lumber, and the damage would probably have been less, if, in storing the cargo, ventilating spaces had been left between the layers of cargo.</i>	
<i>Held, that the defendants, as indorsces of the bills of lading, were liable for freight upon delivery to them of the cargo.</i>	

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<i>Held, further, in a cross action by the defendants for damages owing to damaged condition of the cargo that the plaintiff was not estopped from denying that the cargo had been shipped in good order and condition.</i>	
<i>Held, further, that as part of the cargo was shipped in a damaged condition, and damage was done to the rest of the cargo by reason of the wet condition of another part of the cargo, the ship-owner was not liable in damages.</i>	
<i>Held, further, that if additional damage was done to the cargo by reason of faulty storage, the master was not liable inasmuch as the stowing had to be done by the shippers.</i>	
<i>Held, lastly, that on refusal of the defendants to pay freight after arrival in Cape Town and tender of cargo the master was entitled, in order to maintain his lien for freight, to stack the timber in the customary manner at the docks at the expense of the consignees.</i>	
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<i>Where a decree of divorce had been granted with an order that the plaintiff should have the custody of the minors and that the defendant should have access to them at all reasonable times and places, the defendant subsequently applied for an order that the children should be allowed to visit her at her house twice a week for two hours at a time.</i>	
<i>The Court expressed the opinion that once a month was too infrequent for the visits, whilst twice a week for two hours was too frequent, and suggested that the defendant should be allowed</i>	

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to see the children once a week for two hours at a time at some suitable place.

Swinton (formerly Meyer) v. Meyer.

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Church—Free Church of Scotland—Native congregation — Deacons' Court.

*The defendants were members of a native congregation of the Free Church of Scotland and officials of the Deacons' Court connected therewith; as such officials they were in possession of certain moneys, books and other movables belonging to the congregation and vested in the Deacons' Court for the time being: they tendered their resignations, seceded from the congregation, and founded a new church.*

*Held, that the plaintiffs as members of the Deacons' Court were entitled to sue the defendants for and obtain possession of the said moneys and other assets.*

Acting Chairman and Members of the Deacons' Court of the Native Congregation at Lovedale of the Free Church of Scotland v. Mzimba and others. ... 153

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2. —Directors —Prospectus — Material misrepresentation—Shareholder—*Restitutio in integrum*—Rescission of contract—Fraud—Justus error.

*A shareholder alleging that he has been induced to take shares*

*in a company on the faith of a prospectus issued by the directors, is not entitled to have his contract rescinded unless the misrepresentations relied upon by him were material with reference to his contract to take shares.*

Klette v. South African Cycle Factory, Limited ... 243

3. —Promoter — Contract with Bankers—Remoteness of Damages.

*The plaintiff alleged that being about to promote a company he entered into an agreement with the defendants, a banking corporation, whereby they undertook to distribute copies of the prospectus and forms of applications for shares through their various offices. After the formation and incorporation of the company the defendant refused to distribute the said forms and applications or to receive applications for shares by the public and deposit money in connection therewith. In consequence of an insufficiency of subscriptions coming in the company did not proceed to allotment.*

*Held, that the plaintiff was not entitled to recover from the defendants as damages the loss which he sustained owing to the company being unable to carry out its purposes.*

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7. — — Recital in written contract.	
<p><i>The defendant company being the owner of certain farms employed the plaintiffs to cut fuel and timber on the land. A written contract was executed which, after reciting that the company was engaged in mining operations and required supplies of fuel and timber for mining purposes, stipulated that the plaintiffs should cut fuel and timber in certain lengths in consideration of certain payments to be made for such cutting.</i></p> <p><i>Held, that in the absence of anything in the operative part of the contract showing the quantity to be cut, the recital might be referred to for the purpose of ascertaining the purposes for which the fuel and timber were required and the quantity which the plaintiffs were justified in cutting.</i></p>	
Willoughby's Consolidated Company v. A. D. Pennant & Co.	178
8. — — Sale—Time—Essence of contract.	
<p><i>The plaintiffs, who had entered into an agreement with certain shipping companies, in consideration of a rebate of freight to be made to them, to import goods</i></p>	

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<p><i>only by the ships of such companies, ordered 50 tons of sump from the defendants at New York, cost of shipment, insurance and freight to be paid by the defendants, but the goods to be shipped by one of the said companies' steamers between the 1st and 15th of July. One steamer of the company left New York on the 8th of July, but there was no available space for the sump. Another steamer left on the 19th, and the plaintiffs were willing to receive the sump by her, although leaving after the 15th, but the sump was excluded by reason of all the available space having been taken up by other cargo, including 72 tons of goods shipped by the defendants in respect of orders received from the Cape after the plaintiffs' order.</i></p> <p><i>Held that, according to a reasonable construction of the contract, the plaintiffs were only bound to ship by available steamers, and that none could be considered available if all the cargo space had been taken up, but that, as there was space for cargo shipped by the defendants on orders received by them after the plaintiffs' order, they were liable for breach of contract.</i></p> <p><i>It was known to the defendants that a limit of time was fixed for shipping the sump in order to avoid liability to Customs duty, the imposition of which was expected.</i></p> <p><i>Held, that time was of the essence of the contract although, as it happened, the duty was not imposed at the expected date.</i></p>	
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11. —Implied term—Necessary implication—Consideration. <i>The defendants entered into a contract by which they undertook, in consideration of the plaintiff erecting a proscenium and drop curtain for a stage in their Market-hall, to give him the sole right to use or let the drop curtain for advertising purposes. They afterwards found that owing to the almost prohibitive premium charged for insuring the hall while used for public entertainments it was impossible to find a theatrical tenant and they accordingly let it to C. to be used as an auction mart with liberty to C. to let it for theatrical performances on condition of his paying one-half the fees received by him (not being less than the extra premium) and of his exhibiting the drop curtain at such performances.</i> Held, that only such terms should be implied as are necessary to give the transaction its intended efficacy, and to prevent such failure of consideration as could not have been contemplated. Held, further, that the only terms to be implied in the contract were that the drop curtain should be exposed to public view whenever performances were given and that the defendants would afford reasonable facilities for the giving of such performances. Held, further, on the facts, that there had been no breach of contract on the part of the defendants. Philips v. The Bulawayo Market and Offices Company, Ltd.	460
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15. —of service—Government Department—Powers of subordinate officers. <i>The plaintiff, who was engaged to perform the duties of assistant analyst in the Government service, whilst performing such duties, entered, as he alleged, into a contract with the head of the Laboratory Branch of the Department of Agriculture, under which he was to perform the duties of another officer in lieu of his own for twelve months, and to receive for that period an addition of £100 to his salary.</i> Held, that such contract, if made, was not binding upon the Government. Morgenrood v. Colonial Government ... ..	132
16. —Supply of bricks. <i>The plaintiff contracted to supply the defendant with 200,000 bricks at 17s. per thousand, to be delivered at various times, and should the defendant require more than 200,000 to supply them at the same price. A clause in the contract provided that should the plaintiff fail to deliver bricks according to the contract, the defendant should procure bricks elsewhere at the plaintiff's cost and expense.</i> Held, that before this clause could be enforced as regards more bricks than 200,000 there must be a demand for them by the defendant and a refusal by the plaintiff to supply them. Salie v. Scholtz ... ..	671
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<i>Although prima facie a trustee or other person suing in a representative capacity should be held personally liable for the costs of an unsuccessful action yet, if the judgment gives costs against him without ordering that they be paid de bonis propriis, a writ of execution should be against him in his representative capacity.</i>	
<i>The proper time to apply for such an order is before or at the time when judgment is given, but the omission so to apply would not prevent the Court from supplementing its judgment afterwards.</i>	
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2. — Sentence — Imprisonment—	
Binding over to keep the peace.	
<i>Where a Magistrate convicted a prisoner of assault and sentenced him to a fine of £5 or one month's imprisonment with hard labour, and to find security for £10 for good behaviour towards the person assaulted for three months,</i>	
<i>Held, on appeal, that the Magistrate was justified under the circumstances in imposing such sentence.</i>	
Regina v. Van Dyk ... ..	447
Crown — Liability — Annexation —	
Concession—Act 37 of 1888.	
<i>The grantee of a concession made by a native paramount chief can-</i>	

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<i>not, after the annexation of the territory of the chief by the Crown, enforce against the Crown the rights conferred by the concession. Act 37 of 1888, which gives a power to sue, does not empower the Court to make a declaration of right as against the Crown in such a case.</i>	
Cook Brothers v. the Colonial Government ... ..	701
Crown land — Grant — Condition—	
Transfer—Right of road.	
<i>The condition in grants of Crown land, that all roads and thoroughfares shall remain free and uninterrupted, does not create any rights where none existed before, but reserves such rights of road as had been acquired against the Government before the date of the grant.</i>	
Ellman v. Werth ... ..	150
Customs duty—Customs Union—	
Convention.	
<i>There being an undertaking in the Customs Union Convention that the Cape Government will allow the importation from Natal, duty free, of goods for which Convention duties have been collected in Natal, but no such undertaking in respect of goods imported into Natal before the Convention came into force,</i>	
<i>Held, that the plaintiffs, who had imported whisky into Natal before the Convention came into force and had then paid the lower duty, were not entitled afterwards, under Act 6 of 1898, to import such whisky free of duty into this colony.</i>	
Malcomess & Co. v. Colonial Government... ..	186
Damages—Contract—Costs.	
<i>R. &amp; Co. sued the P. Co. in the Supreme Court for damages for failure to print a Directory in</i>	

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accordance with contract. They recovered £78, which was the amount which the Court considered were their disbursements caused by the unfulfilled contract. Subsequently the P. Co. sued R. & Co. in the Magistrate's Court for £8 12s. 6d. for supplying certain specimen sheets. The Magistrate found that these specimen sheets were supplied in connection with the contract for printing the Directory and gave judgment for the defendants.	
Held, on appeal, that the P. Co. should not, after the judgment in the Supreme Court, have claimed the amount in question and that the appeal must be dismissed.	
South African Electric Printing Co. v. Redfern, Morrison & Co.	582
2. — <i>Injuria sine damno.</i>	
The plaintiffs being unable to pay their hotel bill, the proprietor of the hotel detained their luggage, which included a bicycle. When they subsequently tendered payment of the bill he was unable to restore the bicycle, as it had been claimed by and delivered to a third person. The plaintiffs therefore refused to accept restitution of any of their luggage, and were in consequence compelled to purchase other articles to replace those detained. Three days later the proprietor of the hotel offered to deliver all the luggage including the bicycle. In an action for damages instituted by the plaintiffs,	
Held, that no damage at all had been sustained.	
Geddes v. Collins	... 457
—Measure of—Infringement of Patent Rights — Edison Bell Consolidated Phonograph Co. v. J. Garlick & Co....	... 600

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4. — — — — — Unauthorised contract made by agent.	
Langford v. Moore and others ...	405
5. — — — — — Remoteness.	
Marshall v. African Banking Corporation ...	84
6. — — — — — Seduction.	
Schoenwolf v. Wehle ...	316
Death—Presumption—Probability.	
<i>In re Kannemeyer</i> ...	440
Deeds Office Regulations.	
<i>Ex parte Matthee</i> ...	658
Delivery, place of—Sale.	
Gilson v. Payn ...	306
2. — — — — — See Sale.	
Demand before summons.	
Van der Berg v. Van Tonder ...	545
Deposit—Building Society.	
Langford v. Moore and others...	405
2. — — — — — in bank for minors.	
De Kock v. Executors of Van de Wall ...	496
Derelict Lands Act, section 9—Oral evidence.	
<i>Ex parte Smith</i> ...	37
Diagram—Grant.	
Milnerton Estate, Limited v. Colonial Government ...	164
Diamond Trade Act, section 2—Evidence—Trap.	
Two diamonds were tied up in a rag and placed under a stone at a certain spot by a detective in the presence of two overseers, H. and M., and B., a convict. The diamonds were subsequently found in the prisoner's pipe; the pipe was in a pipe-case and the pipe-case was in a basket in the possession of the prisoner. B. alleged that he saw the prisoner take the rag containing the diamonds, and put it in his pipe-case. M. alleged that he saw the prisoner kick the stone, pass on, and shortly afterwards return, stoop down at the place where he had kicked the	

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<i>stone away, and pick up something there, after which he appeared to be closing his pipe-case.</i>	
<i>Held, on appeal, that the evidence was sufficient to convict the prisoner.</i>	
Regina v. Scott ... ..	275
Directors—Borrowing powers, <i>see</i> Building Society.	
2. —, <i>see</i> Company.	
Divisional Council, <i>see</i> Act 27 of 1894.	
Divorce, <i>see</i> Husband and Wife.	
Domicile—Edictal citation—Restitution of conjugal rights.	
Peters v. Peters ... ..	289
2. —of marriage—Proclamation of July 12th, 1822—Community of goods—Will—Election.	
<i>B., who was domiciled in this Colony, married his wife in England both intending to reside in this Colony, but no ante-nuptial contract was executed. After so residing in this Colony for 14 years, B. died leaving a will by which, after claiming to take the benefit of the Proclamation of July 12th, 1822, he bequeathed their joint property to his children subject to a usufruct in favour of his wife.</i>	
<i>Held, that the law of the matrimonial domicile, viz., of this Colony, must regulate the right of the parties, and that the widow was entitled to elect whether she would claim her half share of the community or take under the will.</i>	
Brisley v. Brisley's Executor ...	321
Domicilium citandi.	
Downey v. Downey ... ..	515
Donation—Acceptance—Ratification—Registration—Death of donor before acceptance—Minors—Deposit of money in bank for minors.	
<i>The mere deposit by a grandfather of a sum of money with a bank in</i>	

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<i>trust for or in the name of his grandchildren who are still under the guardianship of their mother does not constitute a donation to such grandchildren, and if he dies before acceptance of the gift the transaction does not become a completed donation by acceptance after his death.</i>	
<i>The receipt by the bank of the deposit without any intention to accept it on behalf of the alleged donees as a donation to them does not amount to such an inchoate acceptance as would become complete upon it being ratified on their behalf after the death of the donor.</i>	
De Kock v. Executors of Van de Wall ... ..	496
Edictal citation—Domicile.	
Peters v. Peters ... ..	289
Ejectment—Motion.	
Mills v. Jones Bros. ... ..	543
2. — <i>see</i> Magistrate's jurisdiction.	
Election—Legacy.	
Brisley v. Brisley's Executor ...	321
Election, Municipal, <i>see</i> Municipality.	
Election, Parliamentary — Polling officer—Malicious prosecution.	
Litsenborgh v. De Beer and Louw ... ..	297
Election petition — Amendment — Fresh charge.	
<i>An amendment, including a fresh charge, allowed to be made in an election petition although more than six months had elapsed since the date of filing the petition.</i>	
Palmer v. Moltano ... ..	245
2. —Appeal.	
<i>No appeal lies against a judgment upon an election petition.</i>	
<i>Where an election petition had been filed, but before the day of hearing a preliminary decision was given by the Court upon the validity of certain legal objections</i>	



to votes raised in the petition, and leave was thereupon applied for to appeal to the Privy Council upon that decision.  
The application was refused.

Crewe v. Botha ... 32

3. —Bribery and corrupt practices—Agents—Act 21 of 1859, section 1—False statement—Payment by result.

A false statement made by a candidate's agent as to past benefits conferred by the candidate on the voters, does not amount to bribery in terms of the 1st and 2nd sub-sections of section 1, Act 21 of 1859.

The 3rd sub-section is wide enough to embrace payment or an offer of payment depending upon the result of an election, but not to include the case of offering to pay a person, in consideration of his becoming the agent of the candidate, a larger sum than such person had agreed to accept from the rival candidate.

Burton v. Rhodes and Hill ... 2

4. — — —Treating — Proof of bribery—Benefit of doubt.

The promise to a voter by the agent of a candidate that his principal would lend a sum of money on mortgage to such voter, if made to induce him to vote or refrain from voting, is bribery, even if the principal had never authorised the agent to make such a promise.

De Waal v. Sivewright ... 12

5. — — —Act 21 of 1859, sections 1 and 4—Undue influence—Treating.

A candidate is not liable for an illegality of his agent unless the illegality was committed by the latter in the course of his agency, and for the supposed benefit of his principal.

Where the agent has been guilty of bribery for the purpose of promoting the election of another candidate in opposition to the interests of the principal, the principal is not responsible.

Kyle v. Krige ... 39

6. — — —Gifts—Natives—Act 21 of 1859, section 1.

The distribution by a candidate of small gifts among four or five voters shortly before the election, although indiscreet and prima facie illegal, does not constitute bribery in terms of the first sub-section of section 1, Act 21 of 1859, if the Court is satisfied, from a consideration of all the circumstances, that the gifts were not made in order to induce such voters to vote or to refrain from voting.

Harding v. Sauer ... 51

7. —Dismissal.

Crewe v. Botha ... 37

8. —Withdrawal — Substitute for petitioner.

Kleyn v. Dempers and Boyers ... 34

9. —Withdrawal of claim to seat —Counter petition—Act 9 of 1883, section 43.

P. filed an election petition against M., and claimed the seat. Subsequently he applied for leave to amend his schedule of particulars, and it was then stated on his behalf that he intended to abandon his claim to the seat. Shortly afterwards he communicated such intention to M. in writing. M., however, objected to the withdrawal of the claim and filed a counter-petition charging P. with corrupt practices.

An application by P. for leave to withdraw the claim to the seat, and for an order expunging the counter-petition, was refused.

Palmer v. Molteno ... 339

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Encroachment—Building—Damages.		2. —Rule 35.	
<i>The defendant, bonâ fide thinking that he was building upon his own land, encroached with the wall of his building upon five inches of the plaintiff's property. The eaves of the roof of the building hung over the plaintiff's property to a further extent of eleven and a half inches. Upon discovery of the encroachment he tendered a certain amount as damages in respect of the five inches.</i>		McLeod v. Green and Sea Point Municipality ... ..	404
<i>Held, that he had not tendered sufficiently, inasmuch as the plaintiff was also entitled to damages for the eleven and a half inches. The plaintiff consenting to give transfer to the defendant of the strip of land encroached upon, judgment was given in his favour for the value of the whole extent of the encroachment.</i>		3. —Written agreement — Collateral oral agreement—Survey of property sold.	
Greeff v. Krynauw ... ..	591	<i>A written agreement for the sale of land contained a clause providing that all expenses of the transfer including survey charges were to be borne by purchaser, but it contained no provision as to who was actually to have the survey made.</i>	
English Solicitor, Admission of, see Attorney.		<i>Held, that evidence of a collateral oral agreement between the parties stipulating that the purchaser should have the survey made was admissible, inasmuch as such an agreement was not inconsistent with the written document.</i>	
Error—Transfer deed.		Visser v. Murray ... ..	360
<i>Ex parte Holtzhausen and others</i>	513	Excavation—Liability of land-owner.	
Estoppel, see Charter-party.		Clingen v. Ross ... ..	105
Evidence — Accomplice — Cross-examination of accused person tendering his own evidence.		Exception, see Pleading.	
<i>The appellant was indicted in the High Court of Rhodesia together with one K. for theft. Evidence was given for the prosecution which would justify the conviction of the appellant who did not tender his own evidence. K., however, gave evidence on his own behalf and in cross-examination gave evidence supporting the case against the appellant.</i>		Execution, see Writ of Execution.	
<i>Held, on a case reserved, that the admission of the evidence on cross-examination did not invalidate the verdict.</i>		Executor—Assumption—Letters of Administration.	
Regina v. Gilmore ... ..	476	<i>A husband and wife by joint will appointed the survivor and A. executors of the estate of the first dying with power of assumption. After the death of the testatrix the survivor executed a deed assuming B. as his co-executor. On the survivor's death B. applied for letters of administration. A. refused to consent.</i>	
		<i>Held that B. was not entitled to letters of administration.</i>	
		Graaff-Reinet Board of Executors v. The Master.—Re Campbell's Estate ... ..	83
		2. —Co-executor—Refusal to sign account.	
		<i>Upon the application of an executrix who had prepared and signed a liquidation and distribution account which her co-executrix</i>	

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<i>refused to sign, a rule nisi was granted calling upon the co-executrix to show cause why she should not sign the said account or be removed from her office as executrix, and the rule was subsequently made absolute.</i>	
McDonald v. Lowies—Re Du Plessis' Estate ... ..	698
3. —Insanity—Transfer of property—Registrar of Deeds.	
<i>F., her husband's sole heiress, and M. were appointed co-executors under the husband's will.</i>	
<i>M. subsequently became of unsound mind and incapable of carrying out his duties as co-executor.</i>	
<i>The Court, on F.'s application, directed the Registrar of Deeds to pass transfer to F. of the landed property in the estate subject to the production of the order for M.'s detention in a lunatic asylum.</i>	
Re February's Estate ... ..	247
Factor, charterer's, <i>see</i> Charter-party.	
Female servant, <i>see</i> Master and Servant.	
Fencing, <i>see</i> Act 30 of 1883.	
Fidei-commissum—Valuation—Municipality.	
Van Breda v. Town Council of Cape Town ... ..	272
Foreign judgment—Superannuation.	
Edgar v. Scott ... ..	67
Franchise—Qualification—Salary.	
Sonnenberg v. Pennell ... ..	75
Fraud—Negligence.	
<i>The defendants at the request of H. signed certain documents by which they agreed with the Standard Bank, and undertook in consideration of certain banking facilities being granted to H., to guarantee the repayment of all sums of money owed by H. to the bank. In actions instituted by the bank upon these guarantees the defendants pleaded that their signatures had been put to the</i>	

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<i>document through the fraud of H. and that they were in ignorance of the nature or contents of the documents.</i>	
<i>Held that fraud had not been sufficiently proved.</i>	
<i>Held, further, that even if fraud could be proved this defence could not be raised if there had also been negligence on the part of the defendants in signing the documents.</i>	
Standard Bank v. Du Plooy ... ..	116
" v. Coetzee ... ..	116
2. —See Company.	
Fraudulent insolvency—Indictment.	
Regina v. Jacobsohn. ... ..	230
Freight, <i>see</i> Charter-party.	
Fuga. <i>See</i> Arrest.	
General plan.	
Ross and Williams v. Hite's Executor ... ..	73
2. —Evidence — Swanepoel v. Swanepoel and another ... ..	584
Government Department—Contract of Service.	
Morgenrood v. Colonial Government. ... ..	132
Grant—Diagram—"Sea-shore."	
<i>A piece of land granted by the Government was described in the deed of grant as being bounded on the north-west "by the sea-shore," but the diagram annexed represented the boundary on the north-west to be more than 200 feet above the ordinary high-water mark. The area mentioned in the grant corresponded with the area contained within the boundaries shown in the diagram. At the time the grant was made the Government had no power to grant land within 200 feet of the sea unless such grant were approved of by both Houses of Parliament and there was no proof that such approval had been obtained.</i>	

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Held, that the term "sea-shore" should be construed in its popular sense and that the true boundary of the land was that shown by the diagram.		2. — Divorce — Adultery — Evidence.	
Milnerton Estates Limited v. Colonial Government ...	164	H. sued her husband for divorce on the grounds of adultery.	
2. — Error in name of grantee— Procedure.		The only evidence of the alleged adultery was given by S., a coloured servant of doubtful reputation, who swore that the defendant had committed adultery with her.	
Ndabazana Ntapo v. Nguhleni and the Surveyor-General ...	567	This charge was denied by the defendant.	
Hire and purchase system—Theft.		Held, that the uncorroborated evidence of S. was not sufficient to justify the granting of a decree of divorce	
Regina v. Erickson ...	557	Horn v. Horn ...	664
Husband and wife—Agreement for future separation—Ill-treatment.		3. — Children — Custody — Reasonable access.	
An action having been brought by a wife against her husband for judicial separation on the ground of ill-treatment the plaintiff withdrew it and returned to live with the defendant upon his entering into an agreement by which he undertook, in case he should again ill-treat her or necessitate her leaving him, to enter into a notarial deed of separation and pay her a certain sum in cash and certain further monthly payments in lieu of her share of the community.		Swinton (formerly Meyer) v. Meyer ...	693
Held, that such an undertaking for a future voluntary separation cannot be enforced and that pecuniary promises depending upon the validity of such an undertaking are not binding.		4. — Venereal disease.	
Qu.: Whether in consideration of the wife withdrawing the action and consenting to live with the husband his undertaking to pay a certain sum, in lieu of the wife's share in community, in case the Court should decree judicial separation by reason of his marital misconduct, would be enforced by the Court.		Where the defendant had been suffering from venereal disease, contracted since his marriage to the defendant, and did not offer any evidence to show how he had contracted it,	
Braude v. Braude ...	666	The Court granted a decree of divorce.	
		Garton v. Garton ...	683
		5. — Domicile, see Domicile.	
		6. — Funds to institute action— Divorce—Alimony.	
		The Court, on the application of a woman married out of community of property and who was without means, ordered her husband to pay her the sum of £25 to enable her to bring an action against him for divorce on the grounds of adultery.	
		She further applied for alimony pendente lite, but this application was refused as it appeared that she had been living for two years without assistance from her husband.	
		Jopling v. Jopling ...	517

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7. —Insolvency—Wife's Inheritance.	
Greiff's Trustee v. Fourie's Executor and Greiff ...	697
8. —Nullity of marriage—Evidence—Marriage certificate.	
<i>A decree of nullity of marriage granted upon evidence of admission by the defendant, that he was married to another woman at the time when he went through the marriage ceremony with the plaintiff, and the mere production, without proof, of the certificate of marriage of the defendant and the other woman.</i>	
Bell, otherwise Tully v. Tully...	602
9. —Suretyship— <i>Senatus consultum velleianum</i> —Renunciation—Notarial instrument— <i>Authentica si qua mulier</i> .	
<i>A. being indebted to B., induced his wife to whom he was married out of community, to pass a bond on her property to secure the debt. She signed a power authorising the passing of the bond and the renunciation of her benefits, but the power was not notarial, and there was no evidence that she understood her rights as a married woman, whilst she swore that she was wholly ignorant of the nature of the benefit which she renounced.</i>	
<i>Held, in an action on the bond brought against her by B.'s executors that she was entitled to the privileges of the senatus consultum velleianum and of the authentica si qua mulier.</i>	
Alport's Executor v. Alport ...	326
Indictment—Amendment—Prejudice.	
Regina v. Dubese ...	610
2. —Error in date—Prejudice.	
<i>Accused was charged in a Resident Magistrate's Court with committing an assault upon the 25th December. The evidence showed</i>	

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<i>he had committed two assaults, one on the 25th December, outside the limits of the jurisdiction of the Magistrate, and one on the 26th January within such limits. He was convicted of the later assault.</i>	
<i>Held, on appeal, that as accused was not prejudiced the conviction should not be set aside.</i>	
Regina v. Sinclair ...	229
3. —Fraudulent insolvency.	
<i>The accused was convicted upon a count in an indictment charging him with fraudulent insolvency, in that he had fraudulently contracted certain debts. The indictment set forth the total amount of such debts but not the persons alleged to have been defrauded nor the amount in respect of which each creditor was defrauded.</i>	
<i>Held, that the conviction must be set aside.</i>	
<i>The accused was charged in a Magistrate's Court with fraudulent insolvency in having fraudulently removed certain goods. He applied to the Magistrate to postpone the trial until he had had an opportunity of applying to the Supreme Court to set aside the sequestration of his estate. The Magistrate refused the application.</i>	
<i>The Court upon appeal refused to interfere with the Magistrate's decision.</i>	
Regina v. Jacobsohn ...	250
4. —Theft—Fraudulent sale by person intrusted with safe keeping.	
Regina v. Matroos Jan ...	378
Inheritance—Distribution.	
<i>In re Kannemeyer</i> ...	440
Injury, real—Judicial process—Malice—Reasonable and probable cause—Writ of execution—Magistrate's jurisdiction—Setting aside writ,	

Acts done under the sanction of and within the limits of the authority conferred by judicial process are not actionable as "injuries" unless done maliciously and without reasonable cause.

In an action brought in a Magistrate's Court by B. judgment was given against A. for the delivery of a bicycle or the payment of £14, its value. Four months after judgment A. tendered the bicycle to B. who refused to accept it and sued out a writ of execution which was in due form and was enforced against the goods of A. An action was thereupon brought by A. in the same Court for illegal execution and the Magistrate, holding that the writ had been illegally sued out, gave judgment against B. for £5 as damages.

Held, on appeal, that as the execution took place under the formal sanction of judicial process and as there was no proof of malice on B's part, A. was not entitled to succeed in the action for damages whatever right he might have to set aside the writ.

Held, further, that if the writ was improperly issued, A. could not succeed in an action for malicious execution without first having the writ set aside.

Hart v. Cohen ... 379

**Insanity—Tests of responsibility—Knowledge of right and wrong—Power of choosing between right and wrong.**

Upon certain questions reserved for the consideration of the Court on a conviction for murder,

Held: (1) That where the defence of insanity is interposed, the capacity to distinguish between right and wrong is not the sole test of criminal responsibility in all cases.

(2) That, in the absence of legis-

lation to the contrary, Courts of law are bound to recognise the existence of a form of mental disease which prevents the sufferer from controlling his conduct, and choosing between right and wrong, although he may have the mental capacity to distinguish between right and wrong.

(3) That the defence is established if it be proved that the accused had, by reason of such mental disease, lost the power of will to control his conduct in reference to the particular act charged as an offence.

(4) That the capacity of the accused to control his own conduct must be presumed until the contrary is proved and that, therefore, in the absence of such evidence in the present case as might reasonably have induced the jury to find that the accused had lost such capacity, the verdict should not be disturbed, although the presiding judge had not directed the jury to inquire whether the mental condition of the accused at the time he committed the act was such as to deprive him of the power of controlling his conduct.

Regina v. Hay ... 292

**Insolvency—Amendment of distribution account—Ordinance 6 of 1843, section 111—Pledge—Removal of goods—Sale.**

E. pledged to H. goods belonging to him and situated in a certain store. Subsequently, without the knowledge of H., he pledged the same goods to S. E.'s estate was sequestrated and S. removed the goods from the store. The trustees of E.'s estate, with the consent of H., agreed that S. should sell the goods for a certain sum and after deducting the amount of his debt pay the difference into the estate,

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without prejudice to H.'s right to take such action against S. as he might be advised. The trustees did not bring up the matter at all in the distribution account and ranked H. as a concurrent creditor. On application by H. for an amendment of the account, by bringing up the sale price of the goods and awarding him a preference,

Held, that in the ordinary course the trustees should have brought the matter up in the account, but that under the special circumstances H. should seek his remedy by bringing an action against S. and joining the trustees as co-defendants.

Heydenrych v. Eayrs's Trustees and Saber ... 696

2. —Culpable—Punishment.

Regina v. Wolpert and Robins 328

3. —Ordinance 6 of 1843, section 121—Residue of estate—Prescription.

Upwards of thirty years after the surrender of an insolvent estate an asset of the estate, which had not been mentioned by the insolvent in his schedules, was discovered and sold.

Held, that his legal representatives (he having died in the interval) were not entitled to claim the proceeds or any part thereof until payment of all the claims which had been proved.

Re Parker's Insolvent Estate ... 564

4. —Ordinance 6, 1843, section 127—Community—Wife's Inheritance.

The Court has a discretion as to the amount for which it may order a writ of execution to issue under section 127 of Ordinance 6 of 1843.

Where an inheritance under her father's will became due to the

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wife of an unrehabilitated insolvent, married in community of property,

The Court, upon the application of the trustee in insolvency, granted an interdict restraining the executor of the testator's estate from disposing of the assets, pending a further order, the applicant to satisfy the Court as to the value of the insolvent's share in the said estate.

Greeff's Trustee v. Fourie's Executor and Greeff ... 697

5. —Sale—Insolvency of purchaser, see Sale.

6. —Ordinance 6 of 1843, sections 77, 98.

Interdict granted restraining the trustees of an insolvent estate from selling landed property belonging to the estate, until after they had received instructions as to such sale at the third meeting of creditors.

Van der Spuy & Co. v. Truter's Trustee ... 203

7. —Sequestration—Petitioning creditor—Insolvent Ordinance.

Final order of sequestration refused in the absence of prima facie proof to the satisfaction of the Court that the petitioning creditor's debt amounted to £50 in terms of the 6th section of the Insolvent Ordinance.

Fletcher & Co. v. White ... 28

8. —Sequestration by High Court—Confirmation of trustee's appointment by Supreme Court. In re Coetzee's Insolvent Estate 225

9. —Undue preference. Rayner's Trustee v. Rayner ... 62

10. —Attachment ad fundandam jurisdictionem.

The defendants, who were creditors of E., attached certain of his goods ad fundandam jurisdictionem in

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<i>a suit to recover the amount of the debt, but agreed to stay proceedings and release the goods from attachment upon E. giving them a promissory note for the amount of the debt, delivering over the goods under attachment as security for payment of the note, and passing a bond upon his landed property. The defendants thereupon took possession of the goods. E.'s liabilities at the time exceeded his assets, and six weeks later his estate was sequestrated. He failed to pay the note or pass the bond. Held, that the delivery of the goods to the defendants was an undue preference.</i>	
Ewan's Trustees v. Peacock Bros.	138
Inspection of Pleadings.	
Abt v. Registrar of Supreme Court ... ..	513
Instalments, Payment in.	
Hiddings v. Schade ... ..	89
Institution, <i>see</i> Will.	
Insurance — Cession of policy — Delivery.	
Jacobsohn's Trustee v. Standard Bank ... ..	188
2. — Fire—Agent—False Answer.	
<i>An agent employed by a Fire Insurance Company to obtain customers, and assist them in filling up the necessary forms of applications for insurance, induced the plaintiff to make an application, and without asking whether the plaintiff had previously had a fire, inserted without the plaintiff's knowledge a negative answer to a similar question in the form. A fire having occurred on the insured premises,</i>	
<i>Held, that although the plaintiff had previously had a fire, the defendant company could not set up the false answer as a defence to the action.</i>	
Pereira v. Equitable Marine and Fire Assurance Company ...	282

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3. — Lost Policy—Practice.	
Parker v. The Star Life Assurance Society ... ..	225
Insurance Company—Carrying on business.	
Colonial Government v. National Mutual Life Assurance Society ... ..	235
Interdict—Contract in restraint of trade — Draper — Gentlemen's outfitter.	
<i>J., who carried on a business as "draper and gentlemen's outfitter," hired certain premises from L. for the purposes of such business; he showed L. at the time a card containing a list of the articles in which he dealt, and L. undertook not to let an adjoining shop which belonged to him to any person carrying on a similar business. Subsequently L. let the adjoining shop to B., who intended to carry on business there as a "gentlemen's hosier and outfitter." Several of the articles in J.'s card were similar to those which B. proposed to sell.</i>	
<i>Held that L. must be restrained from letting the shop to anyone selling any of the goods mentioned in the card.</i>	
Johnston v. Lennon Limited and Bishop ... ..	373
2. — Perpetual—Blasting.	
Anderson v. Clewes ... ..	36
3. — Transfer — Damages—Sale.	
<i>The lessees of certain property had the right, under the contract of lease, to buy the property for the same price as should be offered to the lessors by others. The lessors wishing to sell the property had certain interviews with the lessees, at the last of which the lessees, according to the version of the lessors, positively refused to purchase the property for £20,000, which was the price which the</i>	



lessors could obtain for the property. The lessors thereupon sold the property to M. The lessors, whilst denying the version given by the lessors, admitted that they had not, before the sale to M., offered to buy the property for the sum named to them by the lessors. Held that the lessees were not entitled to an interdict restraining transfer of the property to M., whatever claim for damages they might have against the lessors.

Gardner v. Executors of Jones 97

4. — Sale—Lease—Possession.

O. applied on motion for an interdict restraining M. from transferring certain hotel property sold to a third person on the ground that under a certain agreement of lease O. had a pre-emptive right over the property. In the absence of clear proof that a proper agreement of lease had been entered into or that the applicant had at any time been in possession of the property, and the purchaser being an innocent party, the Court refused to grant an interdict.

Olsen v. McIntyre ... 595

5. — Shares—Syndicate.

Nicolay v. Carter ... 591

6. — See Water rights.

Interpretation of Statute—Directory and imperative provisions—Southern Rhodesia Order in Council—Validity of Ordinance.

The Southern Rhodesia Order in Council enacted that the Administrator shall submit to the Legislative Council, before the expiration of the month of December in each year, such estimate as he may think necessary of the whole expenditure, not fixed, which is intended to be incurred, together with an estimate of the revenue for the financial year then next ensuing.

The Order in Council, which was promulgated in November, 1898, contained a provision that the Legislative Council should meet within six months after such proclamation. In consequence of the necessity to prepare for and carry on the elections the Council was unable to meet before May, 1899, and as a further consequence the estimates could not be submitted to the Council before the 31st of December, 1898. During its first session the Council passed a Bill for the levying and collection of certain Customs dues, which was duly promulgated as an Ordinance in August, 1899.

Held, that such ordinance was not invalidated by reason of the estimates not having been submitted until May, 1899.

In the absence of a clear expression of its intention by the Legislature, the Court, in deciding whether any particular provisions are directory or imperative, must have due regard to the general scope of the Statute, as well as to considerations of convenience and justice.

Burrowes v. British South Africa Company ... 518

Intestate succession—Representation—Collaterals—Next of kin.

S. died intestate, leaving no parents alive nor brothers nor sisters nor relatives on her father's side; on her mother's side she left (1) an uncle P., who subsequently died leaving children; (2) the grandchildren of an aunt, D., who had died leaving no children alive; (3) the daughter of an aunt, M., who had died leaving no other descendants alive, and (4) an aunt, E., still alive.

Held that the maternal relatives were entitled to only one half of the intestate estate.

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Held, further, that the grandchildren of the aunt D. were not entitled to share in the succession, inasmuch as representation does not extend beyond the children of uncles and aunts.		2. —Repudiation—Form of action.	
Ordered, accordingly, that the half of the estate be divided into three equal portions, one being awarded to the children of P., another to the daughter of M., and the third to E.		Where a lessee repudiates the lease after it has been finally agreed upon the lessor can sue for the rent or for damages for each of contract.	
In re Stephens ... .. 634		Bacon v. Hartshorn ... .. 228	
2. —Succession of wife.		3. —Sale—Possession.	
Ex parte Chouler ... .. 99		Olsen v. McIntyre ... .. 595	
Invasion—Country in enemy's hands		Legacy, see Will.	
—Postponement of interdict proceedings.		Lessor and Lessee—Liquor Licence.	
Colonial Government v. Brady... 610		Mills v. Jones Bros. ... .. 543	
Jury trial—Act 23 of 1891, sections 6, 7.		Letters of Administration. See Executor.	
When an application is made under section 7 of Act 23 of 1891, for leave to have a case tried by jury good cause for the application must be shewn.		Libel—Publication—Letters.	
Winterbach v. Heatlie and another ... .. 574		A summons in a Magistrate's Court alleged libel upon the plaintiff contained in a letter written by the defendant to the firm of attorneys of which plaintiff was a member. Exception was taken on the ground that the summons did not allege publication of the letter. An amendment was allowed which alleged publication to the bookkeeper of the firm, and the exception was disallowed.	
Land Beacons Act—Prescription—Interruption.		Held, on appeal, that inasmuch as the amendment did not allege that the defendant was responsible for the publication to the bookkeeper, the exception should be allowed.	
De Klerk v. Pienaar ... .. 385		Where a summons complains of libel contained in certain letters it is a good exception that the letters are not annexed, and the exact words not set forth.	
2. —See Act 7 of 1865.		Hall v. Zietsman... .. 201	
Land owner—Excavation—Injury—Damages — Negligence — Trespass.		Licence—Life Insurance Company—Carrying on business—Act 38 of 1887, section 11.	
The owner of land is not liable for damages for an injury sustained by a child through falling into an excavation made by such owner on his land, at a spot not resorted to by children, and away from any public or private road.		The N. Assurance Society, after having carried on the usual business of an Insurance Company in this colony for some years, at the end of the year 1896 discontinued the issue of any new policies, but	
Clingen v. Ross ... .. 105			
Lease—Option to purchaser—Rectification of instrument, see Mistake.			

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employed an agent in the Colony, who merely collected the renewal premiums when they became due and paid them into a bank to the credit of the society; when claims arose upon Colonial issued policies they were sent to England by him for instructions.

Held, that the society carried on business in the Colony so as to be liable for the payment of licence money under section 11 of Act 38 of 1887.

Colonial Government v. National Mutual Life Assurance Society ... 235

2. — Liquor—Cancellation—Act 25 of 1891, section 13.

Where a memorial under section 13 of Act 25 of 1891 was presented to a Licensing Court, and a licence granted, upon its subsequently appearing that certain signatures appeared improperly upon the memorial and that without these there was not the majority required,

The licence was cancelled.

Hauman v. the Paarl Licensing Court and Ward ... 578

3. — Condition—Ultra Vires—Registered voter—Act 39 of 1887—Act 28 of 1898—Total prohibition.

Act 28 of 1898 does not repeal Act 39 of 1887, and a native registered voter is not therefore subject to the operation of the former Act.

A condition imposed upon a licence to the effect "That within the A. Municipality, liquor shall be sold to aboriginal natives only in reasonable quantities, and upon the production of a permit from an inspector of native locations, or other officer duly authorized by the Resident Magistrate, stating the quantity to be purchased, to

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be granted by such inspector or officer, only upon production to him of a certificate under Act 39 of 1887, such liquor to be consumed only on the premises of the licensed dealer,"

Held to be ultra vires, inasmuch as it amounted to total prohibition.

Land v. Wodehouse Licensing Court ... 231

4. — — Conditions—Prohibition

A condition in a retail liquor licence that no liquor is to be sold on Saturdays before Nachtmal, is not authorised either by Act 28 of 1883 or by Act 25 of 1891.

Regina v. Van Zyl ... 290

5. — Conditions—Ultra vires

—Total prohibition—Certificate of Justice of the Peace—Native—Reputation.

A condition imposed by a Licensing Court on the holder of a liquor licence that "no native man not being a servant shall obtain liquor except under a certificate of a Justice of the Peace" does not amount to total prohibition in terms of the 2nd section of Act 28 of 1898, and is not ultra vires.

Evidence of reputation that a person to whom liquor has been sold is the illegitimate son of a European is not sufficient to prove that such person is not a native if his mother was a native and he himself has the features and appearance of a native.

Regina v. Parrott ... 480

Liquor law—British Bechuanaland—Proclamation 64 of 1889, section 2—Proclamation 113 of 1891—Bastard.

The appellant was convicted of having contravened section 2 of Proclamation 64 of 1889 of British Bechuanaland as amended by Proclamation 113 of 1891, by supplying liquor to M., whom

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<i>the Magistrate found to be a Bastard. On appeal, the Court refused to interfere with the Magistrate's decision.</i>		<i>of Court, and that under all the circumstances the application should not be entertained.</i>	
Regina v. Kirsten ... ..	544	Cruywagen v. Resident Magistrate of Worcester and Meyer ... ..	206
2. —licence, <i>see</i> Licence.		2. —Summons—Exception—Act 20 of 1856.	
Limitation of action.		<i>It is no ground of exception to a summons claiming damages in a Magistrate's Court for breach of contract, that the summons does not state whether the contract is in writing or not.</i>	
Bell and Moore v. Swart ...	430	Cwaba v. Kuhn ... ..	268
2. —Revival—Acknowledgment of debt.		Magistrate's jurisdiction—Counter-claim.	
Dittmer v. Fryer ... ..	511	<i>The plaintiff sued the defendant in the Magistrate's Court for £45, under an agreement for the sale of a cart, harness and horses. The defendant admitted the agreement, but put in a counter-claim for £67, which included charges for the care of the horses, and the value of one of them which had died. The Magistrate dismissed the case on the ground that he had no jurisdiction.</i>	
Magistrate's Court—Irregularity—		<i>Held, on appeal, that the Magistrate should have heard the case.</i>	
Absence of Jurisdiction—Rule of Court 190—Act 20 of 1856, Schedule B, rule 29.		Overton v. Schindler ... ..	204
<i>C. who had resided for many years at Stellenbosch, entered into a contract at Worcester with M. for the performance of certain work at Worcester. For a few months while the work was proceeding C. lived at a boarding-house in Worcester. He then returned to Stellenbosch. Subsequently, while on a visit to Worcester, he received a letter of demand for money due to M. under the contract. Not satisfying the demand a summons was issued against him out of the Magistrate's Court of Worcester, and service was effected by leaving a copy at the boarding-house at which he had previously lodged. Failing to appear, provisional judgment was given against him in the Magistrate's Court of Worcester. He satisfied the writ under protest, and applied to the Supreme Court by motion for a rescission of the judgment on the ground of gross irregularity, and for a refund of the money paid in satisfaction of the judgment.</i>		2. — —Set-off or compensation—Unliquidated claim.	
<i>Held, that he should have made application under the 190th Rule</i>		<i>The jurisdiction of a Magistrate's Court is not ousted by reason of a counter-claim which is not pleadable by way of set-off or compensation.</i>	
		South African Electric Printing Company v. Redfern, Morrison and Co. ... ..	453
		3. — —Unliquidated damages.	
		<i>In an action in a Magistrate's Court for £30 for rent the defendant excepted to the jurisdiction on the ground that he had a counter-claim for £35, being damages</i>	

for an alleged breach of agreement on the plaintiff's part. The Magistrate, although finding that the counter-claim was unliquidated, sustained the exception.

On appeal, the action was remitted to the Magistrate's Court for trial with a direction to try the counter-claim also in case the defendant should reduce it to the amount claimed by the plaintiff in his summons.

De Jager v. De Jager (3 Juta, 69), approved.

De Wet v. Theron ... 452

4. —Culpable insolvency—Punishment—Ordinance 6 of 1843, section 71—Act 38 of 1884, section 9. A Magistrate cannot in sentencing a prisoner for the crime of culpable insolvency, allow him the option of a fine, even where the case has been remitted under Act 43 of 1885.

Where a Magistrate convicted two prisoners of culpable insolvency, and sentenced them respectively to a penalty of £25 fine or four months' imprisonment and £10 fine or two months' imprisonment, the sentences were set aside, and the cases remitted to him to pass such sentences of imprisonment, not exceeding the periods of four months and two months respectively, which could have been passed if he had not given the prisoner the option of a fine.

Regina v. Wolpert and Robins 328

5. —Future rights—Ejectment—Trespass—Value of right of occupation—Act 20 of 1856, section 10.

In an action in a Magistrate's Court upon a contract under which the defendant was to have certain rights of pasturage in consideration of his deepening a well on the plaintiff's land the plaintiff claimed £20 as damages for

breach of contract and for trespass after such breach. The defendant excepted to the jurisdiction on the grounds that future rights would be bound and that the subject matter of the suit was beyond the jurisdiction.

Held, on appeal, that future rights would not be bound and that the proviso to the 10th section of the Magistrate's Court Act, 1856, does not apply to actions for trespass.

Held, further, that inasmuch as the defence denying any breach of contract on the defendant's part was bona fide and involved the question as to his right of occupation, the exception would have been good upon satisfactory proof that such right of occupation was of the clear value to him of more than £20, but that, as the value was doubtful, the Court below ought not to have allowed the exception.

The principles laid down in the case of Bertram v. Wood (10 Juta, 177) held applicable to the present case.

Terblanc v. Bosman ... 459

6. —Municipal regulation—Lacing goods on public street—Future rights—Title to land—Act 20 of 1856, sections 8, 42—Act 2 of 1893, section 185.

The jurisdiction of a Magistrate to deal with a contravention of a Municipal regulation which prohibits any person from placing goods on a public street is not affected by the fact that there is a dispute as to the ownership of the land which constitutes the street.

The contravention of a Municipal regulation penalised by fine or, in default, imprisonment is a criminal and not a civil matter.

Maxwell v. the Town Council of Cape Town ... 578

Malice, *see* Writ of Execution.

Malicious prosecution—Reasonable and probable cause—Malice—Polling officer.

*The defendants, upon the receipt of certain information with respect to the conduct of the plaintiff as a polling officer at a Parliamentary election, sent a letter to the Magistrate of the district, making certain allegations and requesting him to make an inquiry into the matter. The allegations made constituted four distinct charges of misconduct. The Magistrate held a preliminary examination upon these charges, but the Attorney-General refused to prosecute. In an action for malicious prosecution instituted by the plaintiff,*

*Held, that inasmuch as there was reasonable and probable cause for three of the charges, malice could not be inferred from the absence of such cause with respect to the remaining charge.*

Litsenboigh v. De Beer and Louw ... 297

Marriage, English—Domicile—Community.

Brisley v. Brisley's Executor ... 321

Marriage—Evidence—Heirs.

*Ex parte* Spangenberg; re Estate of Esther Stephens ... 517

Master and servant.—Act 15 of 1856, Ch. IV., section 12—Female servant—Husband's authority—Act 18 of 1873, section 4, subsection 6; section 7, subsection 2.

*Where a female servant, married during the currency of her service, was taken away by her husband without notice, the conviction of the servant for contravening subsection 6 of section 4 of Act 18 of 1873 was quashed on appeal.*

Regina v. Joseph ... 443

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2. —Payment by the month—Construction of contract.

*G, a railway sub-contractor, entered into a verbal agreement with L. and other natives to employ them as labourers in the construction of a line of railway.*

*The agreement provided that each labourer's wages should be 3s. per diem payable monthly on pay day.*

*Held, affirming a Magistrate's judgment, that L. could only claim his wages on pay day as provided by the contract.*

Langbooi v. Gothe ... 700

Merchandise Marks—Act 12 of 1888—Bottles.

*Interdict granted restraining the respondent, a manufacturer of mineral waters, from using for the purpose of his business any bottles bearing the names or trade marks of the applicants.*

Daly and Day v. Giesler ... 239

Minors—Donation—Acceptance.

De Kock v. Executors of Van de Wall ... 496

Misrepresentation—Prospectus, *see* Company.

Mistake—Grant—Name of Grantee—*See* Grant

2. —*Restitutio in integrum*—*Justus error*—Rectification of instrument—Agreement for lease—Lease—Option to purchase—Partnership Incoming partners. *(On the death of V., his son, the plaintiff, who became entitled, as heir, to certain premises, but had not yet obtained transfer, agreed with a firm, of which his uncle was one of the partners, to renew a lease of the premises on the same terms on which the firm held it from V. The firm prepared the new lease, and on their representing to him that the terms were exactly the same as those had*

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the old lease, of which they had the custody and which he had never seen, he signed the new lease. In fact, the new lease contained a material alteration in that it gave the firm the absolute option to buy the premises at a certain price instead of a right to buy in case only he wished to sell. All the parties laboured under the common mistake that the old lease gave the firm the option and three new partners were admitted who never saw the new lease but were also led to believe that the option had all along existed. After the lapse of seven years the firm gave the plaintiff notice of their intention to exercise their option, the land being at that time greatly increased in price. The plaintiff raised no objection but, upon being informed soon after by his uncle of the departure from the agreement, he brought an action to rescind the new lease. Held, that as the plaintiff had signed it in the belief, which was mistaken in fact, that it carried out the agreement to embody the terms of the old lease in the new one, he was entitled to relief as against the firm, who being solely responsible for the mistake could not rely upon the error not being justus. Held, further, that the plaintiff was entitled to claim the rescission of the new lease unless the firm were willing to allow a rectification thereof, in which case they should have the option of so doing. Held, further, that, although at the time of action brought, two of the new partners had left the firm they had no greater rights in respect of the new lease than the old partners, in the absence of proof that their position had been in any way altered by reason of the form of the new lease.

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Held, further, that inasmuch as the plaintiff brought his action immediately on discovering the mistake, the lapse of time, which had not in any way prejudiced the defendants, did not debar him from obtaining relief.

Van der Byl and others v. Van der Byl & Co. ... 343

3 — Undercharge.

Wiggins v. Colonial Government 454

Mortgage bond—Cancellation refused.

*Ex parte* Tutton and Tutton ... 196

2. —Payment, *see* Principal and Agent.

3. —Power of sale.

Where certain bonds hypothecating immovable property contained powers of sale in favour of the mortgagee, the Court upon failure of the mortgagors to pay the amounts due upon the bonds granted a rule nisi calling upon them to show cause why authority to sell in pursuance of the powers should not be given.

Liquidators of the Cape of Good Hope Permanent Building, Land and Investment Society v. Rodel and Others ... 198

Motion—Ejectment—Contravention of Liquor Law—Lessor and lessee.

A lease contained a covenant that in case the lessees should be convicted of a contravention of the liquor law, the lessor may without any demand whatsoever re-enter and take possession of the premises. The lessees having been convicted of such a contravention, Held, that the lessor was entitled to apply by motion for an order of ejectment against the lessees.

Mills v. Jones Bros. ... 543

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Municipality—Bye-law—Erection of building—Line of street—Interdict.		6. —Erf-holders — Water-leading — Interdict.	
<i>A municipal bye-law prohibiting the erection of any building which shall interfere with or encroach upon the line and direction of any street, without the written approval of the Council, does not justify the Council in refusing to allow the erection of a building, the plans of which are otherwise approved of by the Council, within an arbitrary line fixed by the Council, without reference to the frontage of houses situated nearer to the street than such line.</i>		Esterhuysen and others v. Municipality of Caledon ... ..	607
Claremont Municipality v. Hudson ... ..	390	7. —Municipal Officer—Valuer—Construction of 108th section of Act 45 of 1882.	
2. — —Fencing of Excavations.		<i>The 108th section of the Municipal Act of 1882 does not prohibit Municipal Councils from appointing any Municipal Secretary as valuer and paying him for his services as such valuer.</i>	
Clingen v. Ross ... ..	105	Winterbach v. Worcester Municipality and Lindenbergh ...	241
3. — —Placing goods on public street, see Magistrate's Jurisdiction.		8. Valuation—Servitude—Fidei commissum—Rate.	
4. — —Diversión of water—Flood.		<i>In the municipal valuation of immoveable property the valuer should, in the absence of any statutory direction to the contrary, allow for any real servitude upon the property, but not for any fidei commissum imposed thereon.</i>	
Hall v. Claremont Municipality	502	Van Breda v. Town Council of Cape Town ... ..	272
5. — —Election of Municipal Councillors—Nomination—Omission of public notice 49th section of Act 45 of 1882.		Mustard, see Adulteration.	
<i>Owing to the neglect of the Chairman of the Fraserburg Municipality to give the twenty-one days' notice of the election of Councillors, as required by the 49th section of Act 45 of 1882, the applicants, who had consented, at the request of several voters, to become candidates, were ignorant of the day and place of nomination, and were consequently prevented from being nominated.</i>		Mutual will — Construction — Survivor—Usufruct.	
<i>Ordered, that the election of the two Councillors, who were elected unopposed, be set aside and that a fresh election take place.</i>		Coenradie's Executrix v. Coenradie's Executor Dative ...	130
Mader v. Fraserburg Municipality ... ..	540	Native law and custom—Great wife—Will - Allocation of Property—Dominium.	
		<i>S., a Kafir Chief, during his lifetime allocated certain cattle, &amp;c., to the kraal of his wife N. He died leaving a will under which the plaintiffs were appointed executors. The defendant claimed and took possession of the allocated cattle on the ground that he was the eldest son of N. and that N. was the Great Wife of S., and that he was therefore entitled by Kafir law and custom. In an action for the recovery of the cattle instituted by the executors,</i>	



Held that the onus probandi lay upon the defendant and that he had not sufficiently established his defence.

Sigdi's Executors v. Matumbu 524

2. — Lobola. M'Slope v. M'ngamme 613

3. — Procedure—Proclamation 110 of 1879.

*Under Proclamation 110 of 1879 a suit to which a European is a party must be dealt with according to the ordinary law of the Colony. An action having been brought in a Native Magistrate's Court by a European against a native the defendant died, whereupon the Magistrate allowed the defendant's father to be substituted as defendant, both in his capacity as father and as surety under native law for his son, and gave judgment for the plaintiff.*

Held, that the proceedings were irregular and that native law was not applicable.

Maindo v. Moriarty ... 581

Native, sale of liquor to.

Regina v. Parrott ... 480

Native territories—Chief Magistrate—Appeal in Civil Suits—Act 26 of 1894.

*Under Act 26 of 1894, there is no appeal to the Supreme Court from any Court of Resident Magistrate in the native territories in any civil suit in which natives alone are the parties even although no question of native law or custom is involved.*

Nqambana and others v. Bulubulu and others ... 485

Negligence—Collision Contributory negligence.

Langerman v. Berry ... 507

2. —Excavation.

Clingen v. Ross ... 105

3. —Furrow—Damages.

Revels Brothers v. Colonial Government... 308

4. —Neg'igent driving—Damages.

Luff v. Hare ... 448

5. —Tram-car, see Tram-car.

6. —Verbal Contract—Evidence—Credibility.

*L. entered into a verbal contract with J. in terms of which J. for valuable consideration undertook to look after and herd certain rams belonging to L.*

*Under the contract J. was not to be liable in the event of any of the rams dying, but he was to be liable for all other losses.*

*Between certain dates J. through negligence, as L. alleged, lost 33 of the rams.*

*The Court on appeal declined to reverse the decision of the Magistrate, who believed L.'s witnesses, and gave judgment against J. for the value of the rams he had lost.*

Jizana v. Leonard ... 382

Notice of Application—Service, see Practice.

Nuisance—Abatement—Interdict—Practice.

*Where a nuisance dangerous to public health exists the Court will grant an order on motion restraining such nuisance.*

Beaufort West Municipality v.

McIntyre ... 593

Onus probandi, see Spoliation.

Ordinance 6 of 1843, section 71.

Regina v. Wolpert and Robins 328

2. —6 of 1843, sections 77, 98, 111, 121, 127, see Insolvency.

3. —104, section 31.

Falconer's Executor v. Drewitt 546

Particulars. see Pleading.

Partition, Action for.

Van Zyl v. Engelbracht ... 142

Partnership—Accounts—Umpire's decision.

Aitken v. Kyd ... 384

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2. — Departure of managing partner—Receiver.		<i>she was rightly convicted for having falsely stated on oath that she had never had immoral intercourse with one R.</i>	
<i>Ex parte</i> Johnson and Smith ...	127	Regina v. Stevens ...	290
3. — Incoming partners—Lease—Mistake.		Pleading.	
Van der Byl and others v. Van der Byl & Co. ...	343	Sigidi's Estate v. Matumbu ...	433
4. — Service of summons.		2. — Application for further particulars — Rule of Court 330 (g).	
<i>Judgment refused against one partner where the summons had been issued against the partnership, but the partnership had been dissolved and the other partner could not be found and was said to have left the Colony.</i>		McLachlan v. The British South Africa Company and Rhodes ...	34
Arderne & Co. v. Egan & Power	219	3. — Exception—Striking out plea.	
Patent rights—Infringement—Damages.		Watkin's Assignee v. Kromm ...	632
<i>In an action for damages for the infringement of the plaintiff's patent rights for the sale of certain instruments it was proved that before he began to sell the instruments but after he had acquired his rights the defendant sold similar instruments in ignorance of the plaintiff's rights.</i>		Pleadings—Inspection—Registrar of Supreme Court.	
Held, that compensation should only be given for the actual loss sustained and that the measure of such compensation should be the extent to which the plaintiff's sale had been interfered with.		<i>A stranger to a suit is not entitled, as of right, to inspect the pleadings in the Registrar's Office before judgment has been pronounced thereon.</i>	
Edison Bell Consolidated Phonograph Co. v. J. Garlick & Co.	600	Abt v. Registrar of Supreme Court ...	513
Peace, security to keep.		Pledge—Removal of goods—Sale—In olveny.	
Regina v. Van Dyk ...	447	Heydenrych v. Eayrs' Trustees and Saber ...	596
Perils of the Sea, <i>see</i> Charter-party.		2. — of bonds, <i>see</i> Building Society.	
Perjury — Materiality — Prejudice — Character of witness.		3. — of Title Deed, <i>see</i> Title Deed.	
<i>On an appeal against the conviction for perjury of a woman who had charged a man with assault with intent to commit rape on her, and was the chief witness in support of the charge,</i>		Possession, <i>see</i> Spoliation.	
Held that her previous moral character was material and that		Post-nuptial Contract—Registration.	
		<i>Leave to execute after marriage a contract, excluding community of property between husband and wife, refused where it did not appear that at the date of the marriage they had any intention of executing such a contract.</i>	
		<i>Ex parte</i> Peters ...	468
		Pounds Act, <i>see</i> Act 15 of 1892.	
		Power of Sale, <i>see</i> Mortgage Bond.	
		Practice—Application for costs.	
		Standard Bank v. Jacobsohn's Trustee ...	365

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2. — Appointment of executor lative to person presumed to be dead. <i>In re Kirby</i> ... .. 217		15. — <i>Res judicata</i> . Wolfaardt v. Colonial Govern- ment ... .. 248	
3. — Bail bond, <i>see</i> Bail bond.		16. — Rule of Court 329D—Failure to plead—Bar. Pohl v. Van de Sandt de Villiers & Co. ... .. 494	
4. — Criminal Appeal—Act 21 of 1876, section 4. <i>Regina v. Bruyns</i> ... .. 389		Prescription. Joseph's Executors v. Parkin and others ... .. 175	
5. — Demand. <i>A demand before summons need not be in writing.</i> Van der Berg v. Van Tonder ... 545		2. — Insolvency. <i>Re Parker's insolvent estate</i> ... 564	
6. — Derelict Lands Act—Evidence. <i>Ex parte Smith</i> ... .. 37		3. — Interruption—Land Beacons Act. <i>The prescriptive period of occu- pation may be interrupted by the dispossession of the occupier.</i> <i>Such dispossession held to have taken place where the owner of a farm removed a beacon encroach- ing on his land, erected a new beacon in the line claimed by him and compelled one of the owners of the adjoining farm, who had pulled down the new beacon, to re-erect it on pain of being criminally prosecuted.</i> <i>Van Schalkwyk v. Hugo</i> (Foord's Rep., 89) commented upon. <i>De Klerk v. Pienaar</i> ... .. 385	
7. — Discovery—Delay—Costs. <i>Hind and another v. Wallsend Colliery Company</i> ... .. 495		4. — — Possession — Occupation. <i>To support a claim of title to land by prescription, there must be proof that the adverse possession was so patent that the owner, with the exercise of reasonable care, would have observed it</i> <i>Smith and others v. Martin's Executor Dative</i> ... .. 102	
8. — Illegal execution — Setting aside writ. <i>Hart v. Cohen</i> ... .. 379		5. — Promissory note—Part pay- ment of debt—Acknowledg- ment of debt—Lord Tenter- den's Act—Consideration. <i>Part payment of a debt, after it has been barred by prescription, does not take the cause of action out of the operation of the Prescription Act, 1861.</i>	
9. — Land Beacons Act. <i>De Klerk v. Pienaar</i> ... .. 239			
10. — Lease — Repudiation—Form of action. <i>Bacon v. Hartshorn</i> ... .. 228			
11. — Lost policy of insurance. <i>Parker v. The Star Life Assu- rance Society</i> ... .. 225			
12. — Nuisance — Abatement—In- terdict. <i>Beaufort West Municipality v. McIntyre</i> ... .. 573			
13. — Service of notice. <i>A decree of civil imprisonment had been granted against a debtor, but suspended upon condition of his paying certain instalments of his debt; upon renewal of the application owing to the cessation of payment of the instalments, there being no proof that the deb- tor had notice of the application, no order was made.</i> <i>Thomson and others v. Bennett</i> 652			
14. — Summons—Promissory Note —Copy—Rule of Court 12. <i>Kaiser v. Falconer</i> ... .. 611			

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<i>An acknowledgment of a debt does not take the case out of the operation of the Act unless made in some writing signed by the party chargeable thereby.</i>	
Bell and Moore v. Swart	430
Dittmer v. Fryer	511
Presentation.	
Vos v. Marsh	211
Presumption of death—Appointment of executor <i>ad litem</i> .	
<i>Where K. had not been heard of for seventeen years, and when last heard of was in very bad health, Held, that his death should be presumed, and an executor <i>ad litem</i> appointed to administer property in the Colony which had fallen to him by way of inheritance during the interval.</i>	
<i>In re Kirby</i>	217
2. —Probability—Distribution of inheritance — Executors — Security.	
<i>On a renewed application for the payment to K.'s heirs <i>ab intestato</i> of an inheritance due to him out of his mother's estate it was proved that he had been absent from the Colony for twenty-eight years, during the last twenty-four of which he had never been heard of, notwithstanding every possible effort made by his relatives and friends to find him.</i>	
<i>Held, that the probability of his death was so great as to justify an order for the distribution of the inheritance among those who would be his heirs <i>ab intestato</i> if he were dead upon their respectively giving their personal undertaking to the Master of the Supreme Court that they would restore the capital sums received by them respectively in case he should thereafter be found to be alive.</i>	

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<i>Hel', further, that there was no legal presumption of his death and that consequently the distribution of his inheritance should be made directly by the executor of his mother without appointing executors of his own estate.</i>	
<i>Semble, that if the probability of his death had not been so great the personal security of the next of kin would not have been sufficient.</i>	
<i>Vide Re Kannemeyer (7 Juta 322).</i>	
<i>Ex parte Kannemeyer (No. 2)...</i>	440
Principal and agent—Fire Insurance.	
Pereira v. Equitable Marine and Fire Assurance Company	282
2. —Sale—Payment of mortgage bond.	
<i>It is the duty of the vendor of property to pay any mortgage bond on that property, and where he hands money over to a third person for the purpose of paying off such mortgage bond prima facie that third person is his agent for the purpose of making the payment.</i>	
<i>Van der Westhuizen v. Thwaites</i>	317
3. — Unauthorised contract made by agent—Measure of damages — Building Society—Deposit.	
<i>Although the ground of an agent's liability for an unauthorised contract made by him on behalf of his principal with a third party differs from the ground upon which a similar liability rests under English law the measure of damages is the same.</i>	
<i>One of the rules of a Building Society provided that the directors shall have power to borrow any sum for the purposes of the society to advance to their members, either from their bankers or any other source, not exceeding</i>	

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two-thirds of the amount secured to the society by mortgages from its members.

Held, that the acceptance by the directors of deposits amounts to a borrowing and that the acceptance of any deposit at a time when the two-thirds limit had been exceeded was not authorised by the terms of their mandate.

The society having been placed in liquidation, a creditor whose deposit had been so accepted, proved for the amount of his deposit and the liquidators reported that there would be available assets to pay the depositors and other creditors a dividend of 10s. in the pound  
Held, that in the absence of fraud on the part of the directors, the depositor could not claim from them the difference.

Langford v. Moore and others... 405

Privileged will—Children—Adoption—The Roman law of adoption is not in force in this Colony.

The provisions of the law under which a holograph will made by a parent in favour of his children is privileged, do not apply to wills made in favour of adopted children.

Robb v. Mealey's Executor Dative 93

Proclamation, 12th July, 1822.

Brisley v. Brisley's Executor ... 321

2. —No. 110 of 1879, see Native Law.

Promissory note, see Prescription—Provisional sentence.

Promoter of company, see Company.

Prosecuting appeal, Time for.

Regina v. Bruyns ... 389

Prospectus—Material misrepresentation—Restitutio in integrum, see Company.

Provisional sentence—Foreign judgment—Superannuation.

Edgar v. Scott ... 67

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2. —Presentation of document.

Provisional sentence granted upon an acknowledgment of debt payable at the office of the Resident Magistrate of Prieska or any other Resident Magistrate, the document having been presented at the office of the Resident Magistrate of Cape Town.

Vos v. Marsh ... 211

3. —Promissory note—Consideration—Summons—Copy—Rule of Court 12.

The plaintiff claimed provisional sentence upon a promissory note signed by the defendant without stating any capacity. The defendant alleged that he was acting for his wife in the transaction for which the note was given, and that he had received no consideration.

Held, that if the plaintiff did some work for the amount promised, it was immaterial for whom the work was done, and there was sufficient consideration to entitle him to sue upon the note.

The note was written upon a paper bearing certain printed words which on the face of them were not intended to be part of the note. Held, that the absence of these words in the copy annexed to the summons was not such an omission as would entitle the defendant to judgment.

Kaiser v. Falconer ... 611

4. —Promissory Notes—Partnership—Defence.

Kamp v. Hudson ... 564

Public School property—Trustees—Transfer.

The Consistory of a Dutch Reformed Church in 1875 bought certain property and transferred it into the names of three trustees and established a public school thereon. No provision was made for the appointment of fresh trus-

tees upon the demise of the three originally appointed. The Church subsequently spent large sums of money in improving the property but was unwilling to incur any further responsibility therewith. Upon an application by the Consistory for leave to transfer the property to the Committee of Management of the School,

The Court appointed three trustees, to whom it gave power to transfer the property to the Committee of Management or to trustees appointed by them.

Consistory of the D.R. Church,  
Cradock v. The Superintendent-General of Education ... .. 69

Public street, placing goods on, *see* Magistrate's jurisdiction.

Purchase, *see* Sale.

Quantity surveyor, *see* Architect.

Railway contract—Act 40 of 1898, section 1.

The T. Company entered into a contract with the Colonial Government for the construction of certain lines of railway: in one of the terms of the contract (section 3, sub-section 2), it was agreed that work on a particular portion of the line should remain in abeyance until a detail survey of an alternative route had been made and "if need be the instructions of Parliament sought and obtained as to what route should be adopted." The survey referred to was completed, but no application was made to Parliament for the purpose of having the route altered, although there had been opportunity for such application. The contract was confirmed by Act of Parliament subject to certain conditions, one of which provided that the com-

pany should give security before a certain date for the completion of each and every of the said lines. The company gave security coupled with a condition incorporating clause 3, sub-section 2, of the contract.

Held, that the security required by the Act had not been given, and that the company should be interdicted from proceeding with the lines.

Colonial Government v. The Thames Ironworks and Shipbuilding Company, Limited 170

Railway official—Freight—Undercharge—Tariff rate—Mistake—Illegality—*Restitutio in integrum*—Railway Regulation Act, 1861. The consignor of goods by railway, who has paid the freight demanded by the proper railway official (which owing to a mistake for which such official was alone responsible was less than the tariff rate) and would not have sent the goods if the tariff rate had been demanded, cannot, after the goods have been forwarded to their destination, be compelled to pay the difference, notwithstanding that the law prohibits any reduction of rates in favour of any persons using the railway.

Wiggins v. Colonial Government ... .. 454

Receipt—Payment—Owner—Character of witnesses—Credibility. Douglas v. Butler ... .. 479

Rectification of lease, *see* Mistake.

Rectification of transfer deed—Error.

*Ex parte* Holtzhausen and others ... .. 513

Rectification of Will, *see* Will.

Registering Officer, *see* Registration of voters.

Registration of voters—Parliamentary—Constitution Ordinance—Salary or wages qualification

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—*Bona fide residence* in electoral division—Rectification of list of voters—Fraud.

*A person cannot be registered as a voter in any electoral division under the salary or wages qualification, unless he actually resides in such division and bona fide intends continuing to reside there. A Civil Serrant, residing and registered as a voter in Cape Town, served as a Volunteer in a campaign against certain notices in Vryburg, and while so serving, was registered along with hundreds of other Volunteers from different parts of the country, as a voter in the Vryburg electoral division. No objection was taken either before the Field-cornet or before the Civil Commissioner, and only after an election for members of the House of Assembly an application was made to the Court by an unsuccessful candidate to expunge the voter's name from the Vryburg list of voters.*

*Held, that, although the respondent had been improperly registered as a voter in Vryburg, it was too late to apply to the Court for a rectification of the list of voters without alleging and proving fraud on the part of the respondent and the other Volunteers who were thus illegally registered.*

Sonnenberg v. Pennell ... 75

2. — Registering Officer—Civil Commissioner—Revising Officer—Written objections—Re-opening inquiry.

*It is the duty of a registering officer who has received and kept written objections sent to him on or before the day fixed by him for hearing such objections to transmit them to the Civil Commissioner in terms of the 19th section of Act 9 of 1892, although the*

*objectors did not appear before him on the day so fixed to support such objections.*

*The respondent F. having failed to transmit written objections so handed in to him by the applicant, in consequence of which the respondent H., as Civil Commissioner, was unable to decide as to the validity of the objections,*

*The Court directed F. to transmit such objections, and the respondent H. to reopen the inquiry for the purpose of deciding upon such objections.*

Kotze v. Faure and the Civil Commissioner of Stellenbosch... 549

3. —Revising officer—Final determination—Mixed question of law and fact.

*The Civil Commissioner of B. having decided in an inquiry under the 25th section of Act 9 of 1892 that the applicants were not resident in the district, and therefore not entitled to be registered as voters,*

*Held, that as the question of such residence was a mixed question of fact and law his determination upon the point was final.*

Avery v. Le Grange and the Civil Commissioner of Barkly East... 547

Repairs, *see* Will—Usufructuary.

Reputation, evidence of.

Regina v. Parrott ... 480

Residence—Constitution Ordinance, section 8.

Sonnenberg v. Pennell ... 75

*Res judicata*—Form of action—Trespass—Use and occupation.

*The defence of res judicata is not defeated by the fact that the action differs in form from the previous action, if the matter in issue is the same.*

*The test as to what was the real matter in issue must be sought in*

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<i>the pleadings, and not in the evidence actually adduced in the previous action.</i>	
Wolfaardt v. Colonial Government ... ..	248
<i>Restitutio in integrum.</i>	
Wiggins v. Colonial Government	454
Restraint of trade—Contract—Interdict.	
Johnston v. Lennon, Limited, and Bishop ... ..	373
Revising Officer, <i>see</i> Registration of voters.	
Right of retention, vendor's—Insolvency of purchaser, <i>see</i> Sale.	
Right of way.	
Ross and Williams v. Hite's Executor ... ..	73
2. —Neezer v. Long ... ..	369
Road, Right of, <i>see</i> Crown land.	
2. —Right of way—General plan.	
Ross and Williams v. Hite's Executor ... ..	73
Rule of Court 12.	
Kaiser v. Falconer ... ..	611
2. —26—Purging default Pleading.	
Sigidi's Estate v. Matumbu ... ..	433
3. —35—Evidence—Commission.	
McLeod v. Green and Sea Point Municipality ... ..	404
4. —73, <i>see</i> Bail-bond.	
5. —190.	
Cruywagen v. R.M. of Worcester and Meyer ... ..	206
6. —329d.	
Pohl v. Van de Sandt de Villiers and Co. ... ..	494
7. —330 (g), <i>see</i> Pleading.	
Sale.	
Rifkin v. Falconer's Executor ... ..	542
2. —Agent—Payment of mortgage bond.	
Van der Westhuizen v. Thwaites	317
3. —Construction of contract—Cancellation—Re-sale.	
Adolph & Co. v. Warner and Co.	492

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4. —Time—Essence of contract.	
W. Searle & Son v. Arkell and Duglas ... ..	552
5. —Delivery—Place of delivery.	
Gilson v. Payn ... ..	305
6. —Delivery—Ownership—Insolvency of purchaser—Vendor's right of retention—Stoppage <i>in transitu</i> .	
<i>The vendor of certain sheep marked them in order that, in case of the death of any of them, the risk might not fall on him, and kept them in his possession. The purchaser having become insolvent, the trustee brought an action against the vendor to recover the sheep or their value but did not tender the price.</i>	
<i>Held, that there had been no delivery of the sheep to the purchaser before his insolvency and that, whether the sale was on credit or for cash, the trustee was not entitled to recover the sheep or their value without paying the price.</i>	
Truter v. Joubert's Trustee ... ..	387
7. —Goods sold and delivered—Principal debtor or surety—Documentary evidence.	
Myers Brothers v. Berliner ... ..	382
8. —in execution.	
Falconer's Executor v. Drewitt	546
9. —Lease—Possession.	
Olsen v. McIntyre ... ..	595
10. —Option.	
Gardner v. Executors of Jones	97
11. —Protest—Transfer—Cancellation.	
Van Zyl v. Engelbrecht... ..	142
12. —Purchase price payable in instalments—Non-payment of price—Conditions—Time—Essence of contract—Rescission of contract.	
<i>Where in a contract for the sale of land it is agreed that the price</i>	



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<i>shall be paid in several instalments, the vendor is not entitled, on the purchaser's failure to pay one instalment, to claim immediate payment of instalments agreed to be paid at a later date, unless such right is reserved to the vendor in the contract. Nor is the vendor entitled to claim a rescission of the sale unless it appeared from the contract that time was of its essence.</i>		<i>One of the conditions referred to was that the lot sold should be used for building purposes only, and that the purchaser should erect or cause to be erected upon the erf a suitable building.</i>	
Hiddingh v. Schade ... ..	89	<i>It was further agreed that the ten morgen were to be laid out in erven or blocks of erven, which blocks should be of the same size as certain other blocks in the town marked on the general plan. The plaintiff passed transfer to the municipality of the whole of his share, and the ten morgen were demarcated in three blocks, and these the plaintiff took possession of, subdivided, erected several buildings upon and enclosed portion of.</i>	
13. —Quality of articles sold — Expert evidence.		<i>He claimed transfer but the municipality refused to pass transfer of these blocks, unless they were sub-divided into erven of the size at which land subject to the conditions referred to were ordinarily sold.</i>	
<i>Where the soundness of certain wagon wares was in question, and a Magistrate gave judgment contrary to the evidence of experts who had been called, his judgment was altered on appeal.</i>		<i>Held, that the plaintiff was entitled to transfer of the three blocks not subdivided in the manner proposed by the municipality.</i>	
Billingham & Co. v. Mosenthal & Co. ... ..	200	Lind v. Oudtshoorn Municipality ... ..	250
14. —Transfer—Cancellation.		Sea shore.	
<i>Where the plaintiff purchased a definite piece of ground of which the boundaries were pointed out by the seller, but the seller afterwards transferred another piece of ground to him as being that which had been sold,</i>		Milnerton Estates, Limited v. Colonial Government ...	164
<i>Held, that the transfer should be cancelled, and the purchase price refunded.</i>		Seduction—Damages.	
Keur v. Gamba ... ..	191	Schoenwolf v. Wehle ... ..	316
15. —Transfer—Condition—Erven.		Separation, agreement for, see Husband and Wife.	
<i>The plaintiff sold all his right, title and interest in the remaining extent of a certain property to the defendant municipality, with the provision that upon the municipality taking transfer, it should retransfer certain ten morgen consisting of three blocks to him, such retransfer to be subject to the same conditions under which dry erven had from time to time been sold by the proprietors of the remaining extent.</i>		Service of summons — <i>Domicilium citandi</i> for indictment.	
		<i>The defendant having had a charge of bigamy preferred against him, gave a certain address as the place at which a notice to come up for further examination could be served upon him at any time during the subsequent six</i>	

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months. <i>There was no proof that he had ever lived at that address. His whereabouts being unknown summons in an action for divorce was served within six months of the address given.</i>	
Held, that under the circumstances the service was good.	
Downey v. Downey ... ..	515
Servitude—Right of way—Consideration.	
Neezer v. Long ... ..	369
2. ———Transfer—Notice—Consideration—Specific performance.	
<i>In an action to compel the registration of a servitude in favour of the plaintiff's land upon the land of the defendant, on the ground that the defendant had bought his land from a third person with notice of and subject to an agreement for the creation of such a servitude, the plaintiff is not entitled to succeed without clear proof of an agreement binding upon such third person.</i>	
Pienaar v. Van Zyl ... ..	255
3. ———Valuation.	
Van Breda v. Town Council of Cape Town ... ..	272
Solutio—Purchase and sale—Delivery—Place of delivery.	
<i>In the absence of agreement or clear proof of custom to the contrary, the delivery of goods sold should be made at the place where they were when sold. A farmer who has sold produce which is stored in his barn is not bound to assist in loading it on to the buyer's wagons or to do more than place it at the buyer's disposal so that he may remove it without obstruction.</i>	
Gilson v. Payn ... ..	306
Southern Rhodesia Order in Council.	
Burrows v. British South Africa Company ... ..	518

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Specific performance—Registration of servitude, <i>see</i> Servitude.	
Spoilation—Native custom—Lobola.	
<i>The plaintiff sued the defendant in a Magistrate's Court for the recovery of certain horses, which he alleged were his property, but which the defendant had possessed himself of. Both parties were natives, and the horses in dispute had originally been given to the plaintiff by the defendant as part of the lobola for the plaintiff's daughter, whom the defendant intended to marry. Before the entire lobola had been paid the plaintiff's daughter died and the defendant took possession of the horses on the ground that the marriage had not taken place and that under native custom he could reclaim the lobola which he had paid. The Magistrate gave judgment for the defendant.</i>	
<i>On appeal, the case was remitted for further evidence as to the manner in which the defendant obtained the horses, whether the marriage was consummated, and whether it was to have taken place in accordance with native customs or Christian rites.</i>	
M'Slope v. M'ngamme ... ..	613
2. ———Possession — Ownership — <i>Omnis probandi.</i>	
<i>A horse having been taken by the defendant out of the possession of the plaintiff under circumstances amounting to spoliation, Held, that, in an action brought in a Magistrate's Court for the recovery of the horse or its value the burthen of proving ownership or other right superior to the plaintiff's lay upon the defendant.</i>	
Loots v. Van Wyk ... ..	450
Stamp—Promissory note.	
<i>A promissory note which is not expressed to be payable to order</i>	

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must be stamped, notwithstanding section 5 of the Schedule of Act 13 of 1870.	
W. and G. Scott v. Petersen and Wilson ... ..	544
Statute—Interpretation, <i>see</i> Interpretation.	
Stoppage in transitu—Insolvency of purchaser of goods, <i>see</i> Sale.	
Stowage of cargo, <i>see</i> Charter-party.	
Substitution, <i>see</i> Will.	
Succession in Intestacy, <i>see</i> Intestate Succession.	
Summons—Annexure—Stock-list—Act 20 of 1856, Schedule B, Rule 10.	
<i>The plaintiff alleged in his summons that the defendant had received certain sums of money from him, and was indebted to him in that amount; he further said that this amount was due under a certain stock-list drawn up and agreed upon between him and the defendant.</i>	
<i>Held that the omission to annex the stock-list to the summons or to deliver a copy thereof to the defendant did not prejudice him in his defence.</i>	
Shear v. Weinstock ... ..	227
2. —Magistrate's Court	
Cwaba v. Kuhn ... ..	268
3. —Service.	
Downey v. Downey ... ..	515
4. —Partnership.	
Arderne & Co. v. Egan & Power	219
5. — <i>see</i> Practice.	
Superannuation.	
Edgar v. Scott ... ..	67
Suretyship— <i>Senatus consultum velletianum</i> .	
Alport's Executors v. Alport ...	326
Survey of property sold.	
Visser v. Murray ... ..	360
Theft—Evidence.	
<i>H. left his house for a short while, leaving a purse containing money on his bed. On his return, he met</i>	

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<i>the appellant coming out of the gate of the premises. The appellant was lawfully on the premises in the performance of his duty of delivering bread. H. subsequently missed the purse. The appellant was convicted of the theft on the ground that he was the only person seen on the premises, and no other person could be suspected. On appeal, the conviction was quashed.</i>	
Regina v. Van der Poel... ..	577
2. —Indictment—Amendment—Prejudice.	
<i>The appellant was indicted for theft in that he did "wrongfully and unlawfully steal one goat, the property or in the lawful possession of one Ndonje." After hearing evidence for the prosecution the indictment was amended by striking out the words after "possession" and inserting in their place the words "some person unknown" and the Magistrate invited the appellant to give a satisfactory account of the possession of the portion of a goat's carcass found in his possession. After hearing further evidence the appellant was found guilty.</i>	
<i>Held, on appeal, that there was ample evidence for the conviction of the prisoner of theft and that he had not been prejudiced by the amendment of the indictment.</i>	
Regina v. Dubese ... ..	610
3. — — —Fraudulent sale by person intrusted with safe-keeping.	
<i>The indictment charged a prisoner with "theft" in that he did "steal" certain head of cattle. The jury found a special verdict that the prisoner was guilty of the theft of the cattle "by the fraudulent sale thereof which cattle had been intrusted to him for safe-keeping."</i>	

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Held, on a question reserved, that the special verdict was covered by the indictment, and that in the absence of any prejudice to the prisoner arising from the form of the indictment, the sentence should not be disturbed.		with his own mark. He was charged with theft under the provisions of Act 35 of 1893 and convicted.	
Queen v. Matroos Jan ...	378	The Court, on appeal, refused to disturb the conviction.	
4. — Ownership of property—		Regina v. Coetzee ...	580
Hire and purchase		7. — — — Stray sheep—Marking.	
Where a tradesman obtained delivery of goods upon the hire and purchase system, and left the Colony taking the goods with him with the intention of eluding his creditors, and was convicted of theft of the goods,		An ewe in lamb strayed on to N.'s property. He knew it was a stray sheep and did not inform the owner of the fact, but gave it to his son, and after it had lambled he marked the lamb.	
Held, that he was rightly convicted.		Held, that N. was guilty of theft at common law.	
Regina v. Ericksen ...	557	Regina v. Ngquye ...	599
5. — Stock—Act 35 of 1893—		Title deed — Detention -- Alleged	
Evidence of possession of stolen property.		pledge.	
B. was convicted of contravening Act 35 of 1893.		The applicant in 1879 bought certain land through the agency of P., who was acting for the seller, and was also in the employment of D. The purchase price was paid but not the costs of transfer and the transfer deed came into the possession of D. D. subsequently assigned his estate to the respondents in whose possession it now was. The applicant applied to them for the deed, tendering the costs of transfer, but they refused delivery on the ground that they held it in pledge for a promissory note dated September, 1884, which had been given to D. by the applicant for the balance of the purchase price.	
The evidence for the prosecution showed that a white horse belonging to one S. had been killed and the skin stolen, and on the day upon which the horse was killed B. was seen in possession of the skin of a white horse, and was observed coming from the direction in which the carcass was subsequently found.		Held, that, as there was no proof of any pledge and as the promissory note was prescribed, the applicant was entitled to delivery of the transfer deed.	
After B.'s arrest the skin could not be found, and consequently it could not be identified as stolen property.		Held, further, that an equitable mortgage is not created by the pledge of title deeds in this Colony.	
Held, on appeal, that the evidence was sufficient to justify the conviction.		Kellar's Trustee v. Edmeades (3 Juta 25), followed.	
Regina v. Blanckenberg ...	232	De Bruyn v. Danvers' Assignees	693
6. — — — Act 35 of 1893—Re-			
marking sheep.			
The appellant directed that a certain sheep which had come upon his farm and bore the owner's mark should be shorn and re-marked it			

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**Tram-car—Improper construction**  
**— Negligence — Contributory negligence—Boarding in motion.**  
*The plaintiff mounted a tram-car belonging to the defendant company while it was in motion, and alleged that the handle which he seized in order to mount was so improperly constructed that he was unable to grasp it properly, and that the speed of the car being immediately increased, he was thrown to the ground and injured. In an action for damages instituted by him, the jury were directed to consider (1) whether the handle of the car was in such a condition as to prevent the plaintiff from getting a proper grip and thus causing the accident; (2) whether the plaintiff was guilty of contributory negligence; and, with respect to the latter, that if there was no risk usually attending the mounting of the car when slowed down, then the plaintiff could have contemplated no danger if the car was in proper order.*  
**Warmaley v. Cape Town Tramway Company, Limited ... 262**

**Transfer—Cancellation.**  
**Keur v. Gamba ... 191**

2. — **Knowledge of transferee**  
**— Bona-fide mortgagees.**  
*The defendants at a public sale of land belonging to an insolvent estate bought all the land, but as the trustee had not, owing to mistake, received transfer of the whole, an undivided part only was transferred to the defendants. The trustee having subsequently obtained transfer of the remaining portion being 9-56ths of the whole, offered it for sale by public auction, but the defendants publicly protested against the sale. The plaintiff, who had been present at the first sale, was present also at the*

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*second sale and heard the defendants' protest, but notwithstanding such protest he bought the land for the trustee. The 9-56ths portion was then transferred to the plaintiff, but the defendants remained in occupation of the whole.*

*Held, that the plaintiff having purchased with knowledge of the defendants' rights was not entitled to claim a partition of the land, and that the defendants were entitled by claim in reconvention to an order setting aside the transfer to the plaintiff (without prejudice to the rights of bona fide mortgagees) and to a rule calling on the trustee to show cause why he should not transfer the 9-56ths to the defendants.*

**Van Zyl v. Engelbrecht ... 142**

3. — **Trustees — School property.**  
**Consistory of the D.R. Church, Cra'ock v. Superintendent-General of Education ... 69**

**Treating, see Election Petition.**

**Trespass—Pounds Act—Fencing Act.**  
*It is no defence to an action under the Pounds Act, 1892, for damages for trespass on cultivated lands that the cattle came upon the plaintiff's land by reason of his not repairing or assisting to keep in repair a fence between the respective properties of the parties unless there is a legal obligation on the plaintiff to keep the fence in repair. The 13th and 14th sections of the Fencing Act, 1883, impose no such legal obligation.*  
**Adams v. De Klerk ... 484**

2. — **see Magistrate's jurisdiction.**  
 3. — **Removal of goods—Consent.**  
**Jacobs v. Cleghorn and Harris 278**  
 4. — **Use and occupation.**  
**Wolfaardt v. Colonial Government ... 248**

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Trustee, action by—Costs.	
Standard Bank v. Jacobsohn's Trustee ... ..	365
<i>Ultra vires</i> —Condition in liquor licence.	
Regina v. Parrott ... ..	480
2. ———see Licence, Liquor.	
Undercharge—Freight.	
Wiggins v. Colonial Government	454
Undue influence, <i>see</i> Election Peti- tion.	
Undue preference, <i>see</i> Insolvency.	
Usufructuary, <i>see</i> Will.	
Voters' List—Rectification.	
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Water-rights—Riparian proprietors —Public stream—Distribution of water.	
<i>A lower riparian proprietor is not         entitled to an interdict restrain-         ing two or more upper proprietors         from regulating among themselves,         as they think fit, the distribution         of their respective shares of the         water of a public stream for the         irrigation of their riparian pro-         perties, provided that he is not         thereby deprived of his reasonable         share, or of any rights he might         have acquired by contract, grant         or prescription.</i>	
Olivier v. Fourie... ..	309
2. ———Reasonable User.	
<i>The proprietors of R., an upper         farm upon a public perennial         stream, had for the period of pre-         scription diverted all the water of         the stream flowing on the farm.         They were at the commencement         of the period of prescription, and         had been ever since, the proprie-         tors also of the adjoining and         lower riparian farm L. In de-         ciding what was a fair and reason-         able share of water to be allowed         to flow down to a lower farm T.,         owned by a different proprietor,</i>	

<i>Held, that the water taken out on R. must be considered as taken out for the whole farm consisting of R. and L.</i>	
<i>Held, further, that in deciding what is a reasonable use of water the river frontage, the extent of the land, the extent of the arable lands and all other circumstances should be taken into consideration.</i>	
Struben v. W. and H. G. Collett	620
3. ———Water leadings—Interdict— Damages — Municipality — Erf- holders.	
<i>Seventeen erfholders within a         municipality were entitled to the         use of a stream of water in turns.         By arrangement between the Muni-         cipal Council and some of the         erfholders the water to which these         erfholders were entitled during         their turn was diverted and collected         in a reservoir constructed by the         Council. The other erfholders         objected to this and applied for an         interdict to restrain such diversion.         Held, in the absence of clear proof         that the diversion interfered with         the applicants' enjoyment of the         water during their turns, that they         should be left to their remedy of         an action for damages, if any         had been sustained.</i>	
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<i>Ex parte Neethling ... ..</i>	434
2. ———Remarriage of survivor —Condition.	
<i>Husband and wife, married in         community, made a joint will by         which they appointed the children         of their marriage to be joint heirs         of the estate of the first dying         provided that the survivor shall</i>	

so long as he or she remains unmarried receives the income of such estate and upon his or her death the estate shall be divided between the said children." The testatrix died first and the survivor married again.

Held, that upon such remarriage the children of the testatrix became entitled to receive payment of their maternal inheritance.

Watson v. Fraetas ... 266

3. — Substitution — Institution.

Husband and wife by their mutual will, after providing for the enjoyment of the joint estate during the life-time of the survivor, directed that on the death of the survivor, the said estate should devolve upon their children in equal shares, "the children of any deceased child succeeding to the share to which such deceased child would have been entitled." Before the date of the will one of the testators' sons had died leaving the plaintiff, his only child, surviving.

Held, that on the death of the survivor, the plaintiff became entitled to share in the inheritance with the testators' surviving children.

Pike v. Buckley's Executors ... 371

4. — Survivor—Usufruct.

Coenradie's Executrix v. Coenradie's Executor Dative ... 130

5. — Legacy—Condition—Election.

Where property was bequeathed to the testator's grandson on payment of £300 into the testator's estate, but the bequest was subject to a life-interest in favour of testator's son, The Court, the testator having died but his son being still alive, ordered a rule to issue calling on the legatee to elect whether or not he would accept the bequest.

Strauss' Executor Dative v.

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6. — Privileged, *see* Privileged Will.

7. — Proclamation of July 12th, 1822—Matrimonial domicile—Community—Election.

Brisley v. Brisley's Executors ... 321

8. — Testator's intention—Rectification of will—Undue influence.

A testator made a joint will in English with his second wife by which he left the bulk of his property to her children although there were several children by his first wife living. The will had been copied by an attorney's clerk from a previous will in which the testator had made several alterations and after being so copied was in the testator's possession for some time before he asked his wife to join him in executing it. After the execution of the will it remained in the testator's possession and he made several codicils to it. After his death his wife informed the children of the testator's first wife that at the time of executing the last will she believed that such children were provided for equally with her own children and that the testator himself must have so understood it. In her evidence she did not support the latter statement.

Held that, in the absence of any fraud or undue influence on the part of the wife, her statements did not constitute sufficient proof that the will did not carry out the real intention of the testator, in the face of the above facts and of the further fact that the testator, who was a good man of business, understood English perfectly well.

Melville and others v. Executors of De Villiers and others ... 653

9. — Usufructuary—House—Repairs.

A testator bequeathed certain property to his grandchildren,

*some of whom were still minors, subject to a life usufruct in favour of the parents of the grandchildren, the property including a house which was occupied by the usufructuaries and their family, and was in bad repair. The testator provided that the usufructuaries should keep the premises in good order and repair. The Court on the petition of the usufructuaries, the executors under the will and the major heirs consenting, granted an order authorising the executors to advance a certain sum of money out of the inheritance of the grandchildren in order to put the house into a proper state of repair*

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*and effect certain necessary improvements.*

*Ex parte Scholtz and Wife: Re Van der Poel's Will* ... 696

*Writ of Execution—Illegal issue—Malice—Setting aside writ.*

*Hart v. Cohen* ... 379

2. —Sale—Death of debtor—Ordinance No. 104, section 31.

*Where property has been attached in execution of a writ before the death of the debtor, the Sheriff may proceed with the sale after the death of the debtor before the expiration of six months from the time when letters of administration were granted to the executor.*

*Falconer's Executor v. Drewitt* 546



# "Cape Times" Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Right Hon. Sir HENRY DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Sir JACOB BARRY, Judge-President of the Eastern Districts Court, the Hon. Mr. Justice LAURENCE, Judge-President of the High Court of Griqualand West, the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

KLEYN V. REYERS AND  
DEMPERS. { 1899.  
{ Jan. 5th.

This was an application for leave to withdraw the petition filed by the applicant against the return of Messrs. Dempers and Beyers as members of the House of Assembly for the division of Caledon.

Sir H. Juta, Q.C., appeared for the applicant.

Mr. Searle, Q.C., and Mr. McGregor for the respondents.

Sir H. Juta said there had been no publication, and all he could ask was for a rule *nisi* calling on all persons concerned to show cause why the petition should not be withdrawn.

The Chief Justice: Is there any charge against the respondents of knowledge?

Sir H. Juta: Yes; there are personal charges, my lord.

The Court granted a rule returnable on January 12, and ordered one publication to be made in an English Cape Town newspaper and one in a Dutch newspaper circulating in the district of Caledon.

KYLE AND OTHERS V. KRIGE.

This was an application for leave to amend the schedule of particulars attached to the election petition filed by the appli-

cants, and also for leave to have the case set down for hearing on January 16 instead of January 18.

The applicants sought to add to the schedules further charges, viz., four new counts in Table I., seven in Table II., and three in Table III., and to add a fourth table dealing with a case of alleged attempt to induce personation.

The respondent opposed the application, and filed an affidavit in which he complained that a person named Blake had been searching everywhere for evidence against him, and that coloured men had been led to sign affidavits without a due sense of their accuracy. He also alleged that the petition against his return was really promoted by Sir James Sivewright, and that Sir James had told him that the petition against him (Mr. Krige) would be withdrawn if the petition presented by Mr. Pieter de Waal against him (Sir James) was withdrawn.

Mr. Graham, Q.C. (with Mr. Innes, Q.C.), appeared for the applicants.

Mr. Searle, Q.C., for the respondent.

After argument,

De Villiers, C.J., said: The public interest requires that a searching inquiry should be made in every case in which charges of bribery or other corrupt practices are alleged. The only limitation in this case should be this, that no prejudice should be done to the respondent. In the present case I cannot conceive that any prejudice could be done to the respondent by allowing further particulars to be inserted, provided that a sufficient time be given to him to answer the additional charges. The charges should be somewhat more specified than they appear at present, and the Court will now order that these further particulars be allowed, provided that they be more particularised than is the case in the papers now before the Court. The earliest time the Court can conveniently hear the case will be

January 20, and the case will be set down for that day. The schedules must be amended by Saturday next at one o'clock.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

BURTON V. RHODES AND HILL.  $\left\{ \begin{array}{l} 1899. \\ \text{Jan. 5th.} \\ \text{" 6th.} \\ \text{" 7th.} \end{array} \right.$

Election petition—Bribery and corrupt practices—Agents—Act 21 of 1852, section 1—False statement—Payment by result.

*A false statement made by a candidate's agent as to past benefits conferred by the candidate on the voters, does not amount to bribery in terms of the 1st and 2nd sub-sections of section 1, Act 21 of 1859.*

*The 3rd sub-section is wide enough to embrace payment or an offer of payment depending upon the result of an election, but not to include the case of offering to pay a person, in consideration of his becoming the agent of the candidate, a larger sum than such person had agreed to accept from the rival candidate.*

This was a petition filed by Henry Burton, one of the unsuccessful candidates at the election for members of the House of Assembly for the division of Barkly West against the return of the respondents, Cecil John Rhodes and James Hill.

The petition alleged:

That the election of the said Cecil John Rhodes and James Hill was null and void by reason of the following corrupt practices:

That the said Cecil John Rhodes and James Hill did, directly or indirectly, both before and during the election, by themselves, or by some other persons on their behalf, give, or agree to give, offer, promise, or promise to procure, or to endeavour to procure, valuable consideration, or give or procure, or agree to give or procure, or offer, promise, or promise to procure, or to endeavour to procure, place or employment to or for certain voters, and especially in

particular the voters registered as such for the said division, who carried on the occupation of river diggers, or to or for other persons on behalf of certain voters, or to or for other persons, in order to induce certain voters to vote, or refrain from voting, and did corruptly do the acts aforesaid on account of certain voters having voted, or refrained from voting, at the said election.

The schedule of particulars set forth that on the 27th of August, 1893, the said Cecil John Rhodes and James Hill, and their agents, Albert Edward du Toit and one Richard Keat Granger, a partner of the said James Hill, caused to be printed and published in the issue of that date of the "Barkly and Diggers' News," a newspaper circulating in the said division of Barkly West, the following advertisement: "Good News for Diggers and Everybody Else. — Messrs. Rhodes and Hill, the Progressive candidates, have already arranged with the owners of the Vaal River Estate to throw open their entire property. First instalment of good works. Don't forget to record your votes for Rhodes and Hill. Longlands, Delpoit's, Niekerk's Rush, Laaken's Vlat, and other diggings will now boom," which newspaper and advertisement were read by the voters in the said division on the said day, and that the advertisement was afterwards distributed in hand-bill form.

Nathaniel S. Brown, agent of the said candidates, offered Pukwane, voter No.—and at Barkly West, in the said division of Barkly West, the sum of (first) £50, and then £60 as a bribe.

Sir Henry Juta, Q.C., and Mr. Molteno appeared for the petitioner.

Mr. Graham, Q.C., and Mr. Benjamin for the respondent Rhodes.

Mr. Searle, Q.C., and Mr. Close for the respondent Hill.

Mr. Searle said he was prepared to admit that the persons who inserted the placard in the newspaper were the agents of Mr. Hill, but he did not admit that in doing so they were acting with that gentleman's instructions or knowledge.

Mr. Graham said that he made the same admission with regard to Mr. Rhodes.

The evidence given upon the first charge appears sufficiently from the judgment.

Upon the second charge.

Pukwane, a Kafir, registered voter in the district of Barkly West, said that at the last election he was a canvasser in the employ of Messrs. Stighling and Burton,

Sir H. Juta: Do you know two native clergymen called Msikinya?—Yes, one is an evangelist and the other is a clergyman. One is David and the other James. James is the clergyman. They canvassed in the district on behalf of Messrs. Rhodes and Hill.

Continuously?—Yes, the evangelist James. The minister used to come up to Kimberley. They canvassed among the native and coloured people throughout the whole district. The two Msikinyas sent for me on July 30, and I went to them at Chinga's house. Chinga was also present.

Sir H. Juta: And what did they say?

Mr. Graham objected, and pointed out that there was no allegation that Chinga was an agent of Brown's. The only charge in connection with this witness was that one Nathaniel Brown had offered Pukwane the sum of £50 or £60. No date and no time was specified.

De Villiers, C.J.: Is this the occasion?

Sir H. Juta: No, this is leading up to the occasion. I wish to show that Msikinya was an agent employed by Brown.

De Villiers, C.J.: Of course only evidence upon the particular charge of bribery can affect the count.

Sir H. Juta: If I prove that it was done through another man it is just as good as if I prove that the man himself bribed.

De Villiers, C.J.: Such a course might take them by surprise.

Sir H. Juta: No, because all they have to do is to call Mr. Brown and get him to say that he never authorised anyone to offer to bribe.

De Villiers, C.J.: They might want to call Msikinya.

Witness (continuing) said David told him that he had been sent purposely by Mr. Rhodes. Mr. Rhodes had met him on the Market-square at Kimberley, and Msikinya then told Mr. Rhodes that he knew Pukwane, who was a great friend of his.

De Villiers, C.J.: We are going astray. We have no proof that David Msikinya was an agent of Brown's.

Witness (continuing) said that in response to a message sent to him by Msikinya from Mr. Brown, he saw Mr. Brown. That was on the morning of nomination day.

What did Brown tell you then?—He said that I must canvass for Mr. Rhodes and throw up my side, and that I would get a good sum of money. I then declined to take the offer.

What did he offer you?—There was no money mentioned at the time. He said he would give me more than I should get from Messrs. Burton and Stiglingh. I met Mr. Brown again that afternoon when Mr. Maddox and Mr. Johnson, chairman of the Diggers' Committee, were also present. Brown then said, "You had better come and canvass for Mr. Rhodes and Mr. Hill. We will return the cheque you received from Mr. Burton, and we shall give you something better."

Laurence, J.: Had you told him that you already had a cheque from the other side?—I am not sure. He must have heard.

You had a cheque, as a matter of fact?—Yes.

Sir H. Juta: Was there any money mentioned?—Yes. I said: "I won't answer because I see two gentlemen standing here." Mr. Brown took me to the back of the store and made me an offer of £50.

By Laurence, J.: I received £11 from the other side.

De Villiers, C.J.: Well, is that the charge of bribery? Surely it shows the necessity of having a specific charge. Brown offered Pukwane a bribe to canvass. I understood it was a bribe to vote for the opponents.

Sir H. Juta: Expenses incurred in an election, if not *bona fide* expenses, are bribes.

De Villiers, C.J.: Then why mention that Pukwane is a voter.

Sir H. Juta: According to the Act the only expenses allowed are legal expenses, *bona fide* incurred.

De Villiers, C.J.: That defines bribery, and when it is *bona fide* expenditure it is not bribery. But it does not follow that any other expenditure is bribery.

Sir H. Juta: But unless the expenditure is *bona fide* incurred it is bribery.

Witness (continuing) said he told Mr. Brown he was not going to take the £50, because he had already pledged himself to canvass for Mr. Burton and Mr. Stiglingh. The offer was then increased to £60, and "if he was not satisfied he could have more." He was to be taken at once to Mr. Rhodes to get the money. An arrangement was made for him to see Mr. Brown that evening at half-past seven at the Queen's Hotel, but he did not go and he did not meet Mr. Rhodes. He remembered a meeting of natives at Kliplam about a week before the election. Mr. Burton and Mr. Cronwright-Schreiner were there, and Msikinya, who said he had been sent by Mr. Brown to make the offer to witness. Witness took part in the meeting,

and told everything that had happened. Msikinya wanted to interfere, saying that no such thing had occurred, but he subsequently admitted that he was sent by Mr. Brown to offer witness the money.

Cross-examined: At first, at this meeting, Msikinya got up and stated witness was telling a falsehood, but when he was pushed into a corner he admitted that what witness had said was true. Msikinya was cross-examined by Mr. Burton and Mr. Cronwright-Schreiner, and he was in a nice fix. Witness could not remember when he first gave information to Messrs. Burton and Stiglingh about Mr. Brown's offer; it was before he went to see Mr. Hill. It was through instructions received from Mr. Phear, Mr. Burton's attorney, that witness went to see Mr. Hill. The instruction was that he was likely to get a good sum of money for allowing the matter to drop. That money was to come, he believed, from Mr. Du Toit, the agent. When he saw Mr. Hill he did not say he had "something to sell" in connection with the election; his words were that he had "something to say." Mr. Hill asked what it was, and witness replied: "There is a certain offer made to me that Mr. Du Toit was going to give me a good sum of money if I drop mention of this offer made to me by Mr. Brown." Mr. Hill asked witness if there was any bribery on his side, and said he would give witness a good sum of money if he proved there was. He did not mention the sum.

Mr. Graham: What did you go to Mr. Hill for?

Witness: My object in going to Mr. Hill was simply to get the cheque I was promised if I would not mention the offer made to me by Mr. Brown.

Did Mr. Phear tell you to go to Mr. Hill and get the cheque?—Not to go straight to Mr. Hill, but he said I ought to have gone to Mr. Hill in order to get the money.

In order to trap Mr. Hill?—Most decidedly.

Did Mr. Phear ask you to go to Mr. Hill for the purpose of trapping him?—He did not use that exact word.

De Villiers, C.J.: But is this bribery? Is it necessary to deny this.

Mr. Graham said he doubted the necessity of cross-examining the witness at length, when his evidence did not constitute an offence at all, even if his statements were accepted as true.

De Villiers, C.J.: As far as the case has gone I don't think there is any bribery. They might have offered witness £50 or £60

if he would throw up the persons who had employed him and go over and canvass for the other side, but that is certainly not bribery.

Sir Henry Juta: This was an illegal act in the first instance. A person going to a paid canvasser goes with two objects: either to get him away from his side, or to procure a transfer of his services and influence. Was this a *bona-fide* payment to an agent (the only kind recognised by the proviso to the third section) or a colourable transaction? The proviso set forth that the penalty should not extend to *bona-fide* payment of legal expenses, but here a man had been given £11, and the other side offered him £50 or £60, or more if he wanted. Was that a *bona-fide* payment?

De Villiers, C.J., said the question could be argued.

Cross-examination resumed: Witness was now a salesman in the employ of a grocer at Kimberley, as manager. He surrendered his estate last month, with liabilities £200 and assets about £135, the latter being two plots of ground in Barkly West and fifty shares in Frank Smith's Mine. He had been a digger for the last five years, combining digging with store-keeping. He managed a business for Joseph Moss, and things did not go so well. When engaged by Messrs. Burton and Stiglingh as canvasser, he was paid £11. He was to get something besides, but no sum was mentioned. Since the election he had received other sums, making £30 in all. He was not going to get any more. When he met David Msikinya at Barkly West, it was in front of the Courthouse, and there were plenty of people about, but they got some kind of secrecy by walking perhaps ten yards from those people. Witness wanted to explain to the people at the Klipdam meeting that it was a question of principle which led him to decline Mr. Brown's offer. In his talk with Maddox Mr. Brown was present. Witness did not say that he was quite satisfied with Mr. Rhodes's answers to the questions, and that he was sorry he was working on the wrong side, nor did Brown say, "Well, then, if you are an honest man it is your duty to leave that side and come over to us." Witness could not be satisfied with a man who wanted natives to work for 2d. a day. He did not show Maddox a circular with a picture of natives hanging from a tree. Witness had seen that circular; he was supplied with copies of it by Mr. Cronwright-Schreiner and Mr. Burton and made use of

them at the meeting, but he did not ask Mr. Rhodes anything about them. He would not say whether he looked on this offer of Mr. Brown's as a bribe to support the candidates; that was a matter for the lawyers to settle.

Henry Burton, the petitioner, said he was not well acquainted with the river diggings, save to this extent, that during his electoral campaign he saw a great deal of the diggers, and addressed a good many of them at election meetings. A large number of these persons were registered voters. He knew the Vaal River Estate. He did not think it was too much to say that the matter of the throwing open of the Vaal River Estate was really the greatest point with the diggers wherever he went. Other politics did not matter much. The question was what would be done with this estate. He remembered the meeting of natives held at Klipdam, and referred to in the previous evidence. The Rev. Mr. Msikinya was the chief Wesleyan native minister in Griqualand West, and was stationed at Kimberley. He was very active in speaking to the natives and inducing them to support the candidature of Messrs. Rhodes and Hill. The meeting of natives at Klipdam was called by witness and his fellow-candidate. At this meeting Mr. Cronwright-Schreiner addressed the natives on behalf of witness and his fellow-candidate, and was interrupted very frequently by Msikinya, his interruptions always being in favour of the other candidates. After Mr. Cronwright-Schreiner had spoken, Msikinya addressed the natives in favour of Messrs. Rhodes and Hill. At the conclusion of the meeting, Pukwane made a violent attack upon Msikinya. Pukwane stated that Brown had made an offer to him, and that Msikinya had advised him (Pukwane) to accept it, but that he refused to accept it. Msikinya admitted that in this matter of Brown's offer he had been working in the interest of Messrs. Rhodes and Hill. Msikinya, taxed by Pukwane, admitted that his church had received a present of £25 in consideration of his (Msikinya's) labours.

Cross-examined: Msikinya attended the meeting at Klipdam with the object of creating a disturbance.

Sir Henry Juta put in the following copy of a telegram addressed by N. G. Brown at Barkly West to "Alert" (Du Toit): "Barkly natives solid. See Dr. Harris as he passes through. Ask him to impress upon voters necessity for voting solid for Rhodes and

Hill. He can state also that Rhodes and Hill will have Vaal River Estate thrown open."

Mr. Graham admitted that the telegram had been despatched.

This closed the case for the petitioner.

De Villiers, C.J., intimated that before taking any more evidence he would like to hear Sir Henry Juta.

Sir Henry Juta: If the circular put in is not bribery, it is very difficult to say what is bribery. This is not a question of a member of Parliament promising to exercise his influence or to do what he can through the ordinary channels of Parliament. It is a private promise by a private individual with regard to a private estate, and has therefore nothing to do with any promise which a candidate might make with regard to what he would do in his Parliamentary capacity. It had nothing to do with a Parliamentary capacity. It is a statement by a person that he will arrange with private owners to throw open a certain estate. Tracing the history of this matter from the beginning, the river diggings were practically worked out, and the poor men living there had been looking forward for some time for the opening of the Vaal River Estate, and for years they had anxiously hoped that this piece of ground on the opposite side of the river should be thrown open to them. If this estate were thrown open, these people would make a livelihood out of it—it would mean a great deal to them. The question of this estate was the one great point considered by the diggers during the election: politics had nothing to do with the matter. The diggers wanted to know whether they could get this estate thrown open, but this was not a public matter—it was not a matter in which Parliament could interfere. This estate belonged to private individuals, the names of whom the Court has seen. Mr. Rhodes told the diggers that he would use his influence with his friends who were interested and see what he could do in the matter. Wherever meetings with these diggers took place, references to the Vaal River Estate were made. What does it all come to? A promise to procure for these diggers a livelihood, employment, or means of obtaining money—that was what it meant in plain language. To promise to procure this for a man is bribery. According to the Bribery Act, any promise to procure employment for a man, or to provide a means of obtaining money, was bribery. The Court has nothing to do with what was in the mind of the man who made the pre-

mise, or what was in the mind of the man to whom the promise was made. That principle has been laid down so often that one need hardly quote precedents.

Maasdorp, J.: What do you mean by "employment"?

Sir H. Juta: I mean this. If the Vaal River Estate had been thrown open to these people they would have had an opportunity of going there to take up diggings.

Maasdorp, J.: Do you call that employment within the meaning of the Act?

Sir H. Juta: It is more. It is a livelihood.

Maasdorp, J.: And is this, in your opinion, employment within the meaning of the section?

Sir H. Juta: Yes. Supposing I am a candidate, and I say to a man, who I know has a vote, "You have a son. I will try to get him a billet"—that is a promise to devise a means by which he can obtain something which he otherwise would not be able to obtain. That is the inducement which I hold out to him. In the definition of bribery in the Bribery Act it is attempted to cover, and the definition practically does cover, every possible human mode of inducing a man to give a vote otherwise than upon pure conviction. It is a tremendous dragnet which covers everything. Anything held out which will induce a man to vote, any material advantage, any promise—no matter of what kind, no matter what shape or form it may take—anything held out to him of a material nature is a bribe. If I offer a man any such inducement to vote it is a bribe, no matter whether I offer him a penny or 3d.

De Villiers, C.J.: But the throwing open of these diggings does not mean that the diggings are to be thrown open gratis. The diggers will have to pay for their licence. It is a public benefit for all, for all the constituents.

Sir H. Juta: But there can be no public benefit promised except through legitimate channels—in a candidate's Parliamentary capacity—not through private channels.

De Villiers, C.J.: Can you call this "money or valuable consideration"?

Sir H. Juta: I call it valuable consideration. The evidence shows that it was looked upon as a very valuable consideration. It does not matter how many people are affected by it. The point is: do these people by the throwing open of these diggings get something through a candidate which otherwise they would not have been able to get? The licence is immaterial. One of the worst features of the case is that the offer was

subsequently denied. If the offer was denied the statements made in the Barkly West newspaper regarding the opening of the diggings were false. There could only have been one object in inserting these statements, that of influencing votes. But if it were urged that in making these promises the candidate was actuated only by philanthropic motives, why did he make them on the eve of an election? Why had he not made these promises before, years before?

If it were not a valuable consideration why were they so grateful? They could not be grateful because they were going to pay 10s. per month, but because they knew that it would mean prosperity all round. That the candidates had promised to procure.

If a candidate gets another to throw open such ground then that is a valuable consideration; otherwise the Act would be absolutely ridiculous. It would come to this, that a promise to give £5 would be a bribe if made by the candidate, but if he gets a friend of his to give the £5 that would not be a bribe, because it has not been given directly by him, although indirectly it has been. If it is once admitted that throwing open that ground was a valuable consideration, then that valuable consideration was given indirectly by the candidates, because they procured it. *Britt v. Robinson* (5 C.P., p. 503). It was through their negotiations with the owners of the Vaal River Estate that the valuable consideration was given.

Barry, J.P.: Can you say that they were doing it on behalf of Mr. Rhodes?

Sir Henry Juta: If the candidate can get the other person to give the consideration, it is bribery just as much as if he gave it himself.

Maasdorp, J.: Has this estate been thrown open?

Sir Henry Juta: No, my lord.

Maasdorp, J.: Nothing has been given yet. Then you go upon the promise to give?

Sir Henry Juta: The statement was made that it had been given, and it does not matter whether that was true or not. Further, the consideration was to come in the future, for the statement that the ground had been thrown open meant that in the future the people would be able to work on that place. Then on the night before the election Mr. Hill, in his speech, was more definite.

Sir Jacob Barry: Is that the same speech in which he mentions irrigation?

Sir Henry Juta: It is, but then the irrigation scheme was one that had to go through

Parliament, and it was therefore a legitimate thing for the candidate to promise to endeavour to procure.

De Villiers, C.J.: Could the diggings be thrown open without Government?

Sir Henry Juta: There was nothing to prevent the owners of the land throwing the ground open if they wished to do so, but the Government could not throw the ground open, and it was with those owners that the candidates said they would use their influence to get the land thrown open. The wire sent by Mr. Brown the day before the election with regard to the statement showed that he must have derived his information from the candidates, and therein came the significance of Mr. Hill's speech the night before the election to the effect that Mr. Rhodes had had an interview with one of the largest shareholders in the Vaal River Estate.

De Villiers, C.J.: The only question on this argument is whether it is bribery or not, because if it is not bribery then the whole case falls to the ground.

Sir Henry Juta: In the *Lanuncation* case (2 O'M. and H., p. 122), the sitting member nearly two years before the election bought an estate near the town, on which there happened to be so many rabbits that there was dissatisfaction among the tenants. The member, however, took no steps with regard to that until he stood as a candidate. Then there was considerable uproar, and just before the poll he gave leave to his tenants to destroy and sell the rabbits. That not being done so much by an abstract sense of justice as by a desire to influence the election, the election was declared void. That was just what was done in the present case, although it is true that the land did not belong to Mr. Rhodes.

Solomon, J.: That makes all the difference.

Sir Henry Juta: But surely if other people give the valuable consideration—even if not agents—with the knowledge of the candidates, that is bribery.

De Villiers, C.J.: In the case cited, the giving permission to sell the rabbits implied a pecuniary consideration.

Sir Henry Juta: It is the same in the present case, for the diggers would have gladly given money to have that estate thrown open.

As to the second point, the alleged bribery of Pukwane, in England it is illegal to have paid canvassers, and it would also be illegal

in this country if it were not for the proviso to the clause. Section 1, sub-section 3 of Act 21 of 1869, provides that no money shall be paid to any person to induce him to procure the return of any person, but the proviso provides always that the aforesaid enactment shall not be extended to any moneys paid or agreed to be paid for or on account of any legal expenses *bona fide* incurred by or concerning any election. Now the offer of that £50 to Pukwane could not be a legal expense, for the whole transaction was illegal from its very inception. To try and take away a man from another's employment is to commit tort, for which damages can be claimed. Under certain circumstances one can conceive very heavy damages being given. Supposing one very wealthy candidate on the eve of the election enticed away all the canvassers of the other candidate, then very heavy damages might be sustained. Therefore, it can not be said that to get any man to break his contract is a legal expense.

Maasdorp, J.: But supposing Mr. Burton hired a cart for the purpose of his election, which he could properly do, and Mr. Hill afterwards came and hired that cart by paying a larger amount, would that void the election?

Sir Henry Juta: Hiring a cart is not an offence, but to pay a canvasser is an offence. We must start with that, and consequently for a candidate to pay a canvasser to secure his return would be illegal were it not for the proviso, and the proviso only applies to legal expenses. I admit that to take a man away from the service of the opposing candidate by argument would not be illegal, there being no bribery in conviction.

Sir Jacob Barry: Supposing a candidate first enticed a man over to his side by argument and then said, "I will give you £50 if you act as agent for me," would there be anything improper in that?

Sir Henry Juta: If the one transaction were part and parcel of the other then it would be bribery, but it might possibly be different if the two things were absolutely distinct.

*Postea* (January 6th).

De Villiers, C.J., said that the Court would be prepared to give judgment at once, but on the whole they had come to the conclusion that it would be better to hear the evidence of the respondents before giving judgment.

Evidence was then led on behalf of the respondents and the case closed.

De Villiers, C.J., intimated that Sir Henry Juta was entitled to argue on the new evidence.

Sir Henry Juta stated that he would apply to the Court for leave to amend the petition (a) by inserting among the particulars a charge of bribery, based on the various speeches made by the respondents in the course of their election campaign and (b) by altering the charge of bribery in connection with Pukwane so as to make it fall under section 1, sub-section 3, instead of under section 1, sub-section 1.

De Villiers, C.J., said the best course would be for the petitioners to submit the amendments to the other side after the Court had adjourned for the day, and to submit them to the Court the next day.

Sir Henry Juta: In the promise made in Mr. Rhodes's speech there was a substantial consideration. The case of *White v. Adams* (7 Shiel 161) showed that the claims had a marketable value. Then what reason could there be for all these people to run after the candidates on both sides except to get them to do their best to have the Vaal River Estate thrown open. The little licence they had got to pay under the law was really not the equivalent. It is impossible to get over the facts that the reason these diggers were so anxious for that during the whole of that campaign was that it was a case of life or death to them. It was therefore clearly a valuable consideration. The Mines Act recognised that these claims could be hypothecated and transferred.

De Villiers, C.J., asked Mr. Searle if he objected to the amendment of the petition.

Mr. Searle: The amendments bring practically two new charges in place of the two charges which I understand the Court consider to have failed. In England such amendments as those now proposed would not be allowed. *Day on Election Cases*, 1892-93.

De Villiers, C.J.: In subsequent cases it will be found that the case is put on the same ground as it is always put here, namely, whether the respondents would be prejudiced by such amendments being allowed. Therefore the question is whether Mr. Rhodes would be prejudiced if the amendments are allowed.

Mr. Searle: The respondents would be prejudiced. These are two entirely new charges, and the petitioner had every opportunity of bringing them before the evidence of Mr. Rhodes was taken. They knew days and

weeks before the evidence was taken that Mr. Rhodes was going away. Now they practically abandoned both the charges in the petition, and put in two new ones.

De Villiers, C.J.: If these are substantially new charges then it is quite true that the amendment cannot be allowed. The point is whether this is a new charge, it being so closely connected with the circular.

Mr. Searle: This is substantially a new charge.

De Villiers, C.J.: In one respect it does appear to be substantially a new charge, for if the amendment is allowed, and sustained, the result would be that not only would the respondents be unseated, but they would be disqualified.

Mr. Searle: Whereas it is perfectly clear that they had no knowledge of the circular. The new charge is much more serious than the one first brought. The one charge was comparatively venial, while the other is very much more important in its effect on the candidates, it being a personal charge. If such a charge had been made at first very probably Mr. Rhodes would have remained personally for the trial. Besides, it is only a newspaper report of the speech that forms its basis, and the evidence of the person who took the report will be required. With regard to the second charge the amendment should certainly not be allowed, because it is not even hinted at in the petition, it being now said that the agent of the respondents had offered a man in the employ of Messrs. Burton and Stiglingh a sum of money to get him to work for them. The petitioner has had ample opportunity to bring forward those charges before now.

Sir Henry Juta: By our law particulars need not be filed with the petition; all that is necessary to file is the petition, and then it is always open to either side to ask the Court that particulars should be given with regard to the allegations contained in the petition. This cannot be called a new charge, because it is in the petition.

De Villiers, C.J., said: The Court is not quite prepared yet to express its opinion upon the merits of the case; the only question to be decided at this stage is whether the amendments proposed by Sir Henry Juta should be allowed or not. Looking at the petition, we find that there are certain charges of bribery, consisting, first, of a certain advertisement in a newspaper and also in the distribution of certain circulars in terms of the advertisement.



That constitutes the first act of bribery, and the second consists in the offer of payment by one Brown, the agent of the candidates, to one Pukwane of the sum, first, of £50, and then of £60 as a bribe. It is now proposed that, in addition to the particulars inserted in this petition, there shall be inserted a fresh claim and fresh allegation of bribery, consisting of certain speeches which have been made and which are admitted to have been made by the respondents. Now, if the effect of the speeches was to offer a bribe to the voters, there can be no doubt whatever that the respondents would be disqualified from being elected for a period of five years afterwards, and an entirely new charge would have to be made in regard to this. In my opinion, therefore, the insertion of these speeches would amount substantially to a new charge, and it would not be fair to the respondents to allow the amendment at this stage, because the important question will have to be decided still whether the throwing open of the mine to the voters would amount to a valuable consideration given to the voters, and if this throwing open of the mine would constitute a valuable consideration, then there can be no doubt whatever that the respondents, by means of their speeches, have promised to procure, or have endeavoured to procure such a valuable consideration, and the result, if we find against the respondents upon these new proposed particulars, would be not only to unseat them, but also to incapacitate them from being elected hereafter. In regard to the advertisement, the Court is quite satisfied that it was issued without the knowledge of the respondents, but as to their speeches, they must have had knowledge at all events of their own speeches, and undoubtedly if it was a valuable consideration, the result would be that they would be unseated, and that is such a substantial alteration that the Court will not at this stage allow it. Coming to the second proposal, it is not a question merely of particulars; it is a question of the substance of the petition. In the petition the charge against the respondents is that their agent Brown did offer a bribe to Pukwane, not for the purpose of inducing him to procure the election of the respondents, but as an inducement to vote for the respondents. That is the substance of the petition, whereas now the amendment proposed is that the bribe should be alleged to have been, not for the purpose of inducing him to vote, but to induce him to procure the

election of the respondents, and in my opinion that is also a substantially new charge, and ought not to be allowed. The Court will intimate to-morrow whether it is necessary to hear counsel for the respondents upon the merits of the case.

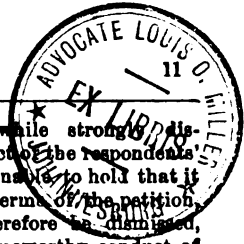
*Postea* (January 7th).

Judgment was delivered in favour of the respondents, dismissing the petition.

De Villiers, C.J.: After the petitioner's evidence had been heard the Court intimated that it was prepared to give judgment at once but considered it advisable that the evidence for the respondents should also be heard. We thought it would only be fair, after statements as to discreditable conduct on the part of the respondents' agents had been publicly made, that an opportunity should be given to the agents to deny or explain the extraordinary conduct imputed to them. I am bound to say, however, that the additional evidence has not carried the case much further. Take the first charge of bribery, that of publishing a certain advertisement and distributing it by means of handbills. It appears that Brown, who was the respondents' electioneering agent, sent the following telegram to another agent, Du Toit, at Barkly West: "Barkly Natives solid. See Dr. Harris as he passes through. Ask him to impress upon voters necessity for voting solid for Rhodes and Hill. He can state also that Rhodes and Hill will have Vaal River Estate thrown open." Du Toit handed over the telegram to Dr. Rutherford Harris and he, in conjunction with Granger, another agent, improved upon the telegram by publishing the following advertisement on the day of the election in the Barkly Diggers' News: "Good news for diggers and everybody else. Messrs. Rhodes and Hill, the Progressive candidates, have already arranged with the owners of the Vaal River estate to throw open their entire property. First instalment of good works. Don't forget to record your votes for Rhodes and Hill. Longlands, Delport, Niekerk's Rush, Laakens Vlak and other diggings will now boom." It now appears that the statement, that an arrangement had been made with the owners of the estate, was an absolute falsehood. This falsehood was disseminated not only by means of an advertisement in the paper but by distributing circulars in terms of the advertisement among the voters of the district. Such conduct was most reprehensible on the part of the respondents' agents, but the question is, does it fall within the definition of bribery as given in the sub-

sections of the Act relied upon in the petition! The whole section was taken over bodily from the English Act and the two sub-sections relied upon are the following: "The following persons shall be deemed guilty of bribery and shall be punished accordingly: (1) Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give, lend or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration, to or for any voter in order to induce any voter to vote or refrain from voting. (2) Every person who shall directly or indirectly by himself or by any other person on his behalf, give or procure, or offer, promise, or promise to procure or endeavour to procure any office, place or employment to or for any voter in order to induce such voter to vote or refrain from voting." I have carefully read and re-read these sub-sections and compared them with the terms of the advertisement and have found it impossible to bring the advertisement within the terms of the prohibition. An absolutely false statement was made in the advertisement as to a great benefit which had been conferred on the voters by the candidates. Even if that benefit amounted to a "valuable consideration" in terms of the first sub-section or to a means of "employment" in terms of the second sub-section, the publication does not amount to a giving, lending, agreeing to give or lend, offering, promising, or promising to procure or to endeavour to procure, such valuable consideration or employment. The enactment is a criminal one and should not be extended by construction. Upon this point I cannot do better than quote the words of Mr. Justice Willes in the case cited by Sir Henry Juta (*Britt v. Robertson*) where the Court of Common Pleas had to construe the 3rd sub-section. "I quite agree," he said, "that criminal enactments are not to be extended by construction. When an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question and makes it criminal." The language used by the Legislature in the present case does not embrace such misrepresentation as was made by the agents of the respondents. It is possible that some other

enactment might have reached them, but the sections relied upon do not meet the case. It is only fair to the respondents to state that when they became aware of the publication, they promptly published in the same paper a letter, saying that the circular had been published without their knowledge or authority, and that the matter had not been settled. They added, however, the following: "What we said in our speeches on this subject was that we would do our best to get the estate thrown open and that we believed that the proprietors were willing to do so, provided that satisfactory terms could be arranged with the Government as regards the charge to be made for the collection of licences." As regards Mr. Rhodes's speeches that seems a correct statement, but if Mr. Hill's speeches were correctly reported he went a little further, for in one of them he said that he was present when Mr. Rhodes spoke to one of the largest shareholders in the estate, and he had reason to hope, unless the Government threw obstacles in the way, that the estate would be thrown open to the river diggers. There was great cheering on his announcement, and it is obvious from the evidence that the throwing open of the estate would be considered by the diggers as a great boon. One of them said it would be a means of livelihood to many of them. If such a means of livelihood is to be considered as "valuable consideration" in terms of the first sub-section or as "employment" in terms of the second sub-section, it would be difficult to avoid the conclusion that by means of their speeches the respondents did promise to procure or endeavour to procure "valuable consideration" for the diggers who were voters in order to induce them to vote for the respondents. The promise admitted by the respondents' letter to have been made in their speeches was that they would do their best to procure this great material benefit for the voters. It is unnecessary, however, to decide whether the sub-sections are wide enough to embrace the speeches, because the speeches are not made a subject of complaint in the petition. An application was made to amend the petition by including the speeches, but this would have been a substantially new charge. The necessary effect of such new charge, if proved, would not only have been to unseat the respondents, but also to incapacitate them for five years from being elected as members of Parliament. It is obvious, therefore, that the Court could not, in fairness, at the present stage



allow the amendment. The second charge made in the petition was that the respondents' agent Brown had offered to a voter named Pukwane the sum of first £50, and then £60, as a bribe in order to induce him to vote or refrain from voting. The evidence, however, shows that the offer was made to Pukwane to induce him to return the money which he had received as agent from Burton, and to become agent for the respondents at a higher remuneration. That some offer of this kind was made is clear from the admissions made by Brown himself. He could hardly have expected that the native Pukwane would return the money he had received from the other side unless it were made worth his while to desert to the side which could pay him better. The Court has nothing to do with the morality of this transaction. The question is whether it is an act of bribery in terms of the two subsections relied upon in the petition. Sir Henry Juta, seeing the difficulty of bringing the case within the terms of the petition, relied upon the third sub-section, which refers to the offence of paying money "to procure the return of any person to serve in Parliament." The payment he contended is illegal and therefore, unless the subsequent proviso protects the respondents, they are guilty. But according to both Rogers and Parker the 3rd and 4th subsections were directed against such extensive bribery as may amount to a purchase of a seat and corrupt agreements with persons whose local influence enables them to control the return. In the *Coventry* case (1 O'M. and H., p. 102), Mr. Justice Willes said: "With respect to canvassers employed to procure the votes of voters within the literal terms of the third clause, I must take leave to refer to the *Lambeth* case which is a case to which I attach considerable importance, because the matter was very much considered under the chairmanship of Mr. Ingham, a gentleman of known good sense and of much legal experience." In that case it had also been held that the employment of paid canvassers did not fall within the prohibition of the third sub-section. The main objection of the sub-section was to prohibit what is known as payment by result, and it is well that it should be generally known that this form of payment amounts to bribery, and would be sufficient to unseat a member. Even, therefore, if the amendment of the second charge of bribery had been allowed, it is by no means clear that the petitioner would have succeeded.

The result is that while strongly disapproving of the conduct of the respondents' agents, the Court is unable to hold that it amounts to bribery in terms of the petition. The petition must therefore be dismissed, but in view of the blameworthy conduct of the respondents' agents, there will be no order as to costs.

Barry, J.P.: I fully concur with all that has been said by the Chief Justice, and I do not think that anything would be gained by my adding anything. If I did add anything it would be to emphasise the conduct of the agents of the parties.

Laurence, J.P.: It seems to me that the point is whether the issue of the circular in the circumstances amounted to a corrupt practice on the part of the respondents' agents and would render void the election. That has been contended on two grounds. It must have been either a gift or promise, and it must have been a gift or promise of cash or valuable consideration in the wording of the clause. I feel some doubt on the first point, namely, as to whether the allegation in the circular might not on a strict construction be regarded as a promise that the respondents would by opening up the Vaal River Estate give to the people certain advantages as diggers. I do not wish to express a definite opinion on that point, but even if that could be maintained I would still feel great difficulty in holding that the promise of additional openings for labour or speculation would be equivalent within the meaning of the Act to be a promise of valuable consideration or employment. If the Court were to hold that it would be going further than has been done in any previous cases, and any ambiguous point in a matter of infringing a criminal statute should be decided in favour of respondent. As to the conduct of Hill, it is clear that he took no steps to disavow the circular, although he had plenty of opportunity of doing so. As a fact he treated the matter with lofty contempt, and only began to see the seriousness of the matter when next day Mr. Rhodes drew his attention to the matter.

Maasdorp, J.: I concur for the reasons given by the Chief Justice.

Solomon, J.: I also concur in the decision. As regards the first charge, the difficulty I felt was to see how the terms of this circular could be brought within the clauses of the Act relating to bribery. In my opinion it is absolutely impossible to come to the conclusion that the circular is within the terms either of the first or second sub-section of the

first clause. It appears to me that this circular was nothing more or less than a false statement recommending the respondents to the electors, a false statement which was calculated no doubt to influence the voters, and which probably did to some extent influence the voters. In my opinion it was a most improper proceeding, a most reprehensible proceeding, on the part of the agents who were responsible for the issue of the circulars. And if the Legislature thought fit to provide in future that such a false statement made with the direct object of influencing the electors should be sufficient to upset the election, I should not complain of that being done. But at present there is no such provision as far as I know in any Act of Parliament making an act of that sort a corrupt practice sufficient to unseat a candidate, and I am clearly of opinion that it does not fall within the terms of the Act referring to bribery.

[Petitioner's Attorney, V. A. van der Byl; Respondent Rhodes' Attorneys, Messrs. Van Zyl & Buissinné; Respondent Hill's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G., P.O. (Chief Justice), Sir JACOB BARRY, K.C.M.G. (Judge-President of the Eastern Districts Court), the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

DE WAAL V. SIVEWRIGHT. { 1899.  
Jan. 10th.  
" 11th.  
" 13th.  
" 20th.

Election petition—Treating—Bribery and corrupt practices—Agents—Proof of bribery—Benefit of doubt.

*The promise to a voter by the agent of a candidate that his principal would lend a sum of money on mortgage to such voter,*

*if made to induce him to vote or refrain from voting, is bribery, even if the principal had never authorised the agent to make such a promise.*

This was the petition of Pieter de Waal against the return of the respondent Sir James Sivewright as a member of the House of Assembly for the electoral division of Stellenbosch.

The petition was in the following terms:

The petition of Pieter de Waal, of Stellenbosch, humbly sheweth:

1. That your petitioner, Sir James Sivewright, and Gideon Johannes Krige were, on the 3rd day of August, 1898, duly nominated as members of the House of Assembly of this colony for the electoral division of Stellenbosch.

2. That thereafter a poll was demanded and was taken throughout the said division on the 16th day of August, 1898.

3. That on the 17th day of August, 1898, the returning officer of the said electoral division declared the state of the poll to be as follows:

Sir James Sivewright	...	...	800
Gideon Johannes Krige	...	...	614
Pieter de Waal (your petitioner)	...	...	622

and he thereupon proclaimed that the said Sivewright and Krige had been returned elected as members of the House of Assembly for the division of Stellenbosch aforesaid.

4. That on the 16th day of September, 1898, the said result of the election was proclaimed in the "Government Gazette."

5. That the return and election of the said Sivewright was undue by reason of corrupt practices in the following respects:

(a) The said Sivewright, by himself and also by other persons on his behalf, gave or agreed to give, or offered, promised, or promised to procure or endeavour to procure money or valuable consideration to or for certain voters, in order to induce such voters to vote or refrain from voting at the said election, and did so far as certain of the said voters are concerned corruptly give or procure such money or valuable consideration on account of such voters having voted or refrained from voting at such election.

Your petitioner annexes hereto a schedule marked A, giving particulars of certain of the acts of bribery herein referred to.

(b) The said Sivewright, by himself and also by other persons on his behalf, gave or provided or caused to be given or provided

was accessory to the giving or providing certain drink and refreshments to or for certain persons, for the purpose of corruptly influencing such persons or other persons to give or refrain from giving their votes at such election, or on account of such persons having voted or refrained from voting at such election.

Your petitioner annexes hereto a schedule marked B, giving particulars of certain of the acts of treating herein referred to.

(c) The said Sivewright himself, or by other persons on his behalf, gave or agreed to give, or offered or promised to procure or to endeavour to procure money or valuable consideration to or for certain persons, in order to induce such persons to commit the offence of impersonation and to vote for the said Sivewright at the said election, and did, so far as certain of the said persons are concerned, corruptly give or procure such money or valuable consideration on account of such persons having committed the offence of impersonation and having voted for the said Sivewright at the said election.

Your petitioner annexes hereto a schedule marked C, giving particulars of the wrongful acts referred to.

Wherefore your petitioner prays that it may please your lordships to declare the election of the said Sivewright null and void, and further to declare that the said Sivewright has incurred the penalties provided in section 38 of Act 9 of 1883, and that your petitioner may have the cost of this petition, or that your lordships will make such further or other order as to your lordships may seem meet.

*Schedule A.*

1. Sir James Sivewright, K.C.M.G., corruptly promised, at a public meeting held by him at Kuil's River, in the Electoral Division of Stellenbosch, on the evening of the 11th August, 1898, and at which a number of voters, residing in or near Kuil's River, were present, that if they, the said voters, voted for and elected him as their member in the House of Assembly, he would secure for them a second platform at the Kuil's River Railway-station, also a siding or facilities to detrain and load their cattle and live-stock, and that he would see that the passenger trains from and to Sir Lowry Pass should, instead of passing through the Kuil's River Station, in future stop to take up and put down passengers, which promises were made by the said Sivewright for the purpose of corruptly influen-

cing such voters to vote for him, and to refrain from voting for the candidates Krige and De Waal at the said election.

2. At a meeting held by the said Sivewright at Somerset West Strand, in the Electoral Division of Stellenbosch, shortly before the said election, and at which a number of voters were present, he promised, if they returned him as their representative in the House of Assembly, to see that they got a certain piece of land at the Strand for school purposes, and that, if he could not induce Government to give the ground, he would himself buy it and pay for the same out of his private pocket and make a donation of the ground to them, which promise was made by the said Sivewright for the purpose of corruptly influencing such voters to vote for the said Sivewright, and to refrain from voting for the candidates Krige and De Waal at the said election.

3. The said Sivewright, shortly before the said election, corruptly promised to one Jan Adrian Ackerman, a voter registered as No. 1,379, a loan of money, in order to induce the said Ackerman to vote for the said Sivewright, and to refrain from voting for the candidates Krige and De Waal.

4. The said Sivewright corruptly procured for Johannes G. B. van Niekerk and Hendrik Oosterwalt van Niekerk, farmers residing at Uitkyk, in the Electoral Division of Stellenbosch, and voters registered in the said Division, the service of certain convicts, for the purpose of inducing the said Van Niekerks to vote for him, and to refrain from voting for the candidates Krige and De Waal.

5. The said Sivewright, at a meeting held by him in the village of Stellenbosch shortly before the election, at which a number of voters were present, corruptly stated that he would pay all voters who worked for his return, as he could not expect them to work for nothing, and, further, that he was willing to take into his employ forty workmen at 8s. 6d. a day for two months, which promises were made by the said Sivewright for the purpose of corruptly influencing voters to vote for him at the said election, and to refrain from voting for the candidates Krige and De Waal.

6. The said Sivewright, shortly before the said election, corruptly promised to one Nicholas E. Loubeur, a voter registered as 1,170, to give his brother, Jacob Eksteen, an appointment in the Government service in Cape Town, and to get his younger brother an appointment in the Magistrate's office at

Somerset West, in order to induce the said Nicholas E. Loubaer to vote for the said Sivewright, and to refrain from voting for the candidates Krige and De Waal.

*Schedule B.*

1. The said Sivewright, shortly before the election, and at the Masonic Hotel, in the village of Stellenbosch, corruptly provided or caused to be given or provided, or was accessory to the giving or providing, certain persons, amongst them being Johannes Hahn, a voter registered as No. 176, Henry Gird, a voter registered as No. 167, Abraham B. de Villiers, a voter registered as No. 512, and Charles Frederick Jones, a voter registered as No. 237, with refreshments and drink free of cost, for the purpose of inducing the said voters to vote for him, and to refrain from voting for the candidates Krige and De Waal.

2. The said Sivewright, shortly before the said election, and at Mrs. Price's Hotel, at Somerset West, in the electoral division of Stellenbosch, at the close of a meeting of electors held at the said place, corruptly provided, or caused to be given or provided, or was accessory to giving or providing, certain persons, amongst them being Albert Faure, a voter registered as No. 140, Gerhard Liesching, a voter registered as No. 291, Charles Frederick Jones, a voter registered as No. 237, Adrian van Sittert, a voter registered as No. 463, with refreshments and drink free of cost, for the purpose of inducing the said voters to vote for him, and to refrain from voting for the candidates Krige and De Waal.

3. The said Sivewright, on nomination day, namely, the third of August, 1898, and at Pieterse's Hotel, in the village of Stellenbosch, corruptly provided or caused to be provided, or was accessory to the giving or providing, certain persons, amongst them being Behran Trowbridge, a voter registered as No. 1,342, with refreshments and drink free of cost, for the purpose of inducing the said Behran Trowbridge and the other persons mentioned to vote for him at the show of hands, and later at the poll, and to refrain from voting for the candidates Krige and De Waal.

4. One Abraham B. de Villiers, a voter registered as No. 511, an agent of the said Sivewright, on divers days previous to the day of election and on the polling-day, corruptly provided and supplied free of cost at his canteen, wine, champagne, beer, and spirits to those voters who promised to vote for the

said Sivewright or stated they had voted for the said Sivewright, for the purpose of inducing voters to vote for the said Sivewright, and to refrain from voting for the candidates Krige and De Waal, or on account of their having so voted or refrained from voting.

5. One Philip Pieterse, an agent of the said Sivewright, on nomination day and on the day of election, at his canteen in the village of Stellenbosch, corruptly provided and supplied free of cost drink, being wine, beer, and spirits, to those voters who promised to vote or stated they had voted for the said Sivewright, for the purpose of inducing voters to vote for the said Sivewright, and to refrain from voting for the candidates Krige and De Waal, or on account of their having so voted or refrained from voting.

*Schedule C.*

Jacobus C. Faure, of Eerste River, in the division of Stellenbosch, an agent of the said Sivewright, promised certain persons who were not registered as voters for the Electoral Division of Stellenbosch, and whose names where known are given below, money and other valuable consideration, in order to induce the said persons to personate certain registered voters and to vote for the said Sivewright, and the said persons did personate and vote for the said Sivewright in consequence. The following are the names of those who were corruptly induced by the said agent to personate voters as above stated, and also the names of the persons so personated:—

Name of Person.	Whom he Personated.	No on Voters' List.
1. Magmoet...	Moss Zeas ...	... 1391
2. Unknown...	Herbert Fichardt	... 1470
3. " ...	Thomas Henry Osler	... 1236

Mr. Solomon, Q.C., A.G., Mr. Searle, Q.C., and Mr. De Waal appeared for the petitioner.

Sir Henry Juta, Q.C., and Mr. Graham, Q.C., for the respondent.

The evidence of the respondent was taken on commission previously to the trial. Charges 4 and 6 of Schedule A were withdrawn at the commission.

Mr. Solomon now applied for leave to amend the first particular in Schedule A, by adding to it the words, "and that he would put the fares upon the railway to Kuil's River upon the same footing as the fares

upon the Simon's Town line." Notice had been given to the respondent that morning. The respondent had been examined on the point and could not be prejudiced.

Sir H. Juta: In England petitions are never allowed to be amended on the morning of trial. *Parker on Election Agents* (p. 521). The amendment introduces a personal charge which involves disqualification. I do not object if the additional words that Sir James used, viz.: "that it would be his duty as their member" to obtain the reduction of the fares were included.

Mr. Solomon: As to powers of amendment, Act 9 of 1883, section 7.

De Villiers, C.J.: If there were any possibility of prejudice to the respondent from this amendment the Court would at once object. But it appears that the respondent has been cross-examined upon the amendment, and the amendment relies upon a speech, on which evidence will be given. It is only proposed now to add a few words of that speech, and seeing that there has been a cross-examination upon this very point, I do not see how there can possibly be any prejudice, because witnesses will have to be called upon the speech as to what was stated in that speech, and if those statements were not made the witnesses will have to give a denial of them. This case is quite different to the Rhodes case. The Court will allow the amendment to be made in so far as it cannot prejudice the respondent.

Evidence was then led. The facts as found by the Court appear sufficiently from the judgments.

Mr. Solomon, upon the first charge of Schedule A.: The respondent when he made promises to reduce the railway fares held the office of Commissioner of Public Works and as such had power to reduce the fares; he also had power to construct the platform and siding mentioned. The promises were absolute promises and not mere statements that these things would be done, such as a private member of Parliament might make. A private member would have to approach Parliament in the matter but the respondent made no reference as to the necessity of approaching Parliament. The promises come within Act 9 of 1859, section 1, subsection 1. *Parker on Elections* (p. 398).

[Mason, J.: If De Waal had said that if elected he would use his influence with the Commissioner of Public Works to get the railway fares reduced, would that be within the Act?]

I think it would, but that is not this case.

[Solomon, J.: Do you say that a promise of benefit to the whole community is valuable consideration?]

Yes. The words of the Act are "a promise &c., to any person"—not necessarily to a voter. If the respondent had promised an influential farmer to get the fares reduced if he procured his return that would be bribery.

[Solomon, J.: Must not the valuable consideration be given to individuals and not to the public?]

In this case it was given to individuals.

[Barry, J. P., referred to the *Bodmin case* (1 O.M. and H., p. 119), where it was said that the names of the persons bribed should be given.]

There is nothing in our law which requires the persons bribed to be named.

In the *Lawnceston case* (2 O.M. and H., p. 129), the promise was made to a number of people.

Mellor, J. said: "Valuable consideration is consideration which is valuable and appreciable." That is a later case than *Cooper v. Stude* (37 L.J.Q.B., 453).

This is certainly a promise which affects every individual voter. *Day's Election Cases* (p. 126); *Pontefract case* (4 O.M. and H., p. 200).

As to the second charge, there was a clear promise of a piece of land, which was valuable consideration; the only question is whether it was intended to influence votes; and unless it was so intended there can have been no object in making the promise.

Mr. Searle addressed the Court upon the charges of treating. He cited the *Norwich case* (4 O.M. and H., 91). Judgment of Kay, J., as to general treating. The *Wallingford case* (1 O.M. and H., p. 58). Judgment of Blackburn, J., as to amount of treating.

Sir H. Juta: The charges of personal bribery should be clear. *Brickford and Croft's Election Manual* (pp. 92 and 96). *Londonderry case* (21 L.T. (N.S.), p. 710). The charges amount to criminal charges and must be dealt with as such. The first and second charges of Schedule A are to some extent in the same category: they are utterances of a public man as to what he will do in his public capacity—not in his private capacity of Commissioner of Crown Lands. The question is whether this is valuable consideration in the terms of the Act. If the reduction of fares is valuable consideration, then no candidate can ever promise to try and obtain such reduction

because it will be bribery quite apart from the position of Commissioner. If the reduction of fares is valuable consideration, then matters of schools and irrigation schemes are valuable consideration also. The Bribery Act aimed at the giving of money or money's worth to private individuals. The granting of a siding or a platform cannot be converted into money; it is merely a convenience. The reduction of fares is a reduction of a tax, and is on precisely the same footing as a reduction of income tax. There is not a single name mentioned in the petition as that of a person bribed, and here an election cannot be upset on the ground of general bribery as it can be in England, because we are governed by a special Act of Parliament.

[Barry, J.P.: The *Launceston* case was decided under a statute similar to the Colonial Act and the names of the bribed persons do not appear to have been given there.]

There the persons bribed were the tenants. The fact that the respondent was Commissioner of Public Works cannot affect the question; the bribery, if it is such, consists in the promise. As to the second charge, the respondent had taken great interest in educational matters in the district; moreover, the statement was not made at a meeting or during a speech; if it was made it was after the meeting and after a great deal of heckling and could not be taken seriously. There is no harm in giving a school or a fountain or in doing some other act of charity. It is for the general benefit of the community; there is no valuable consideration given to any one.

[Barry, J.P.: The guarantors of the school would be relieved of the burden of having to provide a building.]

Two erven had been set apart by Government for the school but the position was not liked. There is no evidence that there was any liability upon the guarantors. *Brixton and Croxford's Election Manual* (pp. 92, 98, 94 and 101); *The Londonderry case* (1 O'M. and H., p. 28); *The Borough of Windsor case* (2 O'M. and H., p. 88); *Day's Election Cases* (p. 149); *The Tower Hamlets case* (5 O'M. and H., p. 89), which is the only case which deals with a candidate's speech. *The Lichfield case* (1 O'M. and H., p. 22); *The Bolton case* (2 O'M. and H., p. 148), as to free railway passes.

The following are cases of charity: *The Borough of Windsor case* (2 O'M. and H., p. 90); *The Plymouth case* (3 O'M. and H., p. 110); *The Westbury case* (1 O'M. and H., p. 49).

As to the charge of promising a loan to Ackerman, that cannot be considered a bribe. Ackerman wanted a loan at six per cent.; he could get that anywhere on mortgage; to constitute a bribe there must be something more than a mere business transaction. In the *Westminster case* (1 O'M. and H., p. 96), it was said that where the bribery was effected at the instance of a third person very cogent evidence is required to show that there was no misunderstanding.

Mr. Searle in reply.

*Postea* (January 20th).

De Villiers, C.J., said: Before dealing with the more serious charges made in the petition, it would be well to dispose of the minor ones. Of these several were withdrawn before the trial, and evidence was tendered in support of two of the minor charges. The first was that one Abraham de Villiers, an agent of the respondent, had corruptly supplied free of cost at his canteen wine and other liquor to those voters who promised to vote for the respondent, or stated that they had voted for him, for the purpose of inducing voters to vote for him. The second was that one Philip Pieterse, another agent of the respondent, had been guilty of a similar corrupt practice. As to the agency of Abraham de Villiers there can be no doubt whatever. The respondent, in his evidence, after stating that one Blake had canvassed and worked hard for him, was asked: "Was Mr. A. B. de Villiers an agent in the same way? A.—Yes; he worked for me also, doing his best to secure my return. Q.—And told you from time to time what he was doing? A.—He told me what chances there were. Q.—And he was canvassing too? A.—I suppose he must have been. Q.—And getting people to promise their votes for you? A.—Yes, I suppose he was." As to Pieterse, the respondent, in answer to the question "Was Pieterse your agent?" said, "I cannot say that he was. He was a supporter of mine." Q.—You knew he was working for you? A.—Yes; but I did not suppose that he was influencing votes. Q.—Was he working in the same way for you as Abraham de Villiers was? A.—Yes, I believe so. I would say he was. Q.—Of course Abraham de Villiers and Pieterse have a good deal of influence in the place with the coloured people? A.—Yes I should say so. Not as much as Mr. Weber, the clergyman.—I express the strong and unanimous opinion of the Court when I say that the employment or even the acceptance by a candidate of the services of a canteen-



keeper as canvasser and agent is a most objectionable practice. The present case is aggravated by the fact that Pietersen had been found guilty on the trial of a previous election petition of corrupt practices in connection with his canteen business. It may be quite true, as the respondent stated, that these canteen-keepers had not as much influence over the coloured people as the Rev. Mr. Weber, but such influence as they had must, in the nature of things, have been of a demoralising character. If, therefore, the evidence given had supported the charge that drink had been given at the canteens to voters upon the terms stated, the Court would have had no hesitation in fixing the respondent with the legal responsibility. The evidence, however, should be clear and conclusive. The consequences to a candidate of corrupt treating, even when he had no personal knowledge of it, are so serious that the Court should not hold it to be established except upon evidence which would warrant a jury in finding the charge proved. It is for this reason that I was desirous that the Court should be strengthened by the presence of our colleagues, the Judges-President, whose long judicial experience must be of invaluable assistance to us. I fully concur with the sentiments expressed by Mr. Justice Willes, when he remarked how strongly he felt "the impropriety, even for the sake of obtaining the good of doing away with corruption, of endeavouring to do away with corruption at the expense of introducing a loose construction of the law, or a hasty and violent presumption upon facts by a judicial tribunal." Now, let me briefly examine the facts upon which the charge of corruption by the two canteen-keepers is proved. A witness, named Simon Maart, stated that at Pietersen's canteen a man named Daniel stood at the door with a horsewhip in his hand and gave the witness a bottle of wine, and that, when the witness wanted to pay for it, Daniel said, "No, no, free drinks to-day." The witness did not see Daniel pay for the wine, but the latter may have done it; and as there is no proof whatever of his agency, or even that he was in the service of the canteen-keeper, it is impossible to hold Sir James Sivewright responsible for what was done by Daniel. The same witness heard Mrs. Pietersen say to another man: "You must not come here and drink. You said you voted for Sir James Sivewright and have told lies. You must not come

here and get drunk and commit a nuisance against the wall." She then turned him off, but she probably turned him off for committing the nuisance rather than for lying about his vote for Sir James Sivewright. Two other witnesses gave evidence as to visits which they paid on election day to the two canteens, but, unfortunately, their evidence is somewhat conflicting, and is tainted by the half-intoxicated condition in which they appeared in the witness-box. One of them said that they had free drinks at De Villiers's canteen and the other denied it. They both agreed that they had free drinks at Pietersen's, but that they got it after they had said that they had voted for the old members, De Waal and Krige. The charge, however, is that free drinks had been given to those voters who promised to vote or stated that they had voted for the respondent, and the charge therefore fails. I come next to the charges under Schedule A, the first of which is that Sir James Sivewright, for the purpose of influencing the voters at Kuil's River to vote for him, corruptly promised them at a public meeting there held by him that if they voted for and elected him as their member he would secure for them a second platform at the station, and also a siding or facilities to detain and load their cattle, and that he would see that the passenger trains would stop for passengers, and that he would reduce the passengers' fares on the railway between Cape Town and Kuil's River. Unfortunately there were no shorthand reporters present, and the Court has to depend upon the recollection of witnesses who may have forgotten the exact phrases which were used by the candidate. Their evidence is very conflicting, but the Court has no reason for believing that any of them wilfully misstated the facts. In the heat engendered by an election the impression made by a political speech upon the minds of the hearers is greatly influenced by the feelings which they entertain towards the candidate, and when called upon, several months afterwards, to give an account of what took place they may, without being chargeable with perjury, give a very distorted account of what was actually said. Mr. Brink, on the one side, was a very intelligent witness, and seemed to be anxious to give a correct and truthful version of the speech, but the same thing may be said of Mr. Riach on the other side. The respondent himself admits having said that if he were returned as a member

it would be his duty to do what he could to obtain better railway accommodation for the Kull's River people, and having pointed out how much better off the people along the Simon's Town line were in respect of railway fares, adding that he said he would bring the resolution before Parliament to treat them in the same way as on the Simon's Town line. It is not clear, however, why such a resolution should have been brought before Parliament, seeing that, according to the General Manager's evidence, the respondent, as Commissioner of Railways, had the power of altering railway fares without a resolution of Parliament. It is fair to say that the General Manager added that the power would not be exercised without his being consulted. Without going into a detailed examination of the evidence in support of this charge it is sufficient to say that the Court is not clearly satisfied that the definite promises alleged in the petition were made. In this view it becomes unnecessary to enter upon the further inquiry whether, in case it had been conclusively proved that the respondent did abuse his position as Commissioner by making the granting of additional railway accommodation conditional upon his being returned as member for the division, he would have been liable to the full penalties of the Act. Acting on the principle that every charge must be proved beyond any reasonable doubt the Court is of opinion that the first charge under Schedule A cannot be sustained. The second charge under that schedule is that, in order to influence the voters at Somerset West Strand to vote for him, the respondent at a meeting of voters there held by him promised them that if they returned him as their representative he would see that they got a certain piece of land at the Strand for school purposes, and that, if he could not induce Government to give the ground, he would himself buy it and pay for the same out of his own private pocket, and make a donation of the ground to them. Fortunately there is less conflict as to what was really said at this meeting than there is as to the previous charge. Mr. Burnard, who gave his evidence very fairly, and is supported by other very intelligent witnesses, says that the following words were made use of: "I tell you what. You return me as your representative to Parliament and I will see that you get that piece of ground, and if I cannot get it I will buy it for you out of my own pocket, and I will make you a present of

it." Mr. Benjamin, a witness for the respondent, who also gave his evidence with perfect fairness, gives a substantially similar version, but he added that Sir James seemed to be sure that the request would be granted by the Government, and that the addition that he would buy the land himself was as if a person were to say, "If it cannot be done I shall eat my hat." I confess that I find it difficult, looking at everything that occurred at the meeting to hold that the offer was intended as a bribe. Mr. Burnard was an active political opponent, and he, so far as appears, was the only member of the School Committee present at the meeting. It does not appear that the respondent knew that Burnard was a guarantor, and if he did know it he could hardly have hoped to influence Burnard by his vague and conditional promise, nor can it be seriously believed that he would voluntarily place a weapon to be used against himself into the hands of a formidable political opponent. He must have known that a serious offer of a piece of land for a school to a school guarantor as an inducement to vote would be undisguised bribery, and that a public meeting would not be a fit opportunity for making the offer. He had been repeatedly questioned by Burnard about this land and about the remissness of Government, of which he was a member, in giving the land to the school, and it appears to me to be extremely probable that the words were hastily uttered without being intended to influence anyone, and without actually influencing anyone. It does appear to me that it would shock common sense to unseat a member and disqualify him for five years by reason of an utterance made without reflection or corrupt motive, and merely to parry the questionings of a political opponent. It is to be regretted that the respondent did not candidly admit having used the words sworn to by his own witness, Benjamin. The next charge to be dealt with is that the respondent, at a meeting held by him at Stellenbrech shortly before the election, at which a number of coloured voters were present, corruptly stated that he would pay all voters who worked for his return, as he could not expect them to work for nothing, and further, that he was willing to take into his employ forty workmen, at 3s. 6d. a day, for two months, and that these promises were made for the purpose of corruptly influencing voters to vote for him. It should be stated at once that there is no

evidence whatever in support of the first part of this charge, namely, the promise that the respondent would pay all voters who worked for him. The respondent himself and his witnesses deny the making of such a promise, which must therefore be taken as disproved. In regard to the second part of the charge, the evidence is somewhat conflicting. It was a most risky thing for a candidate to attempt to influence voters by any reference to his requirements as an employer of labour, even to the extent admitted by him, but the Attorney-General has not pressed the charge on behalf of the petitioner, and therefore nothing more need be said on the point. In regard to the last charge to be dealt with, the petitioner alleges that the respondent, by himself, and also by other persons on his behalf, gave, or agreed to give, or offered, promised, or promised to procure, or to endeavour to procure, money or valuable consideration to a few certain voters to vote, or refrain from voting, at the said elections, and the petition refers to Schedule A for further particulars. Reading the third paragraph of the schedule with the petition, the charge is that the respondent by himself and by his agents agreed to give to one Jan Adrian Ackerman a certain sum of money by way of loan, in other words to lend him a certain sum of money in order to induce him to vote for the respondent. This Ackerman had a brother, named Hermanus, through whom an application was made to the respondent for the loan of a sum of money as mortgage. It is not quite clear when this application was made. The respondent says that it was before the sitting of Parliament which preceded the General Election, but Adrian Ackerman says it was in July, 1898. No definite answer appears to have been given, although Adrian repeated his application without seeing the respondent personally. The respondent states that he received a letter on the subject from Adrian, but he says that he has lost the letter. Adrian Ackerman says nothing about having written a letter. Some time before the election a man named Blake, about whom I shall have to say more later on, came to Adrian Ackerman's farm, when the following conversation took place between them: Blake said, "Mr. Ackerman, you are certain to give your vote to Sir James," to which Ackerman replied, "If he had not been a Rhodesman I would have voted for him." Blake: "Oh,

he may be a Rhodesman, but he is working very well for you farmers. Tell me, yes or no, whether you are going to vote for him." Ackerman: "I cannot give you any promise; I promise nothing, but on the voting day I shall see for whom I am going to vote. I have already asked Sir James for money, and I have been disappointed in my request, and I cannot get money from him." Blake: "I have seen Sir James Sivewright about that money, and he has told me it would be all right. Sir James has authorised me to come to tell you it is all right." According to Ackerman this conversation took place about two weeks before the Kuil's River meeting, according to Blake about one week, but the point is immaterial. Just before the meeting Ackerman again saw Blake, who advised him to see Sir James himself on the evening of the day of the meeting. Ackerman did see Sir James, and his evidence as to their conversation is as follows: "I spoke softly to him and said, 'This is a matter of business between you and me. I wish to speak to you about that money, the money which you let me know I could get. Is it yes or no?' He said: 'Mr. Ackerman, the money is all right; you will get it in time. You keep straight on your side and I shall keep straight on mine.'" If Ackerman's evidence as to this conversation is correct there can be no doubt that it is a clear case of bribery. Sir Henry Juta has laid much stress on the fact that, according to Ackerman's own evidence, the property which he wished to mortgage for £600 was worth £2,000, and that he had no difficulty afterwards in obtaining a mortgage from supporters of the opposing candidates. But the respondent as well as Blake believed that Ackerman was very anxious to obtain the money on loan. The respondent himself says that when he saw the property he dismissed the thing from his mind, and had nothing to do with it. In that part of his evidence, however, in which he gives his version of the conversation with Adrian Ackerman after the Kuil's River meeting he states that in answer to Ackerman's question, "What about the mortgage for my place my brother spoke to you about?" he said, "I will have nothing to do with it in any shape or form, because it will be said that I was endeavouring to corrupt you." Mr. Jacobus Faure, who says that he overheard part of the conversation, states that the respondent's words were: "Ackerman, this is election time. I can have nothing to do with it, for

I might be charged with bribery and corruption." After the present petition had been filed every effort was made by the respondent to induce Ackerman to sign an affidavit to the same effect. His brother was first employed for that purpose, and then Nieuwoudt, one of the respondent's recognised agents, but Ackerman refused to sign the affidavit. Blake also used his utmost influence for the same purpose, and went so far as to take Ackerman to the office of the respondent's attorneys, and there have him questioned. Asked whether Ackerman adhered in the attorney's office to the statement that Sir James had said it was all right about the loan, Blake answered: "Yes, he adhered to the statement." Before this Court Ackerman still adhered to it, and was not shaken by the cross-examination. He was clearly mistaken, however, in his evidence as to the nature of the bond which he eventually passed in favour of Louw. He stated that he had to pay three months' interest in advance, and at first seemed to think that the interest was at the rate of  $5\frac{1}{2}$  per cent., whereas the bond does not require payment in advance, and the interest payable is only 5 per cent. The Court has no reason to believe that Ackerman wilfully swore to a falsehood, but the discrepancy does throw some doubt upon the perfect accuracy of his evidence. On the other hand, it is a strange circumstance that the respondent's tenants, Hermanus Ackerman, and Carinus, and his agent, Nieuwoudt, were not produced on his behalf to support the accuracy of his version of his indirect communications with Adriaan Ackerman. Considering, however, the grave penalty which the respondent would incur if Adriaan Ackerman's account of their interview were unreservedly accepted, I consider it to be the duty of the Court to give the respondent the benefit of the doubt raised by Ackerman's inaccuracy upon another point. No such doubt, however, exists in regard to Ackerman's interview with Blake which is relied upon by the petitioner to establish bribery by one of the respondent's agents. Bribery by that particular agent is not alleged in the petition, but no objection was taken to the charge being entertained under the general charge of bribery by the respondent "and by other persons on his behalf." In the *Norwich Case* (19 L.T., N.S., 615) it was held in England that, under an exactly similar charge, it was competent for the petitioner to go into any acts of bribery by

any person for whom in law the respondent was responsible, whether that person were an agent directly appointed by the respondent, or an agent by virtue of the construction which had been put on the Corrupt Practices Act. In the present case, however, I would have declined to entertain the charge of bribery through the agency of Blake, notwithstanding the absence of any objection on the respondent's part, if it had been a charge which the respondent was unprepared to meet. No suggestion of the kind has been made, and I therefore proceeded to consider whether Blake was the respondent's agent and whether he did in fact offer a bribe to Ackerman. As to his agency, Sir Henry Juta has candidly admitted it. If any doubt existed on the point it would be removed by the respondent's own evidence. Being asked whether Blake was his agent, he answered: "It depends upon what constitutes an agent." Q.—He was working for you? A.—Yes. Q.—Canvassing and working hard? A.—Yes. Q.—And had conversations with you about your election? A.—Yes. Q.—And reported how things were going on? A.—Yes. Q.—And he has been working for you in connection with this petition? A.—Yes. As to bribery by Blake, the Court accepts as correct the account given by Ackerman of his first interview with Blake. His account is substantially corroborated by two other witnesses who were present at the interview. Blake's evidence, on the other hand, is inconsistent with itself and with the probabilities of the case. He went to Ackerman as canvasser, and endeavoured to persuade Ackerman to vote for the respondent. "I talked to Ackerman," said he, "about Sir James being a good man, and all that sort of thing. Then he said: 'I cannot tell you how I am going to vote. Sir James has disappointed me about a loan,' which I understood to mean a matter with regard to a sum of money. Ackerman said: 'I have tried to see Sir James for a long time, and I have written to him, but I have had no answer.' Then I said to him: 'If Sir James promised you money you can rely upon getting it.'" But Ackerman never told Blake that Sir James had promised him any money. Ackerman's version of the concluding portion of the conversation is that Blake said: "I have seen Sir James Sivewright about that money, and he has told me it would be all right. Sir James has authorised me to come to you and tell you it is all right." Blake says that

he saw the respondent after his interview, when the respondent said: "The man is a regular nuisance; I can't go on bothering about him." And yet the witness admits that at a subsequent interview with Ackerman he said: "The meeting is now going to be held, and now is your chance to see him (Sivewright)." The antecedents of Blake are such that the Court cannot possibly except his account in preference to that of Ackerman. We have the case here of a canvasser holding out the promise of a loan to a voter whom he believed to be extremely anxious to obtain the money on loan, and there can be no doubt whatever that he used the alleged promise as an inducement to Ackerman to vote for the respondent. If the respondent's evidence is correct Blake must have told a falsehood in informing Ackerman that Sir James had authorised him to say that it was all right. Why should such a falsehood have been told by a canvasser for a candidate, unless it were to induce the voter to vote for the candidate? The position, therefore, is this: Either the respondent did authorise his canvasser—who was not ordinarily employed as his business agent—to promise a loan to a man who was believed to be very anxious to obtain the loan and whose vote was believed to depend upon the granting of the loan, in which case the respondent was personally guilty of bribery, or the agent without any authority from the respondent falsely told Ackerman that the respondent had promised the loan, in which case the very falsehood of the statement strengthens the view that the promise was intended by the agent as a bribe to the voter. For the reasons already stated the Court accepts the latter alternative. It is to be hoped that the result of this petition will be that candidates will in future accept the services of those agents only whose integrity, and sense of honour can be relied upon. Even if they are not themselves prepared to stoop to corrupt practices they may be compromised by the acts of an unscrupulous agent whose zeal outruns his discretion. "I entertain no doubt," remarked Willes, J., in the *Westbury case*, "as to the doctrine that a single bribe by an agent avoids the election. It does not fix the candidate with penal consequences; it simply says that for the public good, in order that the agents employed by candidates may be deterred from resorting to undue means for the purpose of procuring their election, as a matter of public policy, an election in which an agent

has so misconducted himself shall be void; not to punish the candidate, although it so indirectly operates, but to protect the public and prevent the like practices for the future." These remarks would be equally true as to personation if induced by the agent of any candidate. Several cases of conviction for personation at the Stellenbosch election have been confirmed by the judges on review, and it is well that it should be known that if the evidence of the connection of the agents with such personation had been given in this court the candidate employing them would have been held responsible. In the present case no scrutiny has been demanded by the petitioner, nor does he claim the seat. The judgment of the Court will therefore be to declare that the respondent has not been duly elected, and that no other person is entitled to be declared duly elected. The respondent must pay the costs of this petition.

Barry, J. P., said: I concur fully in the general remarks of the Chief Justice upon the propriety of employing reliable agents, and his remarks and conclusions on the charges of treating, and upon the charge of bribery arising from the promise of a loan to Ackerman, and it is not because I come to the conclusion that Ackerman is not to be believed in the version he gives of the conversation between himself and the respondent that I do not find that the charge of personal bribery by respondent is fully established. My chief reason for not coming to the conclusion is that Ackerman has betrayed the mind of a "bribee," and therefore we may give respondent the benefit of the doubt expressed by the Chief Justice. The charge that the respondent, at a meeting of voters held by him shortly before the election at Somerset West Strand, promised personally that if they returned him as their representative he would see that they got a certain piece of land at the Strand for school purposes, and that, if he could not induce Government to give the ground, he would himself buy it and pay for it out of his private pocket, and make a donation of it to them, has, in my opinion, been proved; but the further part of the charge that the promise was made for the purpose of corruptly influencing voters to vote for respondent and to refrain from voting for the opposing candidates admits of some doubt. To succeed, the petitioner must prove: (1) That there was a promise by the respondent; (2) of something that had monetary value; (3) that this promise

was made in order to influence voters to vote or abstain from voting at the pending election. The law on the subject is found in sub-section 1 of section 1 of Act 21 of 1859, which says: "Every person who shall give, or agree to give, or shall offer, promise or promise to procure, any money or valuable consideration to or for any person in order to induce any voter to vote or refrain from voting" . . . shall be deemed guilty of bribery. These words are identical with those of the English Act 17 and 18 Vic. C. 102 (passed in 1854). The English decisions, therefore, under that Act form a guide in interpreting ours. The facts in evidence bearing upon this portion of the case are these. At Somerset West Strand there is a public undenominational school, the governing committee of which made an application to the Government, in which respondent was Commissioner of Public Works, for a piece of land on which to erect a school building, accompanying it with an offer of £20. This application was refused, in a letter to the chairman, in which Government replied that they could not recommend the grant, and that the land would be put up to public auction. The object of the application was to try and avoid paying the rent of the school building. For this rent, as well as for half the salary of the teacher, members of the School Committee were liable, and so were the guarantors from whom the School Committee were elected. Burnard was vice-chairman of the School Committee, and therefore interested in it, both from a pecuniary and an educational point of view. Up to July last the respondent, who had taken an interest in another public school in the district, had taken none in the Strand schools. Two or three weeks before the polling day, which was the 16th August, there was a meeting of electors at the Strand, addressed by the respondent, who during the course of his speech commended himself for the interest he had taken in education, and, at its close, said, "If any one present has questions to put, do so." A question or two were put by other parties, and then Mr. Burnard rose and said, "Sir James, I would like to put you a question with reference to the school ground. Why did the Government, of which you are a member, refuse to give us that ground?" Sir James said, "I know nothing of that application; besides, the Government has no right to give Crown land." Burnard, who up to that time was under the impression

that Government could make the grant, replied, "Then why has a piece of land been granted for the same purpose at Sir Lowry's Pass to another school?" Respondent answered, "That application was laid before the Waste Lands Committee, of which I am a member, and this committee has recommended the grant." Burnard then asked why their application had not been treated in the same way as the other, and was apparently not satisfied at the treatment his school had received from the Government. Upon this, Burnard says Sir James said, "I tell you what; you return me as your representative to Parliament, and I will see that you get that piece of ground; and if I cannot get it, I will buy it for you out of my own pocket and will make you a present of it." Burnard added that this remark was received with great applause. It appears there are six members of the School Committee, but Burnard was the only one present. There is evidence that one of the guarantors was also present, and certainly the master of the school, Clarke, who was also a voter, and was standing near to Sir James. Clarke, who was also up to that time under the impression that Government could make the grant, corroborates Burnard's statement. A third witness, Joubert, on a visit to the Strand, and who went to the meeting solely out of curiosity, and had nothing to do with either Burnard or Clarke, but took notes, says that he heard Sir James make the same remark in loud tones, and that it was received with great applause. In cross-examination, Joubert adds that he had come as an unwilling witness, and that, thinking Sir James's remarks looked like a promise, he had stopped writing notes, as he wished to have nothing to do with the matter. For respondent, we have his own evidence, taken on commission, in which he says: "After I had spoken I was pretty severely heckled by Burnard, chairman of the Municipality, whom I knew to be chairman of the local committee for my opponent. He asked me why the Government, of which I was a member, declined to give any ground to the Strand for a school. I replied that this was the first I had heard of it, and explained to him the course which ought to be adopted—namely, to address the Secretary for Agriculture and Lands, and let inquiry be made by the Surveyor-General. The thing would then go before the Waste Lands Committee in the House of Assembly, and, if I were their

member, it would be my duty to do what I could to get the land for so desirable a purpose. Burnard was not, however, satisfied and said so, and proceeded to speak further. When I said: "Oh, it is all right; keep your mind easy: I will see that you get your land all right for school purposes, but I certainly have no recollection of saying that I would buy it and give it to them provided they voted for me. I am perfectly certain I did not." In cross-examination respondent said "that I said I would buy it if returned as member. I most distinctly deny." W. Davies, an accountant, living at Somerset Strand, called for respondent, says that respondent was angry at being heckled, and at last got up and said, in a kind of "huff," "Oh, well, rest quiet; if I cannot get it from the Government I will buy it." This witness says he took notes, which he destroyed. He is sure the words "I will buy it" were used, but that he (witness) looked upon respondent's remark as a sort of blind answer, in the same way that you would endeavour to keep a baby quiet. This witness is certain that Sir James said nothing about making a present and that there was no cheering. Another witness called for respondent, Percival Benjamin, carrying on a business at Somerset West, says the words respondent used were: "I have no hesitation in believing that if the procedure I explained to you were adopted, your request will be granted; but if it is not granted, I will myself make you a present of it." This witness curiously adds that when the respondent made the remark about buying the land Sir James "said it in the same way as I should do when asked to do anything; and if anybody said it could not be done I would say, 'If it could not be done, I would eat my hat.'" That he did not regard the words in any way as a promise made by way of a bribe to induce a vote, and he did not think that any sensible man would. Benjamin, in cross-examination, adds he had no recollection of respondent saying he would buy the land, but that he distinctly heard respondent say: "If I am returned as your member, and you put the application through, and the Government refuse to grant it, I will make you a present of the ground." It seems to me clear from all this evidence that the version given by the witnesses for the petitioner is correct. It is true that two of them were not favourable to the respondent's election; but both were

interested in the school; and seeing that Burnard was under the impression that the Government had the power to grant the land, it is not surprising that when the Government wrote to the chairman refusing to make the grant, and informing the School Committee that it would be sold by public auction, with apparently no suggestion at that time that it should be laid before the Waste Lands Committee, the vice-chairman, Burnard, was not satisfied that the respondent had taken any real interest in the school. The so-called "heckling" does not appear to have been an unreasonable questioning of the respondent, and does not account for respondent having at first no recollection of having said anything about buying or making a present of the land, and afterwards swearing positively that he did not say so. Again, Davis's account cannot be correct, if respondent's witness, Benjamin, be believed. With the imperfect memory of Davis and Benjamin of what was said, it is not surprising that they should, even if they intended to speak the truth, have formed the curious impression they did that the words did not convey any other meaning than that they emphasised respondent's conviction that he would succeed in getting the grant through the proper channel. The words sworn to have a plain and definite meaning; they were used by an able and intelligent man, and when used were followed by cheers, indicating that the promise made by respondent to buy the land and give it as a present was appreciated. Burnard says that he took it to be a promise to him. It is now contended that no promise to buy the land and to make a present of it was intended, and that the words: "I will buy, &c.," were only used to emphasise respondent's conviction that he would succeed in getting the grant through the proper channel. The words, however, appear to me to have a plain and definite meaning, and a meaning growing out of and consonant with the discussion which preceded, and but for the fact that the offer was made just before the election would indicate meritorious interest on the part of Sir James in education. That Sir James did not mean what the words ordinarily convey, and meant to mislead those whom he addressed by an offer which he did not mean to fulfil, I cannot think; nor would such deception aid the respondent, seeing that the object is to ascertain what was the effect upon the man to whom it was addressed, and who swears

that he regarded it as a promise to buy the land and present it to the school if the Government would not grant it. Respondent himself has never said that he intended his words either in a jocular sense, or as emphasizing his conviction that he would get the grant from Government. He positively denied using the word "buy," and says he has no recollection of saying anything of the kind. If any such meaning as that of "I will eat my hat" had been intended to be conveyed, it would not, I think, have been conveyed by such an able man in the words sworn to and proved by Burnard. I cannot think that the words convey any other meaning than a promise to Burnard and the committee that Sir James would buy the land at auction and present it to the disaffected committee of the school if his Government, which had previously refused, would not, on his intervention, grant it. But to succeed, the petitioner must also prove that respondent promised a valuable consideration, which the offer of the land clearly was. Petitioner must also prove that in making this promise Sir James did so to induce any voter to vote or refrain from voting against him, and it may perhaps be urged that he only made the promise because he was unable to meet the arguments of Burnard, and that he could not possibly hope that such promise could have any influence upon him. That there is evidence that respondent's object was to influence the audience is, I think, clear, but if his primary object was rather to extricate himself from the false position in which he had been placed than to influence the electors, we may perhaps here again give him the benefit of the doubt. As to the charge of bribery at Kull's River, like the Chief Justice, I am not prepared to disbelieve Brink, and if Brink be believed implicitly both as truthful and correct, there would in my mind be proof of bribery. There are also many circumstances favourable to Brink's veracity, as well as witnesses who support him, but in view of the opposing evidence and the circumstance that there was no reporter, it is possible that the respondent may not have used the exact words imputed to him, and meant to speak in the character of a candidate, and to divorce himself from the position of Commissioner, and said enough at the meeting to show that he did so, and that even as candidate he only used the words to indicate his conviction on public matters, and did not mean to

make any offer out of the public funds, or any promise to procure out of such funds something of monetary value for any voters, which was not the consequence of his honest convictions upon matters of public interest. I confess that his statement, that a member of Parliament owed his first duty to his constituents and that he might as their member be justified in trying to obtain out of the public funds what he could not as Commissioner fairly grant, is a startling, and to my mind utterly erroneous view of the duty of any public man; and seeing that it is a candidate's duty only to state his convictions as a public man, it is not surprising that during the course of his address he should have made use of words indicating that he sought the votes of electors by offering to secure pecuniary advantage, even to individual voters, out of the public funds, to which as members of the general public they were not entitled. Sir James's statement, that he would not promise, or that the voters could not expect him to endeavour to obtain for them the same advantages by reduction of fares, or in the form of expenditure on a platform at Kull's River if he were only member for Griqualand West that he would as member for Stellenbosch, goes far to induce the conviction that his sole object in referring to the reduction of rates and to securing the platform was to win votes, and that it was not really in any *bona-fide* local or general public interest that he spoke. Had it been proved beyond a doubt that what he offered and what he promised was promised solely with the object of winning votes, I should have regarded it as bribery, whether he spoke unconnected with office or in the dual capacity of candidate and Commissioner. Upon all these charges of personal bribery, the respondent has had the benefit of the doubt, but, had the Court arrived at a contrary conclusion upon the evidence it would not have acted without precedent, seeing that in the *Lannceton* or "rabbit" case (2 O'M. and H., 129) the election was avoided under very similar circumstances to those in the Somerset school charge; and where heckling was really proved to exist, the respondent having given leave to his tenants not merely to destroy rabbits which were injuring the crops, but to sell them, it was held by Mr. Justice Mellor that what was done was done not so much from an abstract sense of justice as from a desire to influence the election. Had I been sitting alone, I might have come to a conclusion that bribery had



been proved against the respondent upon the Somerset West charge; but in view of the doubts already mentioned and existing in the minds of my brother judges, I join in the conclusion that personal bribery by the respondent has not been proved.

Laurence, J.P., said: I concur so fully in the view of this case, taken as a whole, which has been expressed by the Chief Justice, that I feel some hesitation as to whether it is worth while to read the reasons which I had prepared before I had the advantage of hearing his judgment. But in view of the importance of the case, and the complexity of some of the issues for decision, it may perhaps be as well, even at the risk of some repetition, to explain in my own way the process which has led me to a substantially similar conclusion on the various points involved. The petition is based on allegations of bribery, treating and personation. Two of the charges of bribery, three of treating, and those of personation were withdrawn or abandoned before or during the hearing. There remain for consideration the cases of alleged bribery contained in Schedule A of the particulars, clauses 1, 2, 3 and 5, and those of treating contained in Schedule B, clauses 4 and 5. As to the latter, it is sufficient to say that I agree in holding that they have not been established. It is probable that on the dates in question certain persons may have obtained drink without paying for it, but the balance of evidence is distinctly against it having been so supplied by any agent of the respondent. As to the charge contained in A, 5, it was scarcely pressed in argument. The statement made by the respondent at the meeting at the Rhenish Institute may have been indiscreet, but it was not unnatural. The rumour which he contradicted was just one of those prejudicial reports which get into circulation at election time, and which a candidate would desire to effectually refute. The evidence satisfies me that he really did want the labour which he expressed himself as willing to engage; that the remuneration offered was not in all the circumstances extravagant or unreasonable; and as a matter of fact, it did not prove sufficiently attractive, and he "never got a single labourer" (Commission 33). Turning to counts 1 and 2, they are based on speeches made by the respondent or answers to questions addressed to him at public meetings. Of these speeches no reports were published, and no shorthand writers appear to have been present or to have taken notes.

Where in such cases there is any conflict of evidence as to what was said, or how things were put, I think, especially considering the severity of the penalties entailed in such cases as the present, any doubtful point should receive the most favourable construction. Experience shows how difficult it is for even the most competent and impartial observers or auditors to give a precisely accurate account of what they believe they have seen and heard, and the reports of partisans of their recollections of *ipsissima verba*, peculiarly liable as they are to be, perhaps unconsciously, mistaken, or in some cases biassed or distorted, should certainly be received with extreme caution. Taking first the second count as to the meeting at Somerset Strand, and comparing the evidence of Messrs. Burnard, Clarke, and Joubert for the petitioner with that of Messrs. Davies and Benjamin and the respondent himself, it seems to me there is no very material difference as to what was actually said. After various questions from Mr. Burnard, who was a strong political opponent, whose vote he could not expect to obtain, and who was the only person present who showed any interest in the matter, the respondent disposed of the question as to the school site by assuring him that, if the proper procedure was followed, they would get the ground, but if not, he, if returned as their member, would procure it for them and make them a present of it. The question is whether this was said for the purpose of corruptly influencing the voters present. It appears that the respondent was interested in education, and had been for years a liberal supporter of a neighbouring school, and if he, as member, would presented this school with a site, there would have been nothing unusual or other than creditable in such a gift. But to make such a promise while soliciting the suffrages of the electors was of course a different matter and throughout the respondent seems to have failed to see the importance of exercising special care at that period, in this and in other instances, as is indicated for example by his candid admissions with regard to his habit of exercising hospitality to his friends and acquaintances at Stellenbosch, and the greater frequency of such occasions during the period of the election. (See Comm. 36, 37.) As to the matter of this site, I think in the first place it may fairly be inferred that the offer to buy it was made rather to clinch the assurance that, if the correct procedure were adopted, the school committee would

be able to secure it, and was dependent, so to speak, on a condition precedent which he explained would not arise; and in the second place that the respondent's object in making it, on the spur of the moment, was not to obtain the support of Mr. Burnard or any one else, but to rid himself of the embarrassment of further questions on the subject by an avowed opponent. There is the further point that whatever the precise construction to be placed on it, the offer was at the most that of a benefit to the community, and not—except on a somewhat strained construction as to the contingent liabilities of the guarantors—that of a valuable consideration or pecuniary advantage to any individual. I should not wish by this remark to be understood in any way as affirming that it would be open to a candidate to scatter promises broadcast of local benefits, to offer for instance to establish public parks or schools or libraries throughout a district, and so demoralise an entire constituency without bringing himself within the Act. But each case must be dealt with on its merits; and in all the circumstances I do not think it necessary to construe this expression as having been used by the respondent for the purpose of corruptly influencing anybody's vote. The case set up in the first count—as to the meeting at Kuil's River—causes more difficulty. Whether there is a legal distinction or not there is clearly a difference in substance, and in the effect likely to be produced, between a candidate promising to push matters, and use his influence to procure objects of local importance as a private member, and the case of a Minister of the Crown promising to use his powers as such to benefit the district which he represents; and in both cases a distinction may probably be drawn between such promises and that of direct pecuniary benefits to any voter or body, or class or group, of voters. I think on the whole that we ought to accept the statement of the respondent, as confirmed by both Faure and Riach, that in the course of his speech on these topics he did point out that there was a possibility of his duties as a Minister having to safeguard the interests of the whole colony, and as a member for a particular constituency, with special local claims and interests, coming into conflict, and intimated that, should such conflict arise, he would have to elect between the two positions. I may add that I attached a good deal of weight to the evidence of Riach, who seemed to be a fair witness, by no

means a strong partisan, and not unnaturally reluctant, as a public servant, when under cross-examination, to state the complexion of his political opinions. Now, the promise to obtain additional facilities, such as a platform, a siding, or a cattle kraal, must be regarded as subject to this general statement, and the respondent may have fairly considered them as justified by the amount of the traffic and generally on public grounds. The other candidates seem to have taken a similar view of these questions, and it certainly struck me that there was considerable force in the argument of counsel that if a promise of such facilities by the respondent was a corrupt practice, so would have been a promise to endeavour to procure them if made by the petitioner himself—an argument which certainly approximated to a *reductio ad absurdum*. Thus it may be said that a private member, to gain his point, would have to go to Parliament; but the strong point made against the respondent is that he could have done these things on his own responsibility, and if so, it would not have been necessary for a private member to go to Parliament; all that was necessary was for him to persuade the Commissioner or the department that there was a sufficient case for granting what was desired. The attitude and language of a Minister in circumstances such as the present, and the apparent attempt to use his position to promote his candidature, might well be the subject of adverse comment and even censure in Parliament or in the public press; but it does not necessarily follow that it was a corrupt practice within the meaning of the Act. It may be said, as was argued in the *Burkly West* case, that promises of such a nature are even more serious, as being more widespread in their influence, than direct bribes to individuals. In some cases it may be so, but the argument *à fortiori* is always a dangerous one; the real question is not whether a thing is worse, or less bad, than what the Act specifically prohibits but whether or no it is within the actual terms of the prohibition. On this branch of the case the strongest point seems to be that with regard to the promised reduction of passengers' fares. On the evidence before us, there is not much dispute as to what was actually said; the main question as to that is whether the respondent said that he intended to bring the matter before Parliament. I am inclined to think, on his evi-

dence and that of other witnesses, that he did say something to that effect; but in any case it is clear that he had the power to deal with the matter himself, though in practice that power was never exercised, except in consultation with the General Manager. It well may be that there was a fair case for the proposed alteration; but it is much to be regretted that the matter was introduced on this occasion, and it is the more unfortunate that the respondent did so, in view of the terms of his letter to Mr. Elliott, written nearly a month before, in which he clearly recognised the construction which would inevitably be placed upon such a proceeding (564). Still the fact remains that although the proposed change would probably have been in practice a special boon to residents in the neighbourhood and those present at the meeting, it was not confined to them or to the electors of Stellenbosch, but would have been shared by them with the general public; and if we once extend the phrase "money or valuable consideration" beyond the sense given to them by the English Courts—i.e., "money or money's worth" or "something reducible to cash"—it would be difficult, if not impossible, to find any precise point at which to draw the line. On these grounds, and after very careful and anxious consideration, I have on the whole come to the conclusion that the respondent's conduct and language on this occasion, though in my opinion on the part of one holding his position it was open to very severe comment, is not clearly proved to have been such as to make him liable to the penal consequences entailed by the personal commission of a corrupt practice as defined by the Act. I come lastly to the third count with regard to the alleged negotiations with Ackerman. The question is whether there was made to him any offer or promise of a loan of money in return for his vote or support at the election. If so, I think—even if the security was sufficient and the loan in other circumstances could have been regarded as an ordinary business transaction—this would amount to a "valuable consideration," and though it would have been better if the word "lend," which occurs in the Act, had been used in the petition, still reading the petition, together with the particulars, and no objection having been taken to the third clause of the latter on the ground of discrepancy with the fifth clause of the former, I also think that the charge has been sufficiently clearly alleged for it to be neces-

sary to go into it. What we have mainly to consider are interviews which took place first between Blake, an agent of the respondent, and Ackerman at the latter's place, and secondly, that between Ackerman and the respondent himself after the meeting at Kull's River. As to the latter, we have only Ackerman's evidence on one side and that of the respondent and Faure on the other. The former says that the respondent informed him that it would be all right about the money, adding "You keep straight on your side and I shall keep straight on mine." The respondent says that he informed Ackerman, speaking in English, that he would have nothing to do with it, as it would be said he was trying to bribe him; and his evidence is corroborated in substance by that of Mr. Faure, who was standing a few paces off. My own impression as to this incident is that very probably—if we had it, say, from a phonograph,—we should find something in the nature of a combination of the two sentences; but at all events on the evidence the probability seems to me rather in favour than against the respondent having said something to the effect that he could not, for fear of misconstruction, deal with the matter while the election was going on; and with the conflict of evidence I should think it very unsafe to decide the case against the respondent personally on this one doubtful phrase. But with regard to the previous interview with Blake, the case stands on a different footing. There is nothing to show that Blake had had any communication on the subject with the respondent before speaking to Ackerman. That being so, I should have thought *prima facie* it was much more probable that Blake said, as he alleges, "If Sir James promised you the money you can rely on getting it," than that he made a positive statement without authority, and stated, what appears to have been in fact untrue, that he had been authorised to promise the required accommodation. And when I asked him in which language he had spoken, and he gave the sentence in Dutch, it seemed to me that the confusion might well have arisen through Ackerman not hearing the conditional "als" with which it had commenced. Moreover, it is difficult to understand why, if Blake had made this false statement, he should have facilitated the subsequent interview between Ackerman and the respondent, a fact which, however, is obviously open to more than one explana-

tion. Still it is impossible to ignore the circumstance that Ackerman's version is supported by two other witnesses, whose presence Blake admits, and that none of them were cross-examined on the point; while Blake, for reasons quite easy to understand, was only produced as a witness after the respondent's case had been closed, and under some pressure from the Court. Moreover the fact that Blake is an individual whose evidence in a recent case had been discredited by the Court, and who had then, as I understand, been found to have committed fraudulent misrepresentation; the further fact that he will not positively deny that he made statements as to this matter of a different tenour to the petitioner's attorneys, the non-production of Ackerman's letter to the respondent, and of the list of voters, on which a special mark seems to have been placed against Ackerman's name; the fact that neither Hermanus Ackerman nor Carinus were called to give evidence, and the extreme anxiety displayed when the case was coming on to get a sworn declaration from Ackerman on the subject—all these are points to which it is impossible to shut one's eyes in deciding where the balance of probabilities lies as to what actually took place. On the whole, I feel forced to the conclusion that on this occasion Ackerman declined to promise his vote, partly on the ground that he had been disappointed about this loan, and that Blake then, whatever the exact words employed, assured him that the loan would be all right. On the one hand, it would seem that Ackerman might have obtained the desired advance as an ordinary matter of business; on the other, there is an answer of the respondent's from which the inference is that he regarded the security as unsatisfactory (Commission, 201). But if Ackerman was anxious to obtain the loan and tried to use his position as an elector as a lever for obtaining it on the most favourable terms, a promise in such circumstances must be regarded as holding out a corrupt inducement, in the same way as if, for instance, there had been a definite promise to lend the money on terms lower than the current rate of interest for such advances. As to Blake's agency, as the relation is construed in these matters, there can, I apprehend, be no doubt on the facts as proved and admitted. I feel bound to add that I have myself felt some difficulty owing to the circumstances that while the petition alleges bribery by the

respondent "and also by other persons on his behalf," the particulars in Schedule A, differing in this respect from those in B, allege only personal acts by the respondent. But no objection was taken to this evidence on that account, and if it had been I do not see any ground on which an application to amend the particulars in this respect could have been successfully resisted. Moreover, it appears that there is an English case in which, on a petition similarly worded, the Court ruled that evidence was admissible of bribery by the respondent's agents (*Norwich Case* 19 L.T., N.S. 617); and although with regard both to this and the other points already mentioned, I think it unfortunate that the petition and particulars were not prepared with greater accuracy and explicitness, the point is certainly a very technical one, and, in the absence of anything to indicate any possible prejudice to the respondent, I think we are bound to deal with the evidence before us, and on this evidence to come to the conclusion that on this one point the case for the petitioner has been established.

Maasdorp, J.: I fully concur in the judgment delivered by the Chief Justice.

Solomon, J.: I have had a previous opportunity of considering the judgment which has been read by the Chief Justice, and I also entirely concur with the view which he has expressed of the facts of the case, and with the conclusions to be drawn from those facts. I only wish to add this—that in the view he has expressed of the facts, and in which I concur, it appears to me that the important questions of law which were raised in the arguments do not require to be determined. If the facts which are alleged in the petition had been clearly proved against the respondent, then it would have been necessary to express an opinion on the legal questions which were raised in the course of the argument, but as we do not find those facts have been clearly proved, it is unnecessary now to express an opinion on those points. Any such opinion, if expressed, would be more or less in the nature of an *obiter dictum*, and *obiter dicta* are somewhat inconvenient things, which, as was said on one occasion, sometimes come home to roost. Therefore I would rather not express an opinion.

After argument as to costs,

De Villiers, C. J., said: The Court is of opinion that the petitioner should pay the expenses of the witnesses who would have been called or who were called to disprove

the charges which were withdrawn; that the respondent pay the costs, including witnesses' expenses, as to charge 3, Schedule A (regarding Aokerman); the petitioner pay the expenses of the witnesses for the respondent to disprove charge 5 in Schedule A (in regard to the meeting at Stellenbosch); and in the same way the petitioner should pay the expenses of the witnesses for the respondent in Schedule B, 4 and 5 (regarding Pietersen and De Villiers). As to the charges made in Schedule A (in regard to the meetings held at Kull's River and Somerset West), each party pays the expenses of his own witnesses. The Court is of opinion that inquiries as to what took place at this meeting were in the public interest. It would have been better for the respondent not to have made those statements, which he admits to have made at those meetings.

[Petitioner's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl & Buismanné.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1899.  
Jan. 12th.

On the application of Mr. Benjamin, Ernest John Schultz was admitted as an attorney, notary, and conveyancer.

On the application of Mr. Benjamin, David Stroyan was admitted as a notary.

### PROVISIONAL ROLL.

FLETCHER AND OTHERS V. CARSTENS.

Mr. Close applied for an order for the final adjudication of defendant's estate.  
Granted.

FLETCHER AND OTHERS V. BRYANT.

Mr. Close applied for an order for the final adjudication of defendant's estate.  
Granted.

SCHRODER V. SCHMAL.

Mr. Buchanan applied for an order for the final adjudication of defendant's estate.  
Granted.

AULISEBROOK V. WATSON.

Mr. Benjamin applied for an order for the final adjudication of defendant's estate.  
Granted.

HAYTON V. COOLTZER.

Mr. Buchanan applied for provisional sentence on two mortgage bonds for £3,000 and £10, and for interest at the rate of 6 per cent. from January 1, 1897, and that the property be declared executable.  
Granted.

ROSSOUW'S EXECUTRIX V. REITE.

Mr. Benjamin applied for a writ of civil imprisonment against the defendant on a judgment of the Court.

The Court ordered the matter to stand over for further affidavits.

RICE'S EXECUTOR V. MARITZ.

Mr. Uppington applied for provisional sentence on a mortgage bond for £150, and that the property be declared executable.  
Granted.

BROADHURST V. FOURIE.

Mr. Joubert applied for provisional sentence for £50, being half a year's rent under a certain lease.  
Granted.

THE MASTER V. WEIGEL.

Mr. Shell, Q.C., moved for the usual order calling upon the defendant to file an account.  
Granted.

THE MASTER V. FITZGERALD.

Mr. Shell moved for the usual order calling upon the defendant to file an account.  
Granted.

DU PREEZ V. SWART.

Mr. Joubert applied for an order for the final adjudication of defendant's estate.  
Granted.

**STRUBEN V. BURR.**

Mr. Benjamin applied for provisional sentence on a mortgage bond for £600, and that the property be declared executable.

The defendant appeared in person, and asked for an extension of time in which to settle the matter.

Provisional sentence granted; execution to be stayed until January 31.

**WIID V. PHILIP.**

Mr. De Waal applied for provisional sentence on a mortgage bond for £200, less £20 paid on account, and that the property be declared executable.

Granted.

**DREWITT V. FALCONER.**

Mr. Buchanan applied for provisional sentence on a mortgage bond for £469, and that the property be declared executable.

Mr. Molteno appeared for the defendant.

After argument,

Mr. Buchanan having consented to a stay of execution, the Court granted provisional sentence, execution to be stayed for a fortnight.

**ILLIQUID ROLL.****SCOTT V. RASMUSSEN.**

Mr. Benjamin applied for judgment under Rule 329D for the restoration of certain bricks to the plaintiff, or payment of £35, their value.

Granted.

**SMIT V. MEYERS.**

Mr. Searle, Q.C., applied for judgment for £40 7s. 6d., cash advanced.

Granted.

**JANTJES' EXECUTORS V. THEUNISSEN.**

Mr. Gardiner moved for judgment under Rule 329D for £145 in terms of a certain deed of sale.

Granted.

**SINK V. STEENKAMP.**

Mr. De Waal moved for judgment under Rule 329D for delivery of certain ostrich feathers, or in default, payment of the sum of £20, their value.

Granted.

**SPILHAUS AND CO. V. ROOS.**

Mr. Gardiner moved for judgment under Rule 329D for £24 15s. 10d.

Granted.

**BAM V. MANCHESTER.**

Mr. Maskew moved for judgment under Rule 329D for £32, less £29 paid on account.

Granted.

**JONES AND CO. V. CARDINAL.**

Mr. Maskew applied for judgment under Rule 329D for the sum of £45 for brokerage.

Granted.

**SYFRET V. BENNETT.**

Mr. Uplington applied for judgment under Rule 329D for the sum of £75, balance of the purchase price of certain landed property.

Granted.

**PURCELL, YALLOP AND EVERETT V. ROOS.**

Mr. Buchanan applied for judgment under Rule 329D for the sum of £15 4s., less £10 paid on account.

Granted.

**PURCELL, YALLOP AND EVERETT V. VALLENTINE.**

Mr. Buchanan applied for judgment under Rule 329D for the sum of £60 7s. 2d., being the amount due and owing for goods sold and delivered and work and labour performed.

Granted.

**REHABILITATIONS.**

On the application of counsel, the Court granted rehabilitations to the following persons:

Rudolf Hendricus van Driel, Paul Willem Michau, Christoffel Hendrik Olivier, Nicholas Frederick Christoffel du Plessis, Dirk Daniel Joubert, Alfred Bullen, and Herman Geduljowits.

In the case of Heinrich Grunder, the Court decided to allow another application to be made in six months.

**GENERAL MOTIONS.****ROSS V. ROSS.**

Mr. Currey applied for a decree of divorce and custody of the children, the defendant not having complied with the order of Court for restitution of conjugal rights.

The Court granted the application.

*Ex parte* STONE'S EXECUTOR.

Mr. Close applied for a rule *nisi* under the Derelict Lands Act to be made absolute. The Court granted the application.

GUEST V. GUEST.

Mr. Buchanan applied for an order on respondent to pay her the sum of £40 to enable applicant to institute an action for divorce, and for maintenance at the rate of £6 per month pending the said action. The applicant stated that she had two daughters, aged respectively twenty and sixteen years; she alleged ill-treatment on the part of her husband, and that she had been driven away from home, and was now living with a neighbour near George. She further alleged that respondent had committed adultery with various women, white and coloured.

Mr. Gardiner appeared for the respondent.

The respondent admitted committing adultery seven years ago, but stated that his conduct had been condoned, that the applicant had left the house of her own accord, taking the eldest daughter with her, and this without proper reason. Respondent was willing to maintain his daughters. He was unable to advance more than £20.

The Court awarded the applicant £20 to enable her to bring the action, £20 to be paid at once, and £10 on March 1, the action to be brought in the Circuit Court at George.

BERNARD AND OTHERS V. BERNARD'S ESTATE.

Mr. H. Jones asked that judgment should be signed against plaintiffs for not proceeding with their action.

The Court granted the application.

LOGAN V. BARNATO'S ESTATE.

Mr. Innes, Q.C., for the defendant, applied for a commission *de bene esse* to take the evidence of Messrs. Joel in London.

The Court granted the application and appointed Mr. Mackarness commissioner, subject to the production of proof of service of notice upon the plaintiff.

WAGNER V. LUDOLPH.

Mr. Benjamin applied for the rule *nisi* restraining respondent from trespassing to be made absolute. It appeared that respondent had removed certain trees from the property of the applicant, who valued the damage

at £60. He had also built a wall within two inches of the boundary between the two properties.

Mr. Searle, Q.C., appeared for the respondent.

The Court made no order, the respondent undertaking not to trespass on applicant's property. The costs of the application to be costs in the action to be brought.

IN THE ESTATE OF THE LATE CAROLINE JACKSON; *Ex parte* SYTNER.

Mr. Gardiner applied for an order releasing Albert Henry Sytner from the office of executor testamentary. The petitioner was unwilling to act for domestic and other reasons, and stated that he was about to proceed on a visit to Europe and would be absent for some time.

The Master reported that it would be to the advantage of those interested that the administration of the estate should be entrusted to a Trust Company. He suggested that petitioner be relieved of his trust and ordered to render an account of his administration and that the Master be authorised to take the necessary steps for the appointment of an executor *ad litem*.

The Court granted an order in terms of the Master's report.

EDWARDES V. POLLARD AND { 1899.  
CHESTER. { Jan. 13th.

Dramatic copyright—Plays—Proof—  
Interdict.

This was an application upon notice to the respondents, the proprietors of Pollard's Lilliputian Opera Company calling upon them to show cause why they should not be restrained from playing and performing anywhere in the Colony certain plays, viz: "Gentleman Joe," "The Lady Slavey," "In Town," "The Gaiety Girl," "The Circus Girl," "My Girl," "The Greek Slave," "The Shop Girl," "The Runaway Girl," and "The Geisha."

The affidavit of W. T. Buissinné, the applicant's attorney, alleged that he was informed and believed that the sole right of performing the plays referred to was vested in the applicant.

A. H. Pollard, the respondents' business manager, filed an affidavit alleging that he had no knowledge, nor had legal proof been given him that the applicant was the legal owner of the plays other than the bare assertions of himself and his attorney: he

said also that the applicant's attorney had exhibited no power or authority to make the application.

The correspondence put in showed that a letter was written to the respondents by the applicant's attorneys, stating that unless the respondents stopped performing the plays they would apply for an interdict. A reply to this was sent to the attorneys from respondents stating that they were prepared to pay royalties on the pieces. Subsequently a cablegram from England was sent by the applicant stating that he did not wish these plays to be performed by the Pollards, and that the whole matter was in the hands of Mr. Ben Wheeler, who was solely entitled to perform these plays in this country.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Innes, Q.C., for the respondents: I admit that an attorney of the Court can make an application on motion without a special power. But there is no evidence before the Court of any title in the applicant.

The respondents are ready to pay him a royalty if he proves his title. In *Marsh v. Bevan* (3 Sheil, p. 220), the rule was discharged because there was no proper evidence of title. In *Searle and Gilbert and Sullivan v. Bonamici and Perkins* (3 Sheil, p. 171), the rule was discharged and the respondents ordered to pay 10 per cent of the gross proceeds to the Deputy Sheriff of King William's Town pending an action for a declaration of rights.

Mr. Searle: The correspondence practically admits that we have the right. We have not at present the legal proofs of right to play all the plays referred to. We have here proofs as regards some of them (all except the first four mentioned above) but they are not attached to any affidavit. The other proofs are on the way out from England.

Mr. Innes in reply.

De Villiers, C.J., said: It is quite clear that no interdict can be granted of the plays of which there is no proof of assignment at all, but in regard to those plays for which there are proofs, the applicant is at all events entitled to a rule *nisi* calling on the respondent to show cause on the first day of next term why he should not be restrained from performing these plays and pay the costs of the application; the rule to operate as an interdict in the meantime.

*Postea* (February 1st).

The rule was made absolute.

[Applicant's Attorneys, Messrs. Van Zyl & Buiesinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CREWE V. BOTHA. { 1899.  
{ Jan. 12th.

Appeal—Election petition.

*No appeal lies against a judgment upon an election petition.*

*Where an election petition had been filed, but before the day of hearing a preliminary decision was given by the Court upon the validity of certain legal objections to votes raised in the petition, and leave was thereupon applied for to appeal to the Privy Council upon that decision,*

*The application was refused.*

This was an application for leave to appeal to the Privy Council from the decision of the Court upon the validity of certain objections raised in an election petition as to the votes of certain minors, aliens, and convicted persons (Sheil 8, p. 424). The applicant (petitioner) filed an affidavit, stating that he felt aggrieved at the decision of the Court on the legal points which had been raised, and intended to carry the case on to the Privy Council. The petitioner also stated that he valued a seat in Parliament at more than £500 sterling.

A further application was made for the petition to be removed from the list of trials set down for the 26th instant.

Mr. Benjamin appeared for the applicant.

Mr. Searle, Q.C. and Mr. McGregor for the respondent.

Mr. Benjamin: It has been held in *Robinson v. O'Leary* (4 Juta, p. 285) that no appeal lies from a judgment upon an election petition, but the petitioner intends to apply for leave to the Privy Council, and comes to this Court in the first instance out of respect.

There is a further difficulty arising out of section 50 of the Charter of Justice. It has been held in the Privy Council that questions of marriage and of divorce have not any pecuniary value and that applications for leave to appeal in those cases should be made directly under section 51. *D'Auliac v. D'Auliac* (4 Moore's P.C. Cases, p. 374).

The application was refused with costs.

De Villiers, C.J. said: Mr. Benjamin has given such very good reasons why his application should not be granted that it is not



necessary for me to say much. It is quite clear from the decision of the Court in the case which has been cited that there is no appeal against a judgment upon an election petition, but even if there is an appeal, that appeal could only be heard when the applicant's petition has been decided. The election petition has not yet been decided. A preliminary question of law for the convenience of parties has been decided, but the case itself is undecided. It is set down for a certain day, and after the Court has given its judgment this application may be made to grant leave to appeal. The petitioner said in his petition that the position of a member of Parliament is worth £500, and in that way he wished to bring the matter under the Charter of Justice. How he made the position worth £500 a year I do not quite understand, because if you look at the Act for the payment of members the utmost amount to be paid is for ninety days. As to the railway ticket, I do not know whether that is worth £500. The statement is rather an absurd one to make in a solemn petition presented to the Court. The petition must be dismissed. The case is set down for a certain day, and on that day it must be heard. The application must be dismissed, with costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buismann; Respondent's Attorney, V. A. van der Byl].

GRAAFF-REINET BOARD OF EXECUTORS V. THE MASTER.— 1899.  
Re CAMPBELL'S ESTATE. Jan. 12th.

Executor—Assumption—Letters of Administration.

*A husband and wife by joint will appointed the survivor and A. executors of the estate of the first dying with power of assumption. After the death of the testatrix the survivor executed a deed assuming B. as his co-executor. On the survivor's death B. applied for letters of administration. A. refused to consent.*

*Held that B. was not entitled to letters of administration.*

This was an application on notice to the Master of the Supreme Court calling on him to show cause why letters of administration should not be granted to the applicant, the secretary of the Graaff-Reinet

Board of Executors, by virtue of the deed of assumption executed by James Nicholl Campbell in his capacity as one of the executors testamentary of the estate of the late Aletta Wilhelmina Campbell. The affidavits in support of the application alleged that James Nicholl Campbell and Aletta Wilhelmina Campbell, who were then married in community of property, executed a mutual will on the 22nd September, 1876, by which they nominated the survivor and Thomas Auret as executors of the first dying, with power of assumption. The testatrix died on the 21st January, 1879, and the survivor continued in possession of the joint estate, but no account was filed by the executors. In or about October, 1885, and ever since, the applicant had acted as agent of the survivor and had collected the rents of the Graaff-Reinet property belonging to the joint estate. On the 17th March, 1894, the survivor, in his capacity as one of the executors of the testatrix, executed a deed of assumption, assuming the applicant as co-executor with him of the will. In 1895 the survivor made a new will, appointing the applicant and one Van Lingen as his executors, but that will was stated to have been lost. The survivor, J. N. Campbell, died on the 3rd October, 1898, and the applicant afterwards applied to the Master for letters of administration under the deed of assumption, but the Master refused on the ground that the deed should also bear the signature of Auret consenting to the appointment. Auret however refused to sign.

Mr. Searle, Q.C., appeared in support of the application. The deed of assumption is not revoked by the death of the assuming executor. *De Korte v. Hofmeyr* (1 Juta, p. 306). The question is whether it is necessary that both executors should sign such a deed. Section 24 of Ordinance 104 does not say that both should sign.

De Villiers, C.J., said: Where there is more than one executor it is perfectly clear that all the executors should concur. They must both act in such an important matter in the same way as they would act in any other important matter. The application will therefore be refused with costs.

[Applicant's Attorneys, Messrs. Scanlen & Syfret].

## FAGAN V. VERSTER.

Sir H. Juta (with him Mr. McGregor) applied for the appointment of a commission to take the evidence of certain witnesses in this action.

The application was granted, and Mr. Howel Jones appointed commissioner.

## SPRECKLEY V. SPRECKLEY.

Mr. Benjamin moved for an extension of the return day.

Granted.

KLEYN V. DEMPERS AND BEYERS. } 1899.  
Jan. 12th.

Election petition — Withdrawal —  
Substitute for petitioner.

This was an application to have a rule *nisi* made absolute. The rule was granted on the 5th instant, and called on all persons concerned to show cause why the election petition filed by the applicant should not be withdrawn.

Sir H. Juta, Q.C., appeared for the applicant.

Mr. Searle, Q.C., and Mr. McGregor for the respondents.

Mr. Innes, Q.C., appeared for a registered voter named McLeroth, who applied to the Court to be allowed to continue the petition against Mr. Dempers only. Mr. Innes said this was a novel application, but he did not know that there was anything which militated against its being granted. All that McLeroth wanted was to put himself in Mr. Kleyn's place. Act 9 of 1883, sections 23, 24 and 26, allowed him to intervene, and put him in the same position as the original petitioner.

De Villiers, C.J., said: The case had better stand over for further information as to the reason why Mr. McLeroth takes this course, but there will be no necessity for Kleyn to appear again; because he is dismissed from the petition. At present there is no order.

*Postea* (January 20th).

McLeroth's application was withdrawn.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

MCLACHLAN V. THE BRITISH SOUTH AFRICA COMPANY } 1899.  
Jan. 16th.

Pleading—Application for further particulars — Rule of Court 330 (g).

This was an application by the defendants in the action for an order upon the plaintiff to furnish further particulars of the allegations made in paragraph 3 of his declaration or to have the paragraph expunged. The plaintiff was a trooper who took part in the Jameson Raid under the defendants, and the action instituted by him was for the recovery of damages on the ground that he was induced to take part in the expedition by means of false representations made by the defendants or their agents or servants.

Paragraph 3 of the declaration was as follows:

"In the month of December, 1894, the plaintiff was employed by the said company, through its duly authorised agents or servants, to serve for a year in the said British South Africa Police within the territorial limits in South Africa, under the control of the said company. In the month of December, 1895, the defendants, through their authorised agents and servants in South Africa, with intent to induce the said plaintiff to remain in the said police force, and in order to induce him to take part in an unlawful and armed invasion of the territory of the South African Republic, as will more fully appear hereafter, falsely and fraudulently represented to the plaintiff that the detachment of the said police in which the plaintiff was serving was about to be employed in active service, and requested him to continue in his said service for a period of another year. The plaintiff relying upon the said misrepresentations was induced thereby to continue his said service for the said period."

Paragraph 4 alleged specific misrepresentation by Dr. Jameson by which the plaintiff was induced to enter the Transvaal where he received wounds.

The defendants had pleaded to the declaration, and by this application they now sought to compel the plaintiff to furnish

the names of the persons who were alleged to have represented to him that there was going to be active service.

Mr. Innes, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the applicants (defendants in the action).

Sir Henry Juta, Q.C., appeared for the respondent (plaintiff in the action).

Mr. Innes: The English practice in this case would be to administer interrogatories under the Judicature Act. Unless particulars are given the defendants will be greatly prejudiced, as they will have to call as witnesses all the officers under whom the plaintiff served.

Sir H. Juta: This is a novel application. It should have been made before pleading. We are quite ready to give the particulars as soon as we know them. The defendants are not entitled to ask that the paragraph be expunged.

Mr. Innes: The application to expunge is made because that is the only remedy which the Rules of Court provide. Rule 330 (g).

The Court postponed the application *sine die*, but indicated that the case might be mentioned again; with the understanding, however, that in the meantime if further particulars could be furnished that would be done; costs of the application to be costs in the cause.

[Applicants' Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorney, D. Tennant.]

IN THE MATTER OF THE PETITION OF GEORGE NEWTON. 1899. { Jan. 16th.

Mr. Jones moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

IN THE ESTATE OF THE LATE JAMES WRIGHT CLARK.

Mr. Jones moved for an order authorising the Registrar of Deeds to pass transfer to the executor dative of certain property in the estate. Petitioner was a son of the testator, and there were four heirs in the estate, two of whom had consented to the property being sold for £750. The other heir was not at present in the Colony, and the date of his return was uncertain, as to the best of petitioner's knowledge he was travelling in Egypt. The petitioner, however, as executor, held a power of attorney from that heir to obtain all amounts due to him under the inheritance.

In his report the Registrar stated that he saw no cause to oppose the application.

The order was granted.

IN THE MATTER OF THE MINOR HENRY WAY CAREY.

Mr. Gardiner moved for an order authorising the sale of certain landed property.

The Master's report was favourable, and recommended that the proceeds of the sale be paid into the Guardians' Fund for the benefit of the minor.

An order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE FRANCIS MURPHY.

Mr. Gardiner moved for an order for the cancellation of a certain lost mortgage bond for £120.

The Court granted an order calling upon all persons concerned to show cause, by the first day of next term, why the said bond should not be cancelled as prayed; the rule to be published once in a Port Elizabeth newspaper.

GREIG V. GREIG.

Mr. Gardiner moved for substituted service in this case. He had been instructed that personal service could not be effected, as the defendant could not be found, and was supposed to have left the country. He suggested publication in a Johannesburg newspaper.

There was no affidavit certifying as to the steps that had been taken to effect personal service, and the Court refused to make any order without further information.

JORREY V. FLOHR.

Mr. Jones moved for leave to sign judgment against the plaintiff for not proceeding with his action. The summons was issued on July 19 last.

Leave to sign judgment was granted.

IN THE ESTATE OF THE LATE CHARLES HOLLIDAY.

Mr. Buchanan moved for an order (1) to sub-divide certain property; (2) for the appointment of a *curator ad litem* to guard the interests of minors; and (3) to authorise certain payments. He also moved for an order authorising the executors to pay the cost of certain fencing.

The orders were granted in terms of a report by the Master.

**MORGAN V. HIDDINGH.**

Sir Henry Juta, Q.C., moved to declare a certain inheritance executable to satisfy a judgment amounting to £27 and costs obtained by the plaintiff against the defendant.

The defendant resided out of the jurisdiction of the Court, and a sum of £60 in connection with a certain inheritance had already been attached. It was now asked to attach such further portion of the said inheritance as might be necessary in order to satisfy the capital and costs.

There was no appearance for the defendant.

The application was granted.

**ANDERSON V. CLEWES.****Perpetual Interdict—Blasting.**

This was an application for an interdict restraining defendant from blasting on certain ground belonging to him at St. James's, Kalk Bay, and also from excavating within twenty yards of applicant's property.

The applicant, W. G. Anderson, was the owner of a house at St. James's, and the respondent, John Clewes, a contractor and builder at Wynberg, had for the past two years been quarrying stone in the vicinity. This was alleged to be a source of danger to applicant's household, for during blasting operations pieces of rock were thrown upon applicant's property, on one occasion a portion of the roof being smashed, and on another occasion a cast-iron railing being broken. In an answering affidavit the respondent admitted that it had unfortunately happened that on several occasions during blasting operations stones had been thrown from his quarry on to applicant's property, but he had had the damage repaired. He also admitted that owing to excavations a certain part of the soil on applicant's property had fallen in. He was prepared to agree that in future no stones should be taken from the ground within ten yards of the applicant's boundary, and also to have competent miners put in charge of the blasting operations.

The respondent was in court, and stated in answer to the Chief Justice that it was only about once a month that he required to blast.

Mr. Molteno appeared for the applicant.

Sir H. Juta, Q.C., for the respondent.

After argument,

De Villiers, C.J., said: Of course it is not the practice of the Court to grant a perpetual interdict on a motion, but at present some

order must be made for the protection of the applicant. The applicant has been very reasonable, and has given the respondent an opportunity of doing things in a proper manner, but the latter has not done so. The household has undoubtedly been exposed to danger by the reckless manner in which this blasting has taken place, and the Court will grant an order restraining the respondent from blasting on his property in such a manner as to cast stones on the applicant's property, and three hours' previous notice of blasting must be given. Further, the applicant to be restrained from quarrying within ten yards of the applicant's property. The respondent to pay the costs of this application.

**DIX V. DIX.**

Mr. Buchanan applied for leave to the petitioner to sue for divorce by edictal citation. The petitioner was Alice Minnie Dix, of Wynberg, who stated that she was married to the respondent, Ernest James Dix, in June, 1892. There were three children of the marriage, of whom only one, a girl, five years of age, was now alive. She alleged adultery on the part of the respondent on divers occasions. Respondent was at present employed by Messrs. Hooper & Richard, at Durban, Natal.

The Court granted leave to sue by edictal citation, personal service to be effected, citation to be returnable February 9. Leave was also given to serve intendit and notice of trial together with the citation.

**JOLLY V. TOE.**

This was an application by the defendant in the suit for an order authorising the Taxing Officer to tax the petitioner's costs of a certain motion and for an order upon the plaintiff to set down his action against the applicant for final hearing on some day in the next term.

The petition set out that the plaintiff had obtained provisional judgment against him upon an I O U for £10 on the 1st August, 1898, but that execution was stayed for one month to enable the plaintiff to bring an action for the recovery of £250, being the purchase price of an alleged sale of 500 shares. That on the 8th August he issued summons for the £250, describing himself as of Johannesburg. The petitioner then excepted to the proceedings unless security for costs was given. Ultimately the case was set down on the 9th November, Thereupon

the petitioner gave notice that he would apply to the Court on the 10th November, to stay proceedings until sufficient security should be given.

That petitioner's attorney in reply thereto was requested to withdraw the notice, as plaintiff's former attorney had retired from the case, and his new attorneys had not had sufficient time to investigate the matter.

That petitioner's attorney thereupon consented to give the plaintiff's attorneys time by withdrawing the motion on condition that the plaintiff paid the costs, in confirmation of which he received a letter (annexed) from the plaintiff's attorneys.

That petitioner's attorney upon applying for the costs in the matter was referred to this Honourable Court by the plaintiff's attorneys, as their client was out of the jurisdiction of this Honourable Court.

Mr. De Waal appeared for the petitioner. The application was granted.

IN THE MATTER OF THE ALLEGED LUNATIC  
H. JOHANNES GERHARDUS LOMBARD  
STEYN.

Mr. McGregor moved that a rule *nisi* be made absolute calling on the alleged lunatic to show cause why he should not be declared incapable of managing his affairs, and why the secretary for the time being of the Board of Executors at Cape Town should not be appointed curator of his property.

Mr. De Waal, the *curator ad litem*, said that he had made lengthy inquiries at Malmesbury, and had found that Mr. Steyn was imbecile and incapable of managing his affairs.

The Court made the rule absolute.

IN THE MATTER OF THE PETITION OF THE  
CONGREGATION OF THE DUTCH REFORMED  
CHURCH AT MARAISBURG.

Mr. Buchanan moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

IN THE ESTATE OF THEUNISSEN.

Mr. Buchanan moved for an amendment of an order of Court granted on the 12th December, 1898, so that the costs of the application as taxed might be included in the sum to be raised.

Granted.

IN THE MATTER OF THE PETITION OF  
ANNIE SOPHIA SMITH.

Derelict Lands Act, section 9—Oral evidence.

This was an application for a rule *nisi*, granted under the Derelict Lands Act, to be made absolute.

The application had been before the Court on the 1st November, 1898, and had then been ordered to stand over until the rule had been served upon the executor dative of one Martin, in whose name the property in question was registered. The petitioner claimed the land by reason of prescriptive occupation.

Mr. Close, for the petitioner: An executor dative has now been appointed, and he claims the land. We cannot now press our claim under the Act, but section 9 admits of the Court making an order for the speedy and inexpensive determination of the matter.

Mr. Joubert for the executor dative opposing the rule: I do not object to the Court making an order for oral evidence to be given and without pleadings being filed if the Court has such power.

The Court ordered that oral evidence in support of, and in opposition to, the rule being made absolute should be taken, and set the case down for February 14.

CREWE V. BOTHA.

{ 1899.  
{ Jan. 16th.

Election petition—Dismissal.

This was an application on notice to the petitioner calling upon him to show cause why his election petition should not be dismissed and why he should not be ordered to pay the costs of the petition. An affidavit by Mr. Van der Byl (Mr. Botha's attorney) was read, to which was attached a letter received from the petitioner's attorney stating that no evidence in support of the petition would be led at the trial, as the petitioner was satisfied that without the votes of the persons who had been excluded by the recent decision of the Supreme Court it would be no good going on with the case.

Mr. Searle, Q.C. (with whom was Mr. McGregor) appeared for the applicant (the respondent in the petition).

Mr. Innes Q.C., appeared for the respondent (the petitioner in the petition).

Mr. Innes consented to the application being heard now instead of on the day fixed for the trial. He did not consent to the order being granted.

Mr. Searle said that the counter-petition was filed merely in order to show that the petitioner would not be entitled to the seat in any case. He submitted that the respondent was entitled to the costs of filing that petition and the costs of the present application.

The Court dismissed the petition with costs, and declared the respondent duly elected.

[Applicant's Attorney, V. A. Van der Byl; Respondent's Attorney, Messrs. Van Zyl & Bussinné.]

#### DE VILLIERS AND GOUWS V. VANES AND LEE

This was an application for the postponement of the hearing of the election petition filed by the applicants.

An affidavit by Mr. Van der Byl, the petitioners' attorney, alleged that the petitioner De Villiers had notified him on January 12 to withdraw from the case, but to this the other petitioner (Gouws) refused to assent.

Mr. Searle, Q.C. (with whom was Mr. McGregor), appeared for the petitioners.

Mr. Innes, Q.C. (with whom was Mr. Graham), appeared for the respondents.

The Court discharged the order fixing January 19 as the day of trial, and intimated that it would notify to the Registrar when it fixed a day. The applicants were ordered to pay any costs which the respondents had been put to in the way of subpoenaing witnesses.

## SUPREME COURT

[Before the Right Hon. Sir HENRY DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Sir JACOB BARRY, Judge-President of the Eastern Districts Court, the Hon. Mr. Justice LAURENCE, Judge-President of the High Court of Griqualand West, the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

DE VILLIERS AND GOUWS V. VANES AND LEE. 1899.  
Jan 24th.  
Feb. 9th.

This was an application for leave to withdraw the petition against the return of the respondents, and an order as to the costs,

Mr. Searle, Q.C., appeared for the petitioners.

Mr. Innes, Q.C. and Mr. Graham, Q.C., for the respondents.

Mr. Searle said he believed that some arrangement had been come to between the petitioners and respondents with regard to the payment of costs. As to the exact nature of this arrangement he had not been informed.

Mr. Innes said that he was in much the same position as his learned friend. He understood that the costs had been paid to, at any rate, one of the petitioners.

Mr. Searle said that the petitioners' Cape Town attorney had been no party to any such arrangement. Whatever had been done had been done by the parties on their own responsibility.

Barry, J.P.: If neither party asks for costs why should either get them?

Mr. Innes said that he did ask for costs. This arrangement had been made locally at Uitenhage.

The Court granted a rule *nisi*, but ordered that on the return day full information should be given to the Court as to the reasons for such an arrangement, the rule to be published once in a Port Elizabeth paper and once in a Uitenhage paper; returnable 9th February.

*Postea* (February 9th).

Mr. Searle moved that the rule be made absolute.

Mr. Innes, Q.C. (with whom was Mr. Graham, Q.C.), for the respondents.

Mr. Searle, in accordance with the order of Court on the granting of the rule *nisi*, read the affidavit of De Villiers the petitioner explaining the statement that certain money had been paid by the respondents. The affidavit set out that as a redistribution measure had been passed the applicant considered that it was not worth while to proceed with the case, which would entail heavy expense. Towards the costs of the applicants £300 had been paid by the respondents. De Villiers was in court, and would give evidence if necessary.

Mr. Innes said that the respondents had confirmed the action of their agents, who had made the arrangement referred to by the applicant De Villiers.

De Villiers, C.J.: Were there any personal charges against the respondents?

Mr. Innes: A packet of sweets and 2s. 6d. are alleged to have been given by one of the respondents. That is all,

Mr. Searle asked that no order be made as to costs. He explained that the £300 paid as to costs would not cover the costs of the applicants.

The Court granted the application.

De Villiers, C.J., said: The rule has been published, and no one has offered to take up this petition, and the Court is therefore now justified in authorising the withdrawal of the petition. The explanation given as to why this money was paid to the petitioner seems to be fairly satisfactory. The costs seem to have been heavy. It appears from the statements of counsel and from the affidavits read that the money has not been paid to the petitioner in consideration of his withdrawal of the petition, and that is the real point that we wished to be satisfied about, but it appears that the money was *bona fide* costs incurred on behalf of the petitioner, and that these are the only costs which have been paid to the petitioner. Under these circumstances the Court will allow the petition to be withdrawn.

[Petitioner's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl & Buismanné.]

KYLE V. KRIGE. { 1899.  
Jan. 24th.  
" 25th.  
" 27th.  
" 30th.

Election petition—Bribery and corrupt practices—Agents—Act 21 of 1859, sections 1 and 4—Undue influence—Treating.

*A candidate is not liable for an illegality of his agent unless the illegality was committed by the latter in the course of his agency, and for the supposed benefit of his principal.*

*Where the agent has been guilty of bribery for the purpose of promoting the election of another candidate in opposition to the interests of the principal, the principal is not responsible.*

This was an election petition filed by Harrington Kyle, Arthur Latimer David Logie, and George Tubbs, of Somerset West, and Charles Frederick Jones, of Stellenbosch, against the return of the respondent Gideon Johannes Krige as a member of the House of

Assembly for the Electoral Division of Somerset West. The petition alleged that at an election recently held for the election of two members, the three candidates respectively received the following number of votes:

Sir James Sivewright	...	...	800
Gideon Johannes Krige	...	...	644
Pieter de Waal	...	...	622

and that the two first-named, of whom the respondent was one, were declared duly elected.

It alleged that the respondent was by himself, and by his agents, and other persons acting on his behalf, guilty of bribery, treating, undue influence and personation. It said that the respondent and his agents were guilty of such general bribery, general treating, and general intimidation both before, during, and after the election as would by law render the election null and void. The petitioner prayed accordingly that the election of the respondent might be declared null and void. Schedules of particulars set forth the names of persons who were alleged to have been bribed, the names of the alleged bribers, and the nature of the bribes, which varied from £5 to "six pence," "drinks," "a shilling," and "fish, value 2s." There were several cases of, alleged treating, and the name of the treater was given in most cases as Pieter de Waal, jun. The schedules also set out particulars of intimidation.

Mr. Innes, Q.C., and Mr. Graham, Q.C., appeared for the petitioners.

Mr. Searle, Q.C., and Mr. McGregor for the respondent.

Mr. Innes said he would not proceed with several of the charges set out in the particulars.

The facts proved appear sufficiently from the judgments.

Mr. Innes, upon the question as to whether P. de Waal was the respondent's agent: There is no satisfactory or complete definition as to what constitutes agency in election matters, but it is clear that it is inferred more easily than in ordinary affairs. If a candidate puts a man in the position of doing for him what he cannot do himself he is responsible for the acts of that man.

[De Villiers, C.J.: Your argument might be shortened if we assume for the present that De Waal was the respondent's agent. If in any particular case it is shown that he did not act in the respondent's interests then the important question will arise whether the respondent is bound by his act. Such

questions rest upon this principle, that what an agent does is for the benefit of his principal. If therefore he acts in any particular case against the interest of his principal then the latter is not bound by that act.]

I submit that the cases do not go as far as that. Bribery does not include only bribe to vote for oneself. Act 21 of 1859, section 1, provides that every person shall be deemed guilty of bribery who shall. . . . give, lend, . . . in order to induce any voter to vote, or refrain from voting. . . .

[De Villiers, C.J., referred to a *dictum* of Wills, J., with respect to the liability of the candidate for the act of his agent done for the supposed benefit of his principal.]

In this case the respondent and De Waal were standing together, and an agent was appointed for them both. The authority was never revoked and therefore the respondent is responsible. The effect of De Waal's agent getting Sivewright's supporters to give their second votes to De Waal weakens Sivewright though it may also weaken Krige. If my contention is not correct two candidates standing together may get their agents respectively to bribe for the other candidate, and thus safeguard themselves. Principals are liable until the agency is repudiated. As to a coalition among candidates see judgment of Blackburn J., in the *North Norfolk case* (1 O'M. and H., p. 240). There is only one case which points in the direction which your lordship indicates, the *Norwich case* (2 O'M. and H. p. 39), and what is said there about traitorous agents is merely a *dictum* by Keating J. The utmost extent to which that *dictum* can be pressed is that if an agent goes to a voter and says "I do not want you to vote for one of the candidates I represent" that terminates the joint agency. There is no evidence that anything of that nature happened in this case; the evidence cannot be pressed further than to show that P. de Waal favoured the candidate De Waal more than the respondent.

[Laurence, J.: It may be that an agent may think the opposing candidate is so strong that it is better to get votes for one of those whom he represents than for another.]

There is nothing here to show that P. de Waal considered that Sivewright was safe.

[Solomon, J.: If Sivewright was considered safe it is improbable that Krige and De Waal would have run together.]

P. de Waal received a letter asking him to work for Krige and De Waal, and he did not

reply that he would not work for Krige. There is nothing in the evidence to show that he actually threw Krige over altogether. Several witnesses depose that he canvassed votes and told them he was canvassing for Krige. Krige in his own evidence says distinctly that he did not repudiate or terminate the agency.

With regard to joint agencies, Lord Coleridge, C.J., in *Malcolm v. Ingram*, the *Boston Case* (31 L.T., p. 845, 8 L.R.C.P., p. 168) said that from the time of the coalition between two candidates, each was responsible for the acts of the agents of the other, however innocent the candidate might be. The law looks to the purity of the election.

(The remainder of the argument was upon the evidence adduced regarding the various charges.)

De Villiers, C.J., said that the Court would hear Mr. Searle on three points only, viz.: the treating of Malays at Somerset West Strand, the bribery of Wentzel by P. de Waal, and the bribery of Olivier by Jan Haupt.

Mr. Searle, upon the question of P. de Waal's agency: It cannot be denied that P. De Waal was present at the first committee meeting, and that there he was appointed to canvass at the Strand, but he says, and he is corroborated by other evidence, that he raised an objection at the time against having to canvass for Krige. The agency has not been established as clearly as it ought to be because Krige did not know what De Waal was doing in the matter. The evidence of what was done at the Strand shows that in everything he did there, P. de Waal acted directly against the interests of the respondent, and solely in the interests of the candidate De Waal.

[Laurence, J.P.: Supposing that the policy of De Waal and Krige had been through their agents to prevent the supporters of Sivewright from plumping, would not that help Krige?]

If that had been clear it might have done so. There is the evidence of three persons to the effect that P. de Waal notified his position at the time that he was appointed to canvass. In any case there was a loose organisation. These people were volunteers; there were practically no paid agents employed, one man working voluntarily in one place, and another in the other, and not communicating with the principals at all; that makes it more difficult and harder that the candidate himself should be responsible for all their



acts. The judgments in English election cases show how strongly the onus of proof is considered to be upon the petitioner in cases of this kind where the expenditure upon the election has been so small. (The rest of the argument was upon the facts.) Counsel cited the following authorities: *Hedderwick's Election Manual* (p. 137); *The Barrow-in-Furness case* (4 O'M. and H., p. 82); *The Wakefield case* (2 O'M. and H., p. 101); *The Bridgewater case* (1 O'M. and H., p. 112); *The Wullington case* (1 O'M. and H., p. 59); *The Bewdley case* (1 O'M. and H., p. 19); and *The Tunton case* (2 O'M. and H., p. 75).

*Postea* (January 30th).

Judgment was delivered.

De Villiers, C.J.: Although the petition in this case contains a great number of charges the case itself lies in a very small compass. There are twelve charges of bribery, sixteen of treating, five of undue influence, and one of inducing personation. Of the twelve charges of bribery, six have been practically abandoned, and there remain six to be dealt with. The first of these is the charge that on the 12th of August, 1898, one Pieter de Waal, an alleged agent of the respondent, had offered a bribe of five shillings to Moetasa Abdol Latif. The only evidence in support of this charge is that of Latif himself, who said that De Waal had not spoken a word to him before the election. He added that De Waal spoke to him after the election, but not about the election. This charge, therefore, falls to the ground. The next charge is that at the end of July or early in August, 1898, De Waal had paid the sum of two shillings to one Akielien Wentzel as a bribe. To prove the agency of De Waal evidence was given that early in July, 1898, a meeting of supporters of Krige and De Waal was held at Stellenbosch, at which De Waal was present. That meeting, according to the minutes—which were very properly produced by the secretary, Mr. Marshall—there and then resolved itself into a committee to support the candidature of the two candidates De Waal and Krige. Only three meetings appear to have been held, and the minutes do not show that De Waal attended any meeting except the first. The petitioners' witness, Joubert, expresses his belief that De Waal did attend more meetings, but De Waal himself says that he did not. He added that at the one which he did attend he told the meeting that it was much easier for him to support Sir James

Sivewright than Krige, and that he thought it was impossible to support De Waal and Krige. Joubert does not remember the remark being made, but Cornelius Roux, who was also present at the meeting, states that P. de Waal said that it was easier to work for De Waal and Sivewright, and that he was going to work for De Waal and Sivewright. Taking the evidence afforded by the minutes together with the rest of the evidence, I am satisfied that to the extent to which P. de Waal attempted to influence any voters in favour of Krige he must be held to have been the agent of Krige, as well as of De Waal. The question may, however, arise whether P. de Waal must be held to have been the agent of Krige in respect of acts, if proved to have been committed, for the benefit of the candidate De Waal only, and in opposition to the interests of the respondent, and I shall proceed at once to consider this question. The reason why a candidate is held liable for the acts of his agent is because the acts are committed for the supposed benefit of the candidate. The principle was well stated and illustrated in the *Blackburn Case*, where the learned judge remarked as follows: "No person can win and wear a prize upon whose behalf the contest has not been fairly carried on; whether it be the owner of a horse, in respect of the unfair play of his jockey, or whether it be the candidate in a parliamentary contest, in respect of his agent; whether it be the principal who has been guilty of the illegality, or whether the illegality has been committed by his agent only, even though without his authority or against his will, provided it be done in the course of his agency and for the supposed benefit of his principal, such principal must bear the brunt, and cannot hold the benefit in respect of which the agent has compromised him." The proviso introduced by the learned judge, that the illegality must have been committed in the course of the agency, and for the supposed benefit of the principal, is a most important one. Where the illegality has been committed for the purpose of promoting the candidature of another person in opposition to the interests of the principal, it would, in my opinion, be impossible to hold the principal responsible or to punish him for such illegality on the part of the agent. The Parliamentary Elections Act, 1883, fully recognises this principle, for the 36th section

provides for the unseating of members in those cases only where corrupt practices have been committed for the purpose of procuring their election. The statement made by De Waal as to the bribe of two shillings, alleged to have been given by him to Wentzel, is as follows: They met about three weeks before the election, when De Waal asked Wentzel whom he was going to vote for. Wentzel said: "One vote I shall give to Sir James Sivewright, and the other I am not certain about." Then De Waal said: "You may give that other vote to one of my friends, Mr. De Waal." During the conversation, Wentzel asked for money, which was not then given. The conversation ended with De Waal saying that he would see Wentzel later about voting. Some days afterwards a meeting was held by De Waal's uncle and Krige at the Strand, and on the same day De Waal again met Wentzel, who walked with him some distance and bothered him for 5s., and then to get rid of Wentzel De Waal gave him 2s. for liquor. De Waal admits that during this conversation he said to Wentzel, "Are you going to give a vote to De Waal?" and that the answer was, "Yes." Wentzel gives a different version of the two conversations. According to him De Waal said at the first conversation: "I know you are going to vote for Sir James Sivewright, but you know you have two votes, and do not throw one away; there are two other candidates, that is De Waal and Krige." Wentzel said, "Yes, that is all right." Then he and McColla asked for some money, and De Waal said, "I have no money now, but will see you again whenever I am passing." Wentzel further says that at the meeting on the subsequent day he put a number of questions to the candidates, and that after the meeting was over De Waal said to him: "You are very clever in asking questions; you should work for the two old members," and then gave him a two shilling piece to work for him and do his best for the old members. Questioned why he asked for the money, he said he thought he might get a drink out of it. He contradicted himself in some important points. At one time he said that when he went to the meeting he had not decided to vote for any one of the candidates, but when pressed he admitted that he intended to give one vote certain to Sir James Sivewright, but did not know what to do with the other. As to the money, he said it had nothing at all to do with the election. I agree with my learned brethren, who think

that, after this answer, and considering the smallness of the amount, and all the other circumstances, the giving of the money was not intended as a bribe at all. Assuming, however, that it was so intended, there is much force in the contention that the bribe could only have been; to induce Wentzel to vote for the candidate De Waal in opposition to the respondent. Wentzel admits that De Waal took it for granted that one of his votes would be given for Sivewright. De Waal clearly desired that the other vote should be given to his uncle, and not to the respondent. He had given previous notice that he would only work for his uncle, but even if he was guilty of treachery in now supporting De Waal in opposition to Krige, it would be difficult to hold that he committed the illegality for the purpose, in the words of the Act, of "procuring the election of" the respondent. It was suggested that there might have been a plan by which some of the supporters of Sivewright should be asked to give one vote to the respondent in one place and to De Waal in another, but there is no proof whatever of such a plan, and if there was, De Waal was not a party to it. He clearly believed that Sivewright would be elected, and on the occasions on which bribery or treating is alleged to have been committed, he worked for his uncle only, and in opposition to the respondent. The next charge is that De Waal gave a bribe of 2s. to one Philip Barends. De Waal admits having given this sum to Barends, who is a tottering old man, but he swears that he did not say anything to him about voting, and that the money was given because he was very poorly, and had said that he had not money to buy food. Old Barends himself stated that nothing was said about the election, and that when the money was given De Waal said, "You have been working for my father, and you have been a faithful servant at work." In the absence of proof that there was any extensive distribution of alms on behalf of the respondent before the election, it is impossible to hold that it is act of charity amounts to bribery. The next charge is that the respondent, or one Wouter Ackerman, had given a bribe of 2s. to one Willem Cederaas. The charge against the respondent personally was abandoned at an early stage of the case, and the evidence was confined to bribery by Ackerman. He was the manager of the respondent's farm, and seems to have interested himself intermittently in the respondent's election. He attended the

first meeting of Krige and De Waal's supporters, and according to Joubert's evidence, had to work the neighbourhood of Mr. Rhodes's farms. The evidence of his agency is not strong, but for the purpose of this case it may be assumed that he was one of the respondent's agents. Without going into the details of the evidence, it is only necessary to say that I am not satisfied that the sum of 2s. was given to Cedemas at all. Ackermann admits that Cedemas asked him for 2s. the evening before the election as an advance, as he would lose a day's wages, and he agrees with Cedemas that no money was given that day. Cedemas, however, says that on the following day he got the 2s., whereas Ackermann says that Cedemas did not come to the farm at all on the day of the election. In this he is supported by the witness Frederick Gerhard, who appeared to me to be a perfectly trustworthy witness. Considering Ackermann's admissions as to a letter written by his wife to Mr. Faure directly asking for a bribe, his evidence would not possess very great value, but corroborated as it is by the evidence of Frederick Gerhard, and by that of the respondent himself, it is impossible for the Court to dismiss it altogether. The demeanour of Cedemas in giving his evidence and his admissions to Frederick Gerhard and to Joubert satisfy me that his evidence is not to be relied upon. The last charge of bribery is that on the 10th of July last John Haupt, an agent of the respondent, paid the sum of 5s. as a bribe to one Jacobus Olivier of the many unsatisfactory witnesses who gave evidence in this case, this man Olivier is about the worst. His statement is that before nomination day Haupt asked him to sign a paper for Krige and De Waal, but that he did not sign it. So far he is supported by Hendriks, who was also present and was asked to sign, but did not. Hendriks then seems to have left, and a further conversation took place between Haupt and Olivier. According to Olivier, he said in reference to this requisition, "How about this; if I go to vote, I shall lose a day?" Haupt answered, "All right, I shall give you 5s.; I can pay it," and he (Olivier) then said, "All right, that will do." Olivier further said that on a subsequent day he met Haupt, and asked him for 5s. Q.—What did he say? A.—He asked me what I wanted with the 5s., and I said I wanted it to pay my club. Q.—What did he do? A.—He felt in his pocket, and said he had not got the 5s., but he said he

would fetch it. Q.—After supper did you go out? A.—Yes, I went out and met Haupt, and the 5s. was put into my hands, and he said, "Keep straight," and I said, "All right." In cross-examination Olivier was asked, "What did you do with the money?" A.—I went and drank it out. Q.—It was not true about the club at all; you did not want it for the club? A.—No, that was not so; it had nothing to do with the club. Q.—You said it to get 5s. out of him. A.—Yes, I said it to get 5s. out of him. Haupt, in his evidence, admits that on the 20th of July Olivier asked him for the loan of money in order to pay his club subscription for which he was being pressed, and that he (Haupt), after obtaining the money from Mr. Jacob Krige, whose overseer he was, gave it to Olivier as a loan for fifteen days. He denies, however, having said anything on that occasion about keeping straight. Mr. Jacob Krige was called to prove that he gave 5s. to Haupt, and the avowed purpose for which it was given, but Mr. Innes having objected to any evidence of what was said by Krige to Haupt as to that purpose, the answers given by Krige go no further than to prove that on the 20th July he gave 5s. to Haupt for a loan. His evidence, so far as given, still leaves undetermined for what purpose the loan was intended. After the expiration of the fifteen days two attempts at least were made by Haupt to get the money back from Olivier. The suggestion has been made that Haupt did not ask for a return of the money until after he knew that an affidavit alleging bribery had been made by Olivier, but Olivier, after some fencing, admitted that one application had been so made before he swore to the affidavit. The connection of Blake, whose bribery was proved in a previous case, with the making of this affidavit does not tend to add much weight to its contents. Olivier admits that on first being asked for a return of the money he only said that he could not get it. After he had seen Blake he was again asked for the money, and then only he said that he did not owe the money at all, and that it was given for his vote. An action was afterwards brought by Haupt in the Magistrate's Court to recover the 5s., and that action is still pending. In the course of his cross-examination Haupt gave evidence which is somewhat inconsistent with his evidence in the present case, and he explains this inconsistency by the length and severity of the cross-examination he had to undergo in the

Magistrate's Court. Upon the main issues of bribery his evidence is quite consistent. There are, however, two circumstances which tend to throw grave suspicion on his conduct. He admits that on a certain day, after the date of the loan, he met Olivier and some other coloured voters speaking to his (Haupt's) brother in Dorpstreet, and that he then said to his brother: "There is nothing to be got from them. They are all Sivewright's people. Leave them alone. If they want to vote for Krige and De Waal they can keep straight." His brother substantially corroborates this evidence. The words were, "Zulle kan regt hou," a colloquialism which does not necessarily import a sinister object. If it be true that the observation was addressed generally to the men, the suspicion would not be quite so grave that the advice was given in connection with the previous loan to Olivier. Another suspicious circumstance is that on one of the occasions on which Haupt asked for a return of the money he told Olivier that he would help him again. Asked whether he advised Olivier to get the money from his master, he answered: "He told me he would try and get it from his master." Q.—And did you tell him then that you would let him have it back again? A.—Yes; this is always my habit with my boys. Q.—That is to encourage them to come again? A.—To come and work for us. Q.—But he was not working for you? A.—He is a mason; he had worked before. Q.—But he was not in your service at all? A.—Not at this particular time. Q.—Did you suggest that he should get the money from his master? A.—Yes; and I also told him that if he gave me the money, and if in future he required money, I would help him.—The explanation is not quite satisfactory, but his eagerness to get the money is intelligible in view of the fact that, even if the giving of the money had been quite legitimate, the circumstances under which it was done might raise a suspicion of bribery. Everything depends in this case upon the question whether Olivier's evidence is correct as to what took place at the interview about the requisition before the nomination day. Olivier says that in answer to his remark, "If I go to vote I shall lose a day," Haupt said, "All right, I shall give you 5s. I can pay it." It is not quite clear how Olivier's going to vote could have been discussed upon a request that he should sign a requisition, a

request which he refused to comply with. When they met again Olivier admits that he simply asked for five shillings, and not for the five shillings. He admits also that Haupt said, "What do you want with the five shillings?" and that the answer was that he wanted to pay his club subscription. Olivier further admits that he wanted the money for drink, and that he told a lie to get the money out of Haupt. I confess that I experienced the greatest difficulty in reconciling this evidence with the statement that five shillings had been previously promised. Why should he tell a lie to get the money if the money had already been promised? On the other hand, if Olivier then for the first time asked Haupt for the loan of the money, it would be the most natural thing for Haupt to say "What do you want it for?" and for an untruthful person who was eager for a drink to answer, "I want it for a club subscription." An application thus made for so beneficial a purpose as the payment of a poor man's club subscription would appeal to most men's generous instincts, and the fact that such an appeal was considered necessary goes far, not only to show that no money had been previously promised, but that when it was lent it was not given with a corrupt motive. No doubt Olivier says that whenever he afterwards met Haupt the latter said "Keep straight," and that his answer always was "All right"; but one cannot help feeling that a man who could tell a deliberate lie to obtain a drink would not scruple to tell a lie to obtain a conviction. Haupt's evidence is in some ways unsatisfactory, but that of Olivier is still more so. Under these circumstances, I entertain the most serious misgivings as to whether the Court would be justified in finding Haupt's guilt conclusively proved. Following the course which I adopted in regard to the personal charge against Sir James Sivewright, I would, if sitting alone, have given the respondent the benefit of what appears to me a most reasonable doubt. The same evidence will, however, often strike different minds in different ways. One of my learned brethren is satisfied that the charge of bribery has been disproved, whilst the three others do not share in the very serious doubts which I entertain. I loyally accept their verdict with the result that the charge of bribery by Haupt must be held to be proved. In regard to Haupt's agency very little need be said. He candidly admits that he was present at the committee meeting when he was appointed

cavasser, and that the respondent was also present. He admits also that he took the requisition round and worked for the respondent and De Waal on polling day. The respondent does not deny that Haupt worked for him with his knowledge, and the agency must, therefore, be held to have been proved. I come next to the charges of treating, of which there are sixteen in number. The occasions, however, on which the treating is said to have taken place, are only two in number—namely, once in the Commercial Hotel, Somerset West Strand, and once in the Masonic Hotel in Stellenbosch. There can be no doubt that Pieter de Waal, whose agency has already been discussed, did two or three weeks before the election order a dozen and a half of beer for some Malays at the Commercial Hotel. The sum paid by him was only six shillings, but if the beer was given with the corrupt motive of influencing the voters in favour of the respondent, the smallness of the amount cannot save him from the consequences of De Waal's indiscretion. De Waal's statement is as follows: "I was looking for the barber and somebody said, 'He is at the hotel.' The barber is one of the Malays. I went in, and there I saw the barber standing and watching a billiard game, and then I met a whole lot of Malays, about nine or ten or more. Then I said to them, 'I say, all you here. You know there is an election coming on, and whom are you going to vote for?' Before they gave an answer I said, 'I know that you are going to vote for Sivewright, but there are two other candidates, De Waal and Krige.' Then I said, 'I shall be very glad if you give the other vote to Mr. De Waal.' I either said 'De Waal' or 'Oom Piet.' I am not quite sure which. One of them, a very respectable old man said, 'Mr. De Waal, we feel inclined for a glass of beer.' I said, 'I cannot give you any beer on a day like this.' Then they said, 'You don't give it us on account of the election.' I said, 'All right,' and then another Malay said, 'It has nothing to do with the election.' Then I ordered a dozen and a half of beer." His evidence is somewhat in conflict with that of four of the witnesses for the petitioners, who state that De Waal told the Malays that it would be foolish to throw away their second vote, and that they should give one vote to De Waal's uncle or to Krige. On the other hand five of the petitioners' witnesses substantially corroborate De Waal's evidence. They agree in saying

that De Waal's words were: "I know you are going to vote for Sir James Sivewright, but you have two votes. Don't throw one away; give one to Oom Pieter," that is, to the candidate De Waal. Upon this evidence, given on behalf of the petitioners, and supported as it is by the evidence of De Waal himself, it is impossible to hold that he was acting in the supposed interest of the respondent. It is by no means clear that the beer was given with a corrupt motive, but even if it was, the respondent cannot be legally affected by it. The remaining charges of treating refer to an incident which occurred in the Masonic Hotel at Stellenbosch, when Pieter Louw entertained his friends to some drink. It appears that he is of a somewhat jovial disposition, and inclined to the form of hospitality which consists in giving free drinks to one's friends and receiving free drinks in return. On the occasion in question the candidates Krige and De Waal and several of their supporters as well as opponents were at the bar drinking, and Joubert, who was at that time one of the respondent's supporters, said that the Bond people and Progressives must stand separate now. This was considered such a good hotel bar joke that Louw repeated it. Those present fell in with the joke, but in fact the drinks were given to all. The fact is that they were social equals, who were indulging in a little pleasantry, and it would be impossible to hold that the drinks were given with any corrupt motive. Indeed, Mr. Innes did not lay much stress on the charge, which may therefore be dismissed from further consideration. The charge of inducing personation was withdrawn, and there only remain for consideration the charges of undue influence. These are five in number, but four were withdrawn, and the one remaining is that on the 9th of August, 1898, Cornelius Roux had been guilty of undue influence by intimidating one Abraham Isaacs, and ejecting him from certain premises. The evidence as to Cornelius Roux's agency is very slender, but for the purpose of this case it may be assumed that he was one of the respondent's agents. Isaacs had occupied a plot of land on Roux's place for many years at a rental of £8 a year, during the time Roux's father was the owner, and a few years afterwards. It appears that when the sons William and Cornelius came to manage the farm a dispute arose between them and Isaacs, which led to notice to quit, but through the intercession of the father the

notice was withdrawn. Isaacs paid his rent by working for the owners for one day in every week. Shortly before the election a dispute arose between Cornelius and Isaacs about vine sticks which the labourers were collecting, and insensibly this dispute glided into a political discussion. According to Isaacs' evidence Roux said: "You have always promised to go for the old master. You must do the same with us," to which he answered, "I will not do as you mean." Asked what he took Roux to mean he said: "To vote for the old members. I said: 'It is not my old master, but you.' He said: 'It is a pity that I am not master altogether.' Then I said: 'What you say may do you an injury. There are two men present, and you may be brought before the Court.' He asked me what my meaning was, and I said that I meant that I would vote for Sir James and Mr. De Waal. Master said, 'There is no occasion for you to vote for De Waal; we can scratch your name out of the book.' " Further on he says that Roux also said, "We cannot live together; we must part." On the following day Willie Roux told Isaacs that he had been insulting his (Willie's) brother, and told him to look for a place. Some question arose as to compensation, and it appears that Willie offered to allow Isaacs to remain until his crops had been reaped, but after a visit to Stellenbosch, Isaacs seems to have preferred to receive compensation for his improvements, which was duly paid to him, and he left. He admits that the conversation with Cornelius Roux was a somewhat exciting one, and that in the course of it he upbraided his master for not even having helped him to pay the dog tax. Upon the evidence given on behalf of the petitioners, it is not clear that Cornelius Roux dismissed Isaacs at all, or that if he did, the dismissal had anything to do with the election. According to Cornelius Roux, the conversation had become very angry before they came to touch on politics, and nothing was said on that occasion about the election. He reported to his brother Willie what had taken place, and added that if Isaacs remained there it would come to blows. The evidence is wholly insufficient to support the charge of undue influence. The personal charges against the respondent were very properly withdrawn before the trial. The Court is unanimously of opinion that he conducted his election in a praiseworthy manner, and that the modesty of his expenditure, not

exceeding twenty-four pounds, is an example worth of imitation. Unfortunately for him, Haupt, one of his agents, has been found by a majority of the Court to have been guilty of a corrupt practice, and the respondent must bear the consequences. The Court will declare that he has not been duly elected, and that no other person is entitled to be declared duly elected in his place. The respondent must pay the costs except the expenses of the witnesses in connection with the charges not held to have been proved, which must be paid by the petitioners.

Barry, J.P., said that of the charges originally made the only ones that were attempted to be supported by Mr. Innes in his very able argument were four of bribery, viz., the bribery of Wentzel, old Barends, and Cederas, each with 2s., and Olivier with 5s.; the treating of seven Malays by an expenditure of 6s. worth of Cape beer distributed amongst them with other Malays, non-voters, after a public meeting, and the treating of one Henry Biesel with a drink, together with the charge of intimidating Abraham Isaacs, but the Court did not think it necessary to hear counsel for the respondents on the two charges of bribing Barends and Cederas. After briefly referring to the evidence with regard to the two last-named charges, his lordship dealt with the question of the agency of De Waal, pointing out that he did nothing to defeat Sir James, but everything to lessen Krige's chances of getting in at all, but after what he had said at the first meeting, his lordship could not regard Pieter de Waal's conduct as in any way affecting his credibility, which came into question in dealing with the charge of bribing Wentzel. Holding that view, it was not necessary to deal with the question whether the distribution of the 6s. worth of beer was a corrupt treating or only a good-natured concession made to the men's solicitations without any special object. That disposed of all the charges of treating by De Waal. With regard to Wentzel, his lordship could not disbelieve De Waal in what he had said in opposition to either Wentzel or O'Connor, and he believed him when he said that he asked him for a vote only for De Waal. He entertained no doubt as to the history of this gift and De Waal's statement, and therefore would, even if De Waal had been acting in that matter for Krige and De Waal, have dismissed the charge

is not proved. With regard to the charge of the bribery of Olivier by Haupt, his lordship after reviewing the evidence said that when application for the return of the five shillings was first made Olivier did not deny that he owed it, or allege that it was given him as a bribe. The intervention of Blake, the conspicuous untruthfulness of Olivier, all combined, went very far towards creating a most serious doubt upon this criminal charge, a charge upon which he ventured to think Haupt—who ought, if guilty, to be charged with bribery criminally—would not be convicted before any jury in any court anywhere. Entertaining that doubt—a doubt far less serious than the one which he entertained in the last Stellenbosch charge, imputing personal bribery to the respondent—he felt that he would be departing from the principle upon which he then acted if he were to refuse to give Haupt the benefit of the doubt he now entertained. He therefore concurred with the judgment of the Chief Justice.

Laurence, J.P., said: On most of the points in this case I concur with the conclusions expressed by the Chief Justice, and also I think in all material respects in the reasons which he has indicated for those conclusions. I propose, therefore, to confine my observations almost exclusively to those issues on which I have what I feel to be the misfortune of being compelled to take a different view. The only charges on which I think it necessary to say anything are those contained in Table I. (bribery), Nos. 5, 6, 11, 12, the first charge in Table II. (treating), and the first charge—the only one submitted to the Court—in Table III. (undue influence). As to the latter, the conviction of Abraham Isaacs from the cottage and plot of ground which he had occupied for nearly thirty years, I think it most regrettable that this incident should have occurred at the time of an election at which he was on one side and his master and landlord on the other. I do not, however, think it necessary to discuss the question as to whether either Cornelius Roux, with whom he had the dispute, or his brother William Roux, who gave him notice to quit, has been proved to have been an agent of the respondent, because on the evidence as a whole I am not satisfied that the former was guilty, as alleged, of undue influence or intimidation. I think it quite possible that Isaacs—whose head seems to have been occupied at the time with political topics—may have misconstrued an observation of Roux's as to

the necessity of docility or subordination as referring to politics, when it really referred to matters of husbandry, and then have launched into an excited tirade or diatribe which prevented any explanation. It seems probable that he was a somewhat impracticable character, and that the elder Roux, who did not find the arrangement with him an advantageous one, preferred his room to his company, and took the opportunity of his reported impertinence to his brother to get rid of him, paying fair compensation for disturbance, on grounds of a non-political character. I think the case was quite a proper one for investigation, but I am not satisfied that it has been established. As to the question of treating, I don't think I need say anything about Mr. Piet Louw, or the ideas of wit and humour and the standard of sportsmanlike conduct which, according to his evidence and that of other witnesses—such as Joubert and the last two witnesses, Mr. Carl Haupt and Mr. Naude, and that ingenuous letter-writer, Mr. Wouter Ackermann—appear to pass muster at Stellenbosch. Before dealing with the other charge of treating, I may say one word as to the episode of Cederas and Wouter Ackermann. The latter might perhaps be held, as a matter of election law, to have acted as the respondent's agent, and if so, he is certainly not a very creditable specimen. But even assuming that he spoke to Cederas about his vote and gave him that little object-lesson with the stick—an incident to the invention of which I should doubt whether the brain or imagination of Cederas would be equal—the evidence of Gerhard, as has been pointed out by the Chief Justice, increases the doubt as to the actual payment on the voting day of the sum of 2s. as alleged by Cederas; and even if Cederas did receive the sum, he does not allege that it was either asked for or given with any specific reference to his vote, and it might well have been regarded as an advance, such as he seems to have obtained on other occasions, in order that when he went to the village to vote he might not lack means for recruiting his exhausted system after exercising his privilege as a free and independent elector. I now proceed to the much more important topic of the sayings and doings of Mr. Pieter de Waal, the nephew of the unsuccessful candidate, who was the respondent's colleague in the contest. Although there is evidence that he raised some preliminary difficulty or objection, it seems perfectly clear that De Waal

did receive and accept a mandate to act as canvasser and obtain votes for the two candidates who were standing together. At this time, when political feeling was running high, and when, as shown by the result of the poll, the voting for these two candidates seems to have been on the whole very solid and consistent, I can scarcely believe that at a meeting of their principal supporters Mr. De Waal, jun., seriously intimated an intention of acting, not for Krige and De Waal, but for De Waal and Sivewright. In any case, having accepted the mandate, and knowing that every means was being taken to emphasise the fact that the candidature was a joint one, he must be presumed to have been acting under it, and for the benefit, directly or indirectly, of both his principals, and this must be clearly disproved before, in any particular case, it can be held that the respondent was not responsible for his actions. It does not appear to me to be so disproved by the mere fact that on any particular occasion he asked known supporters of Sivewright to give his uncle their second vote. Clearly, in a case like the present, the natural policy of the supporters of the joint candidature would be to get those on the other side to split their votes, and on the pretext that it would be "a pity to waste a vote," to dissuade them from plumping; and there is some slight evidence that De Waal was not the only canvasser who resorted to such tactics. It is true that De Waal boldly asserts that he never asked anyone to vote for Krige. That, if so, would not be altogether conclusive, but the statement is one which it is impossible to accept, contradicted as it is by no less than nine witnesses—Bergsteed, Larry, Dreyer, Adams, Baderoen, Wentzel, O'Connor, Haupt, and Anna Barends. I do not include Stamper, whose evidence on the point is not explicit. Mr. De Waal, it may be said, is in this dilemma. Either his conduct was so disloyal as to affect his credit generally, or, as in fact is proved by the testimony of a cloud of witnesses, his statement on this point is one on which no reliance can be placed. Now applying these general considerations to the particular facts, I am disposed to hold that when he treated a group of Malays in the canteen at the Strand shortly before the election on a considerable scale—a thing which he admits he never did on any other occasion—this was a corrupt practice by an agent of the respondent, and this view is strengthened by the circum-

stance that, shortly before, he was speaking outside the canteen to several members of the same group, and asking them to give their second vote to either De Waal or Krige. If, however, this incident stood absolutely alone, and since at the actual time when the treating was going on there is nothing to show that he spoke on behalf of Krige to any voter, it may, perhaps, be contended with some force that on that occasion he was not working on his behalf, and in view of the terms of section 86 of the Act of 1883, it might be safer to give the respondent the benefit of the doubt. But the incident does not stand alone. There was the little matter of the two shillings given to the old man, Philip Barends. The Court did not think it necessary to hear Mr. Searle on this point, because the only bribery alleged was that of old Philip himself, and Philip states distinctly that De Waal said nothing to him about his vote. His act is therefore, in all the circumstances, open to the charitable construction that it was an act of charity; but it seems rather a pity that Mr. De Waal should have confined his visits to the Barends family, and his eleemosynary donations to election time; and though he carefully explained to Mrs. Anna Barends, the wife of another voter, that the gift had nothing to do with the election, it seems to me clear that he spoke to her on behalf of both candidates, and one can scarcely resist the conclusion that his real object was to produce a favourable impression in the Barends' family circle, and to obtain popularity for the side which he represented. The case, however, of Wentzel seems to me to stand on a different footing. He admits having gone to Wentzel's place, and there both Wentzel and McColla swear that he asked for their second vote for either De Waal or Krige. He admits having gone to the house because he wanted Wentzel's vote, and that Wentzel then asked him for money. The evidence as to what he himself said is very dubious. At first he says, "The only thing I said was that I would be very glad if he would give the other vote to another candidate." That was "the only thing he said"; but he proceeds to explain that he was "alluding" to—which is very different from mentioning—Mr. De Waal, and finally asserts that he mentioned his name. Then he said he would see them later on, and in fact he did see Wentzel on a subsequent occasion. Krige and De Waal had been holding a joint meeting on the Strand; De Waal, jun., had been on the platform;



after the meeting he was going to the house of Burnard, the chairman of the joint committee, and it was on this occasion that he admits having seen Wentzel and given him 2s.—"just," as he says, "to get rid of him." It is true that Wentzel says that when he first asked for money on the previous occasion, when De Waal was asking for his vote, it had "nothing to do with the election" (540). But after all we must use our common sense, and, taking the admitted facts, it seems to me abundantly clear that this money was given as a bribe by the respondent's agent. The fact of the payment is undisputed, and taking that fact in connection with all the surrounding circumstances. I think there is only one inference which can reasonably be drawn. Of course Wentzel and McColla are not very reputable witnesses. People who ask for bribes, take them, and are willing to come forward and admit the fact, can never be persons of a highly moral character; and if evidence of this class is to be rejected on that ground alone, I suppose allegations of bribery could scarcely ever be proved. The duty of the Court is no doubt to closely and severely scrutinise such evidence, and if such scrutiny gives rise to doubt, the respondent should have the benefit of it. I am sorry to say that I can see no room for such doubt in the case I have discussed. The same observations apply with, if possible, still greater force to the case of Olivier, which alone now remains for examination. Olivier, who is a mason's labourer, was canvassed by John Haupt, admittedly an agent of the respondent's, who called him into his room and asked him to sign a requisition and to vote for De Waal and Krige. Olivier alleges that he said that if he went to vote he would lose a day's work, whereupon Haupt promised him 5s., and he replied, "All right, that will do." Haupt denies this promise, and says that the sum of 5s., which he subsequently handed to Olivier, was not a gift but a loan, advanced to him on the false pretext, which Olivier admits having made, that he wanted the money to pay a club subscription or something of that kind. Now let us first consider what facts are beyond dispute. It is common cause that, shortly before the election, Olivier obtained 5s. from Haupt, which the latter borrowed for the purpose from his master, who happens to be the respondent's brother. It also seems to be common cause that shortly before this Haupt had canvassed Olivier in his room,

and that the latter had then asked for money either as a gift or a loan. It is stated by Joubert, who was not cross-examined on the point, that Haupt about that time had spoken to him about Olivier's political attitude, and, receiving an unfavourable answer, had intimated his intention of seeing him himself; it is also admitted that the money was handed to Olivier in Dorp-street, Stellenbosch, a district which had been specially assigned to Haupt to canvass. It is further admitted that there was no special relation such as that of employer or employed, between Haupt and Olivier, that this was the only occasion on which the former had assisted the latter in this way, and that, apart from the election, he had no special motive for running about to obtain cash in order to save Olivier the annoyance of being posted as a defaulter at his club, or anything of that kind. It is further admitted that Haupt, after giving him this money and before the election, told Olivier, on at least one occasion, to "keep straight." Of this phrase he could give no explanation when the case was before the Magistrate, and the explanation which he says he has subsequently recollected, and with which he has favoured the Court, is to me almost unintelligible. His brother, however, candidly admits that this was said while the canvassing was going on—"while we were working hard"—and that the meaning was, "keep straight in the election." For my part I can only interpret the expression in one way—as a sort of *do ut des* or *dedi ut des*, which would have no significance if the previous transaction had been of the nature alleged by Haupt. Once more, it is admitted that Haupt shortly afterwards—he says before, Olivier says after the day of the poll—was very anxious to get this money back, and his own messenger, Jacobs, corroborates Olivier's statement that he said his object was not to save Olivier, as he puts it, from getting into trouble, but to avoid getting into trouble himself about the election or on account of Olivier. Lastly, it is admitted that Haupt at this time promised Olivier, if he would then return this particular sum, that he would let him have it back again, and would help him again, that, he explains, being "always my habit with my boys," to which category, however, Olivier did not happen to belong. Now, if Haupt had previously promised the money, I can quite understand that Olivier should be anxious to convert that promise into a

performance before the election, and that a man of his class would not be over scrupulous in the reason assigned for asking for it on any particular occasion, just as a tradesman who wishes to ask politely for the settlement of his little account sometimes explains confidentially that he has a heavy bill to meet on an early date. But notwithstanding the circumstance that Olivier, a witness of the usual type in such matters, pretended to want for his club what he really wanted for the canteen, the admitted facts taken as a whole seem to speak for themselves with irresistible cogency. They force me to the conclusion that Haupt has failed to account for this transaction, and that all the circumstances clearly show that it was a corrupt payment made in view of the election and in order to induce Olivier to vote for the candidates on whose behalf Haupt was acting. If it were merely a question of oath against oath, it might doubtless be said that both witnesses were so unsatisfactory that the Court could not safely accept the evidence of either; but starting from the concrete fact of the passing of the money, and after a very careful examination and analysis of all the antecedent and subsequent circumstances, I can come to no other conclusion than that which I have indicated. I may add that, had it been possible, I should have been only too glad to do so. It has been fairly pointed out by Mr. Searle that, on the information before us, this election appears to have been contested, at all events so far as Mr. Krige is concerned, with great frugality. There is nothing to indicate that corrupt practices extensively prevailed. Only three actual cash payments to voters have been proved—two by De Waal and one by Haupt—and they were all of very small amounts. And in one case at all events the Court is unanimous in holding that the payment is not proved to have been in the nature of a bribe. But elections have frequently been avoided by small matters of this kind. There is both English and Colonial precedent for doing so, in one case, if I am not mistaken, in the very constituency which is now before us. Some years ago there was a very hard case at Southampton, where an election was avoided because it was proved that an agent had promised a voter his return railway fare from Winchester, amounting I think to precisely two shillings; by the English law the result was that the candidate—a man of considerable local influence, who

would have had no chance of being selected elsewhere—was not only unseated, but precluded from again offering himself for the same constituency during the then existing Parliament. Our own law is, I think rightly, not so severe; but it is a strict law, and it is our duty to apply it strictly. Had the Court any power to relieve the respondent from the consequences of the action of his agents the present might well be considered a case for its exercise; but in the absence of any such discretionary power, and on my view of the evidence, I can come to no other conclusion than that two at least of the charges made by the petitioners have been proved, and that the respondent therefore was not duly elected.

Measdoep, J. said that with respect to the charges upon which the Court had unanimously determined that the petitioners had failed, he did not think it necessary to add any observations of his own beyond expressing his concurrence. But besides these there were three charges upon which they could not agree. These were the cases of Akieldeen Wentzel and Jacobus Olivier in the tables of bribery, and that of treating by De Waal contained in the second table. He agreed with the finding of the majority of the Court upon the charge relating to the bribery of Wentzel by De Waal, although his reasons differed from those of his brethren. After dealing with the evidence on this point, his lordship said that he could not come to the general conclusion that every petty gift by De Waal during the election had a corrupt motive, but each case must be determined separately and distinctly upon its merits, and must be clearly proved. He then pointed out that Wentzel himself had told them that the gift had nothing to do with the election, and that must be taken to mean that he did not regard it as made corruptly to secure his vote. If he was really under that impression it would under all the circumstances be difficult to find that he was beyond a doubt wrong. Whilst the evidence created a suspicion, it also raised a doubt, and his lordship thought that the finding upon that point must be in favour of the respondent. Taking the agency of De Waal as proved, his lordship next dealt with the case against him of giving drinks to a number of persons. Proceeding, his lordship said: "Under our law the treating of a non-voter for the purpose of inducing a voter to vote is corrupt. In the decided cases it is held that treating parties of men, whether voters or non-voters with the corrupt intention of

gaining influence and popularity as a means of inducing voters to vote, is a corrupt practice. I am unable to come to the conclusion that up to the door of the canteen De Waal held out corrupt inducements on behalf of Krige and De Waal, but that he had no sooner entered the canteen when he acted for De Waal only; nor can I think that some of the men were treated in order to gain popularity and votes for Krige and De Waal, and others only on behalf of De Waal. I come to the conclusion that the treating was done corruptly within the meaning of the Act by De Waal as agent for Krige to induce the voters then present and other voters to vote for De Waal and Krige, and that upon this ground it must be held that the respondent has not been duly elected." With regard to the bribery of Olivier by Haupt, his lordship, after reviewing the evidence, said: "I find nothing in the case to make me think that Olivier's character is such that we must discard his evidence. I come to the conclusion that it has been proved that Haupt, acting as the agent of Krige, gave to Olivier, a voter, the sum of 5s. in order to induce him to vote for Krige, and that by reason of this corrupt practice Krige has not been duly elected."

Solomon, J., in his judgment confined his remarks principally to the charge of bribing by John Haupt. After an exhaustive review of the evidence in connection with that charge, his lordship said: The conclusion then to which I come to in this charge is this: that Haupt's evidence generally is unworthy of credence; that, though undoubtedly Olivier is in many respects not a satisfactory witness, his evidence is corroborated by the circumstances of the case, and most materially by the admission made by Haupt himself; and that, sitting as a juror, I am satisfied that the charge has been made out. In my opinion Haupt is to a great extent convicted out of his own mouth, and I find it quite impossible to explain away his admissions, chiefly these with regard to the use of the words "Keep straight," and the promise to return the money if Olivier would get the 5s. from his master when he required it. Being satisfied that this 5s. was given, and that it was given in connection with a promise to pay 5s. for Olivier's vote, I come to the conclusion that Haupt has been guilty of bribery within the meaning of the Corrupt Practices Act, and that the respondent's seat must be declared vacant. . . . Before concluding, I should

like to say just a very few words on the only other two charges in which I have felt any difficulty, viz., the treating of the Malays by Pieter de Waal, and the payment of 2s. to Wentzel by the same person. As regards the latter charge, I have felt grave doubt as to whether I ought not to have found that charge proved; but in the face of the statement of Wentzel himself, that the payment of the 2s. had nothing to do with the elections, I feel justified in giving the respondent the benefit of the doubt on the ground that it has not been quite clearly proved that the money was given for a corrupt purpose. As regards the former charge, it seems to me that the weight of the evidence is in favour of De Waal's statement, that he treated the Malays not on behalf of Krige but solely on behalf of De Waal; and that being so, I cannot see how it can be said that in doing so he was acting on behalf of Krige, and for the purpose of procuring his election.

[Petitioners' Attorneys, Messrs. Van Zyl & Buisson; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G., P.O. (Chief Justice), Sir JACOB BARRY, K.C.M.G. (Judge-President of the Eastern Districts Court), the Hon. Mr. Justice BUCHANAN, the Hon. Mr. Justice LAURENCE (Judge-President of the High Court of Griqualand West), and the Hon. Mr. Justice MAANDORP.]

HARDING V. SAUER. { 1899.  
Jan. 30th  
" 31st.

Election petition—Bribery and corrupt practices—Gifts—Natives—Act 21 of 1859, section 1.

*The distribution by a candidate of small gifts among four or five voters shortly before the election, although indiscreet and prima facie illegal, does not constitute bribery in terms of the first subsection of section 1, Act 21 of*

*1859, if the Court is satisfied, from a consideration of all the circumstances, that the gifts were not made in order to induce such voters to vote or to refrain from voting.*

This was an election petition filed by George Harding, of Aliwal North, against the return of the respondent, Jacobus Wilhelmus Sauer, as a member of the House of Assembly for the Electoral Division of Aliwal North. It set out that at the election which took place on the 24th August, 1898, at which Jacobus Nicolaas Petrus Botha Charles Crewe, and the respondent were the candidates, the poll was declared as follows:

J. W. Sauer	...	...	796 votes
J. N. P. Botha	...	...	600 votes
C. P. Crewe	...	...	598 votes

and that the two first named were thereupon declared by the Returning Officer to have been duly elected.

The petition proceeded in the following terms:

That your petitioner says that the said Jacobus Wilhelmus Sauer was, by himself and by his agents, and by other persons on his behalf, guilty of bribery, treating, undue influence, personation, and of aiding, abetting, counselling, and procuring personation, and other corrupt and illegal practices before, during, and after the said election.

That the said Jacobus Wilhelmus Sauer, by himself and by his agents, induced and procured persons to vote at the said election, knowing that such persons were prohibited by law from voting at the said election.

That your petitioner annexes hereto a schedule, giving such particulars as he can at present furnish regarding the subject matter of this petition, indicating the nature of some of the illegal or corrupt practices complained of.

That further inquiries are being made with a view to furnishing additional particulars of the illegal practices adopted by the said Jacobus Wilhelmus Sauer, or by his agents on his behalf, and the right is therefore reserved by your petitioner to amend and to supplement the particulars now furnished, and to lead evidence in support thereof, and of any additional charges that he may hereafter put forward at the trial of this petition.

That by reason of the matters herein set forth your petitioner says that the said Jacobus Wilhelmus Sauer was and is incapacitated from serving in the present Parliament as member in the House of Assembly for the electoral division of Aliwal North, and that the election and the return of the said Jacobus Wilhelmus Sauer were and are wholly null and void.

Wherefore your petitioner prays that it may be determined and decreed that the said Jacobus Wilhelmus Sauer was not duly elected or returned, and that the election and return of the said Jacobus Wilhelmus Sauer were and are wholly null and void, and that such order regarding the costs of this petition may be made as shall be deemed meet.

Schedule of preliminary particulars referred to in the election petition challenging the return and election of Jacobus Wilhelmus Sauer as member for Aliwal North in the House of Assembly.

TABLE L.—BRIBERY.

Name of Persons Bribed.	Name of Briber.	Nature of Bribe.
Maynier, J. J. ...	J. W. Sauer	A pipe
Khati Jantje. ....	do.	A blanket
Daughter of Marthinus Suping	do.	A blanket

Amended Schedule of particulars to be annexed to the election petition relating to the Aliwal North election suit between George Harding and Jacobus W. Sauer.

TABLE I.—BRIBERY.

Name of Person Bribed.	Name of Briber.	Nature of Bribe.
Josiah Molefane...	J. W. Sauer	One rug
Moss Molali ...	do.	do.
Thomas Cryfer ...	do.	do.
Marthinus Suping	do.	do.
Khati Jantje ...	do.	do.

(The Register numbers of the bribed persons, with the exception of Molali, were also given.)

Sir Henry Juta, Q.C. (with whom were Mr Graham, Q.C., and Mr. Benjamin), appeared for the petitioner.

Mr. Searle, Q.C. (with whom was Mr. Molteno) appeared for the respondent.

Sir H. Juta applied for leave to amend the schedule of particulars with respect to the cases of Moss Molali and Marthinus Suping. In the case of the former there was no number given, because he was not a voter, and the evidence would be to the effect that his son was the headman of a location, and that the bribe was given to Moss Molali for the

purpose of influencing his son. The son was a registered voter, and he would ask that the words "for the purpose of influencing his son" be inserted in the schedule. In the case of Marthinus Suping, the evidence would show that the blanket was not given direct to him, but was given to his daughter Emily for the purpose of influencing her father to vote. He would also ask, therefore, for the insertion of the words, "to his daughter Emily for the purpose of influencing her father Marthinus Suping" in the schedule.

Mr. Searle said that he should have to object unless he knew that Robert Molali was present. He contended that the petitioner had had ample time to file an amended petition. In the case of Emily Suping he had no objection to the amendment.

The Court granted leave to amend the petition in respect of the case of Emily Suping, but ordered the case of Moss Molali to stand as printed.

Wilmer Pearmain said he lived in Bensonvale, in the Aliwal North district, and remembered the meeting held at Pearmain's store on July 12, on which occasion witness acted as the interpreter in Kafir. It was a meeting of coloured electors, and there were from 75 to 100 present. Josiah Molefane was a man of influence, and was the headman of the Bensonvale location. Moss Molali was also a man of influence, and his son, Robert Molali, was the headman of the Sterkspruit location. Mr. Sauer, in the course of his speech, informed the people that he expected support from them. About half an hour after the meeting witness went round to the store and saw Mr. Sauer in close proximity to Molefane and Molali. Molefane had a new rug and Molali a blanket, the rug being worth about 15s. and the blanket from 5s. to 7s. 6d. On the 18th August Mr. Sauer held another meeting, when witness again did the interpreting. Thomas Cryfer, who belonged to the Bensonvale location, was there, but witness could not say whether Marthinus Suping and Khati Jantje were there. Mr. Sauer again asked the natives for their support, and told them that there was going to be an election.

Cross-examined: Witness was working as a Leaguesman during the election, and Mr. Crewe was the League candidate. He was working voluntarily during the election. Mr. Crewe and some of his friends were present at the second meeting held by Mr.

Sauer. The natives were all strongly in favour of Mr. Sauer, and it was hoped by the League party to get the second vote for Mr. Crewe.

By the Court: Mr. Sauer said nothing as to whom the natives should give their second vote, either one way or the other.

Cross-examination continued: Witness did not think that either Moss Molali or Robert Molali were on the list of voters.

Re-examined: He believed that Crewe polled the most votes in the Herschel district.

Isaac Madiehe, a native, employed as a salesman at Pearmain's store for the last eight years, said that at the meeting which Mr. Sauer addressed in the yard of the store in July he was present, and afterwards Mr. Sauer and Moss Molali came into the store and subsequently to that Molefane came in. Mr. Sauer asked witness for a blanket, which he gave to Molali, the cost of the blanket being 5s. After that Molefane came, and Mr. Sauer turned round to witness and told him to give Molefane a rug for his old woman. Witness took down a rug value 16s. and gave it to Molefane. Mr. Sauer shook hands with Molefane, and the rug and blanket were booked to Mr. Sauer. The second meeting on the 18th August was also held near the store. Witness went to the meeting and saw Thomas Cryfer, Marthinus Suping, and Khati Jantje there, and after the meeting they came to the shop with Emily Suping. Mr. Sauer came in with Cryfer and Jantje, and shook hands with the girl and asked whether she was a girl or a wife, and witness said she was a girl. Mr. Sauer then told witness to get down three rugs, value 10s. each, and gave one each to Emily Suping, Thomas Cryfer, and Khati Jantje. Mr. Byron, the bookkeeper, came in afterwards, and the rugs were entered to Mr. Sauer's account.

Cross-examined: Mr. Sauer had been at Bensonvale many times before. Witness had known Mr. Sauer for a long time, and had along with all natives about there supported him. Robert Molali, Moss Molali, and Molefane were men who had worked for Mr. Sauer at the last election. Before the first meeting in July was over witness and others went to Mr. Pearmain's shop, and Mr. Sauer and Molali came in half an hour afterwards. It was rather a busy day with the natives. Mr. Sauer when he was in the shop called to witness and told him to take down the blankets. Nothing was said about voting. It was done quite openly. Moss Molali

handed the blankets to Mr. Sauer. Mr. Sauer spoke to Emily Suping and then asked witness if she were married or unmarried. He told witness to give her a blanket. Nothing was then said about voting. He was just going away when he gave those blankets.

Re-examined: Witness had not seen Mr. Sauer in the store before buying those blankets.

Robert Byron, the bookkeeper in Pearmain's store, produced the books kept in the business. On July 12 there was an entry against J. W. Sauer of one blanket, 5s., and one rug, 16s. That entry was made by witness in the ordinary course of business. Then, on August 18, there was another entry: J. W. Sauer, three rugs, at 10s. each. That was also entered by witness in the ordinary course of business, and these entries were correct. Witness was not in the store when the sales took place, but he saw Moss Molali and Molefane outside with a rug and a blanket, which looked like new. Mr. Sauer came out of the shop as witness went in. The salesman told witness about the sale, and he made the entry. It was the same on the second occasion.

Cross-examined: Witness gathered from the talk of the natives at the last election that they were all in Mr. Sauer's favour. That had been so all along.

By De Villiers, C.J.: The shop belonged to Mr. Walter Orsmond.

Josiah Molefane said that he was the headman of Molefane's location at Bensonvale. He had been headman since the Basuto war. He remembered one meeting held by Mr. Sauer at Bensonvale. That was in the yard of Mr. Pearmain's store in July last year. Witness was present at the meeting, and heard Mr. Sauer speak about the election and ask the people for their support. After the meeting witness went round to see Mr. Sauer so as to salute him. Witness went into the store, and saw Mr. Sauer just by the door. Mr. Sauer did not go in; he only gave an order to the salesman. Witness greeted Mr. Sauer, and the latter shook hands with him. Witness saw Moss Molali standing outside, among other people. Mr. Sauer ordered the shopman to give witness a rug. Witness did not ask for the rug, and did not pay for it. Witness had never had a rug or anything else from Mr. Sauer before.

Cross-examined: Witness had known Mr. Sauer for many years, and had supported him and voted for him four times. He had known Mr. Sauer more than twenty years.

Witness's grandfather had been headman before witness, and he also had supported Mr. Sauer. The natives in the last and previous elections had always supported Mr. Sauer. Witness when he was in difficulties always wrote to Mr. Sauer as a friend and asked for advice. Witness had always regarded Mr. Sauer as a friend. Mr. Sauer said that witness must give the rug to his wife. There were many people in the store at the time. Mr. Sauer did not ask witness for his vote, but came to address his (witness's) people. Witness had also supported Mr. Crewe.

Re-examined: Witness was also a registered voter.

Buchanan, J.: Did you vote?—Yes.

Re-examination continued: Mr. Sauer never spoke to the witness when he gave him the rug. Witness could give no reason for Mr. Sauer giving him that rug. Witness did not attend the second meeting, as he was sick at the time.

Moss Molali said that he belonged to the Sterkspruit location, near Bensonvale. His son was the headman of that location. Witness had been at that location forty years. Witness was at the first meeting Mr. Sauer held at Pearmain's store. Witness's son and other people from the Sterkspruit location were there. Some of them were voters. After the meeting the whole group went into the store together. Mr. Sauer, when they were inside, did not say anything, but gave witness a small blanket for his wife. Witness did not ask him for the blanket. Witness had never had a blanket or anything else from Mr. Sauer before.

Cross-examined: Before the meeting witness had spoken with Mr. Sauer. They talked about the weakness of the land, and witness also told Mr. Sauer about his wife's illness. Witness also reported to him that his name had been struck off the voters' list, although he had been on before for thirty-four years. Witness asked to have his name again put on the list, but Mr. Sauer said he would have to wait until the fresh registration. Witness had supported Mr. Sauer ever since he went into Parliament. He had known Mr. Sauer's father. Mr. Sauer did not speak about voting at the time he gave witness the rug.

By Laurence, J.P.: Witness's son was standing next to him when Mr. Sauer gave him the blanket. His son's name had also been struck off the list.

Thomas Cryer said that he lived in the location at Bensonvale, and was a registered

voter. Witness was present at the meeting held by Mr. Sauer behind Pearmain's store. Mr. Sauer made a speech pointing out that there were three candidates standing for Parliament, and it was for them to make a choice. He did not ask them for their vote. Afterwards witness went into the shop with others; among them Silwana. Mr. Sauer greeted them, and then in passing said "Cryfer, come here for a minute." Witness then followed him into the shop. In the shop were Martinus Suping and his daughter. Then Mr. Sauer ordered three blankets, and gave one to the daughter, one to witness, and one to Jantje. All that Mr. Sauer said then was: "Is she (the daughter) a married woman?" Witness never asked Mr. Sauer for the blanket. Mr. Sauer just said the blanket was for witness's wife. Witness had known Mr. Sauer for thirty years, and always supported him. They had always looked upon Mr. Sauer as if he were their father. As far as witness had heard, all the natives in the district had looked upon Mr. Sauer as that. Witness did not see young Mr. Pearmain in the shop. All was done openly. He went off at once, and they had not time to thank him. Witness did not regard it as being done to influence his vote. Witness supported Mr. Sauer and Mr. Crewe. Witness had also known Mr. Sauer's father.

Khati Jantje said that he lived in the location at Bensonvale, and was a registered voter. Witness remembered the meeting at Pearmain's store before the last election, when Mr. Sauer addressed them, and said that Parliament was over and election time coming, and they must prepare themselves to elect another member. He said that if they decided to elect him he left that to their own decision. Mr. Sauer never spoke to witness privately, but witness saw him in the store immediately after the meeting was over. Mr. Sauer gave witness a rug, and also gave rugs to Tom Cryfer and Emily Suping. He did not say anything to them when he gave them rugs. Witness had never had a rug or anything else from Mr. Sauer before.

Cross-examined: Witness had known Mr. Sauer for many years, and had voted for him five times. He regarded him like a father, and used to go to him for advice when he was in trouble. Witness wrote to him, and he answered some letters. He never charged for them. The Bensonvale people all supported Mr. Sauer, and had always done so. Witness saw young Mr.

Pearmain in the store at the time the rug was given. It was done openly. Witness did not take it as having anything to do with influencing his vote.

Re-examined: Mr. Sauer had been their member for many years.

By Laurence, J.: Mr. Sauer never said that the rug was for witness's wife. He just gave it to witness. Witness was certain Mr. William Pearmain was in the shop.

Marthinus Suping, also living in Bensonvale location, said that he was the father of Emily Suping, and was a registered voter. Witness was present with his daughter at Mr. Sauer's meeting. Afterwards, in the shop, Mr. Sauer ordered the shopman to give him three rugs, and after that gave one to Emily Suping, one to Tom Cryfer, and one to Khati Jantje. Witness did not ask for the rug.

Cross-examined: Witness had always supported Mr. Sauer, and looked upon him as a father. Mr. Sauer had never asked for his vote. Witness did not regard the rug as a bribe. If he had thought it was for that he would have asked Mr. Sauer what he wanted to buy his vote for. Witness did not hear Mr. Sauer ask his daughter anything.

Emily Suping, daughter of the last witness, gave corroborative evidence as to Mr. Sauer giving presents of blankets to her and the others.

Hanselwana, a native agriculturist at the location at Bensonvale, said that he was a registered voter, and was present at the meeting in August last at Pearmain's store. After the meeting witness was standing outside with Cryfer and Khati Jantje. Mr. Sauer in passing beckoned Tom Cryfer, and they all went into the shop. Witness gave corroborative evidence as to the presents of rugs, Emily Suping, Khati Jantje, and Tom Cryfer each getting one.

Cross-examined: Witness was also a supporter of Mr. Sauer, and had been so since Mr. Sauer became a member. Witness regarded him as a great friend.

By Barry, J.P.: There was a large number of natives at the meeting; some were supporting Mr. Crewe, and some were supporting Mr. Sauer, but the majority were supporting Mr. Sauer. Witness knew that Mr. Sauer knew him.

By Laurence, J.P.: Witness was not disappointed because he did not get a blanket.

By Maasdorp, J.: Witness had as much influence as Suping or Tom Cryfer.

By Laurence, J.P.: After Mr. Sauer's address some of the natives asked him questions. Some of the natives were satisfied with the answers and some dissatisfied.

This closed the case for the petitioner.

Jacobus Wilhelmus Sauer, the respondent, said that he was Commissioner of Crown Lands and Public Works, and in July last he went to Aliwal North to visit his constituents. He had been member for Aliwal North since 1874. About July 12 last he held a meeting at Bensonvale. Those present were mostly natives, but there were six or eight Europeans. Witness saw Moss Molali previous to the meeting, and his evidence as to his complaining to witness about his name being struck off the voters' list was correct. Witness had known him for many years, and witness believed that he had supported him. Witness addressed the natives, and was very favourably received. Molali's son was also present. Witness believed that the son's name had also been struck off the list. Witness had tea at Mr. Pearmain's, and then just before he went away he walked round to the shop to see Isaac to say good-bye to him. On the way Molali met him. Witness walked into the shop and asked for a blanket for Molali, as the latter's wife was ill, and then, as he was about to ask the shopman for it he saw Isaac Molefane, and gave him a blanket also. Witness told Isaac to put it down to him. Witness had known Molefane for many years, and Molefane had always been a strong supporter of his. A second meeting was held, because at the first meeting, which took rather a long time, witness wanted to get away. The natives, however, said that they had heard that the Government was about to proclaim the Glen Grey Act, and before they accepted it they wanted him to explain the provisions of that Act. That was the sole reason for the calling of the second meeting. At the first meeting, as far as witness could see, the natives were all in his favour. At the second meeting in August Mr. Crewe was present, and some of Mr. Crewe's supporters were also there. About twelve or eighteen Europeans were there, and about 150 or 200 natives altogether. There were more at the second meeting than at the first. Both witness and Mr. Crewe addressed that meeting. Mr. Crewe and his friends said they were not opposing him.

By Laurence, J.P.: Witness did not say anything as to what those present should do with their second vote. They pressed witness

as to what they should do with it, but he refrained from advising them. He would not give them any definite lead.

Examination continued: After the meeting about a dozen people, including Mr. Crewe and witness, went and had dinner at Mr. Pearmain's. Witness then went into the store. It was then sundown. A number of people were there. Witness thought, but he could not be certain, that young Pearmain, who had acted as interpreter for witness, was in the store at the time. The girl, Emily Suping, was negotiating for some sale, and apparently had some difference with the shopman, and witness after asking whether she was a young woman or a married woman said to the shopman: "Oh, give her a blanket." He also gave blankets to the other two natives.

Witness had always regarded those men as very strong supporters of his. The rugs were not given to bribe these people. He had never tried to buy a vote in his life, and had never asked a man, white or black, for his vote. It was all done openly, and there were a number of Leaguesmen, not supporters of witness, about.

Cross-examined by Sir H. Juta: When did you go up to Aliwal North to begin your campaign?—I was there in July and August, and I think I was there in April.

After you returned from your visit there in April you went up at the beginning of July?—Yes, or it may have been the end of June.

I mean when did you go to Aliwal North, not these other places?—At the end of June or the beginning of July.

Did you remain in Aliwal North all the time?—No.

When did you leave there? How long were you away?—I was away from eight to fourteen days.

When you went up the first time and addressed this meeting at Bensonvale, had you then been chosen by the Bond?—No, nor have I been chosen since.

At the time when the first meeting took place at Bensonvale the candidates whom the Bond were going to put up were Botha and Becker?—Not that I know of; I knew nothing about it at all.

You knew nothing about it?—I saw their names mentioned the same as I heard my name mentioned and a number of others.

Do you know that meetings were held by various branches of the Bond?—I heard so.

And Becker and Botha were put forward?—Yes, amongst others.



Before nomination day the number of candidates had been reduced to two?—No, and I do not know it now; it was not so, as a matter of fact.

You were not aware that on nomination day Botha and Becker were put up by the Bond?—No. I know they were nominated at some of the branches.

But you, at any rate, were not?—No.

You were also aware that the natives were opposed to the Bond?—Generally, I think.

At Bensonvale?—They were.

And you were asked at Bensonvale to say who the second person should be—to tell the natives what they should do with the second vote?—I declined to tell them.

When you went a second time, were you then nominated by the Bond?—I have not been nominated by the Bond at any time.

It was a very much contested election?—Not so far as my seat was concerned; not so at all in my case.

You say it was not contested, so far as you were concerned?—No; when I say not contested, of course there was a contest, but I was told by all sections, except some extreme Leaguesmen, that they would support me—and, as a matter of fact, they did.

But without the native vote you would not have secured a majority?—I would have been returned without the native vote.

What is the strength of the native vote?—Nominally, I think it is 576.

Out of?—I should say about 1,700 or 1,800.

Do you know how many actually came to the poll altogether?—No.

And your majority was 196 over Botha?—About that.

You told the Court this morning that you were all along certain of the native voters?—Yes.

You say they amounted to about 576 votes?—I say the native vote in the district represents about 576.

576, and as a fact you got 796 votes, 200 votes more than the native vote represented?—Yes.

When was the last occasion when you were down there?—In 1894.

De Villiers, C.J.: When was the dissolution?—In July or August.

You went up at once after the dissolution?—I think I went up before.

Sir H. Juta: You knew that the dissolution was going to take place?—I knew it was coming.

And you went up in April for the purpose of preparing the way?—I went up.

And you went before that to Bensonvale? I went there in March, 1896, or 1895, but 1896 I think.

And before that?—I think the time before that was the last General Election.

That was in 1894?—Yes.

You held one meeting there in 1894 at Bensonvale?—I held one meeting, but I do not think I went to Bensonvale.

I think you will admit that this last election was much more keenly contested than any election before?—I have already stated that as far as my seat was concerned there was never any question.

We will leave your seat for a moment; take the elections generally; were they keenly contested?—Yes, I believe so.

In 1894 there was also a contested election?—I believe so.

But you must know?—I am just thinking.

But surely you as a member of Parliament must know who stood with you in the constituency; did not Orsmond and De Wet stand?—Yes.

And De Wet got in against Orsmond?—Yes.

Were you then nominated by the Bond?—No.

But De Wet was?—Yes.

And he was put in and Orsmond was put out?—Yes.

Now this man Molefane; you have known him for a good many years; he is the headman of this Bensonvale district?—I believe so.

Do you know it?—I have been told so; I do not know personally that he is, I have no doubt from what I have been told that he is.

And you have known him a good many years as headman?—Yes.

And has he as a headman considerable influence in his location?—Well, some headmen have influence and some have not.

But he is one of those who have?—Yes, I believe so; I should think he is.

Of course, he is an important personage to get on your side during elections?—I should think so, yes.

And Molali?—I don't know that he has any influence.

How long have you known him?—Twenty years or more.

You have always tried to get his support?—No, never.

You don't know anything about his support?—No, I have never tried to get it.

Do you know that he was a man who had great influence?—I cannot say that I knew that he had particular influence; I knew that he was supporting me.

And that he was exerting his influence on your behalf?—I do not know.

Do you mean to say you did not know anything about it?—I did not know that he had any special influence.

How many years have you known him?—Twenty or twenty-five years.

Did you know his son?—Yes.

Did you know he was a headman?—I did not know then; if he is a headman I should say he is a very small one, and that he has very little influence.

Did you not inquire as to who were the persons who had influence in the Herschel district?—Not in the usual way. I had not the slightest doubt as to the support I should get in Herschel; I addressed public meetings there, but I did not ask a single man in Herschel to vote for me or support me.

Had you asked them before?—Never.

You never inquired who were the men of influence in the place?—Well, I may have inquired, but in those days I always left my electioneering matters entirely in the hands of Mr. Walter Orsmond.

But you put questions to him as to who were the influential men?—I don't know that I did.

You left everything in the hands of Mr. Orsmond?—Yes.

He is the owner of the store that has been mentioned?—I did think that Mr. Pearmain was; he was owner for some time, but Mr. Walter Orsmond, I am now told, is the owner of the store.

Was he the owner in July or August?—I only heard about it recently.

Do I understand you to say that you never made any inquiries as to who were the most influential people amongst the natives at Bensonvale?—Never at Bensonvale.

And at Sterkspruit?—I cannot say that I did; I knew two or three men there, two or three headmen of influence in those parts.

Cryfer, you knew him?—Yes.

And Jantje?—Yes.

Do you know Martinus Suping?—Yes, I have known him for a long time.

He is a man whose vote is worth having?—I suppose any man's vote is worth having, but I do not know that he had particular personal influence.

And I think that you canvassed personally during this election. You had a house-to-house canvass?—No,

Nowhere?—Nowhere.

Do you know a man called Sam, employed in the club, at Aliwal North, a native?—Yes.

Did you not speak to him?—Yes.

Did you not ask him if he knew of influential men?—No, I asked Mr. Orsmond about Sam, and he told me that the club employed Sam.

Did you not ask Sam for his support?—Yes.

He canvassed amongst the natives?—Yes. It was this way; he told me he was canvassing for me and that he knew there was opposition from certain quarters, but that I was strongly supported in Aliwal. He said, "I will support you." I said to him, "I hope you will do your best."

And do you say that during the last election you asked nobody to vote for you?—Nobody.

Not a soul?—Not a soul. I do not remember having ever asked a man to vote for me.

Not amongst the farmers?—No.

In Aliwal?—No.

You saw a great many people about the election?—A great many.

Then did you make each one a little speech?—No, nor did I write letters.

Then what did you do when you saw these people?—What do you mean by when?

You say you saw a number of people personally?—I did not say that.

What did you say?—I am going to say what happened. When I was staying in Aliwal the majority of the farmers came and saw me, and spoke to me about the election and there was not a single man who came to me who did not say he would support me. I went and held three or four meetings in the country. As to my going about and asking for votes or working at a house-to-house canvass, it is untrue.

You say you spoke to no man; you went to no man and spoke to him about the election or asked him to work for you?—I spoke a great deal about the election.

Do you mean to convey this, that during the election you did not ask a single man to vote for you?—I do not believe I ever asked a man to vote for me. You see, I never had any occasion.

You never had occasion to ask for support?—No; everybody except a few extreme Leaguesmen said they would support me.

Oh, never mind the Leaguesmen. At these meetings of the natives at Bensonvale, did not you ask the natives for their support?—No,

You never asked them ; you never said you were there as a candidate, and you wanted to be returned ?—No ; I said to them there were three candidates ; I told them who the candidates were, and I said I left it to them to make their choice. I did not ask them to vote for me.

Did you not tell them why they should vote for you ?—I did not.

To come back to the second meeting ; although you were not nominated by the Bond, you then had the Bond support ?—Well, I had the support of the Bond and the non-Bond people ; I had the support, I may say, of the Aliwal district practically as a whole.

Yes, but we know all about that ; we see that by the result.—Yes, that is so.

But you had not the support of the Bond then ?—I tell you I had the support of Bond and non-Bond.

Then you had the support of Bondmen ?—Yes.

Was that the first time you had that support ?—No.

When did you have it before ? You did not have it in 1894 ?—No, but then I had a very large support of Dutch-speaking people.

I am speaking of the Bond as a body ?—I do not think I had the support of the Bond as an organisation. I do not know whether I had or whether I had not. I believe they only ran Mr. De Wet, but whether they supported De Wet alone or De Wet and myself I will not be certain.

In 1894 ?—Yes.

Then the Bond ran against you ?—They supported me, and, I believe, I was returned at the head of the poll.

But to come back to the last election. Was there a large number of natives at your meeting ?—At this second meeting there were more natives than there were at the first.

I do not suppose you mean to convey to the Court that without the native vote it was possible for you to have got in ?—Yes, I would have got in ; I am sure of it ; I am sure I would.

But Botha got no native vote ?—Very little, if any. I think he got some, however.

And you beat him by 196 votes ?—About 200 votes.

193 was the exact total ?—That is about 200.

Do you mean to say that you would have beaten him without the support of the natives ?—I think so.

Of course more than 200 natives voted ; you know that ?—I don't know it.

You won't say that it was not so ?—No, I would not say that.

But speaking from your own information ?—I believe that a great many natives gave away one vote ; that is, they did not use their other vote.

You mean to say that in your opinion a great many more than 200 natives voted ?—A great many only gave one vote each.

And that vote may have been given to Crewe or yourself, but not Botha ?—I don't know.

Don't you know that Crewe polled more votes in Herschel than you did ?—No, I believe that so far as the native vote was concerned I got more than Crewe, but I have made no inquiry. I believe I did not get much of the European vote in the Herschel district.

And now after the second meeting did you ask Cryfer to go inside the shop ?—No, I do not remember that.

You heard what he said in his evidence ?—Yes.

There was no cross-examination of him on this point ?—No.

Would you contradict what he said ?—No, I may have called him in.

Why ?—Probably to give him the blanket.

Then you had it in your mind to give him the blanket before you went into the shop ?—I might have, but I would not say.

What would you have given him the blanket for ?—Well, probably for the same reason that I gave the blankets to the others.

Which others ?—Those mentioned in the schedule.

Why did you call Cryfer in ?—If he said I called him in I would not deny it. I do not know why I called him in ; I may have called him in to give him the blanket.

But why should you have called him in when you did not call the others in ?—I might have wanted to speak to him.

But why should you have asked him particularly to go inside ?—I was in a great hurry.

But you could have spoken to him outside, and this would have saved you all this little walk to the shop ?—I do not remember why I called him inside.

Can you suggest why you called him side ?—It may be that I wished to talk to him.

But did you talk to him ?—I do not know ; I cannot remember.

But if you did talk to him, what did you talk to him about?—I do not remember.

But what did you talk to him about?—I do not remember that I talked to him; I cannot remember what I may have wanted to talk to him about.

But why did you want to talk to him in the shop and not where he was standing?—I can only say I do not remember.

I think you said you went into the shop parlour to get change?—I said I went in there partly for that object.

Why did you not pay for the blankets there and then?—I did not pay for them there and then.

Why not?—I really don't know whether it was because I had not the ready cash or whether I was in a great hurry; I don't know.

But if you were in a great hurry you had time to talk to this girl and ask whether she was an "intombi"?—I did not talk to her; I asked the man.

But you shook hands with her?—I do not remember that I did.

But you seem to have shaken hands with so many people; will you deny that you shook hands with her?—I will not deny it.

But still you had time to make these little inquiries; and why, if you were in so great a hurry, did you make inquiries about this girl?—I did not make inquiries. I simply asked the question.

De Villiers, C.J.: Did you ever give blankets away at any other time?—No; but presents.

Cross-examination resumed: You have heard the witnesses say that they have never received anything from you before?—Yes.

You have never bought blankets in Pearmain's shop before?—I believe I have.

When?—I cannot say when.

But you must say when; it is important?—I remember buying some there, but I do not remember exactly when.

For yourself?—No.

For whom?—For one of the natives.

When was that?—Not at election time.

You are not certain when?—No, I am not quite certain.

When was this?—It was on one occasion: I cannot remember the exact date; it was a coat.

But on any other occasion had you ever bought goods, or any articles of apparel for natives?—Never in Herschel or in Aliwal North. That is the only occasion I remember. I have forgotten if I did, but I may tell you that at different times when I have been in

Aliwal natives who have known me for years have asked me for presents, and I have given them small presents in the way of clothing or otherwise.

You distributed tobacco on one occasion?—I do not remember, but I may have done so.

At the last election?—Not that I know of.

Have any of those people had presents from you at any time?—One had; Moss Molali.

Is he the one who got the coat?—Yes.

Is he the only one?—He is the only one of the men mentioned in the schedule who got presents before that.

Have any of these men mentioned in the schedule received money at Bensonvale during election campaigns?—Well, I cannot remember, but I do know that at Herschel and Aliwal the people have frequently come to me, and I have made small presents to those with whom I have been friendly for a long time.

You were there in 1894 at the election?—Yes.

Did you give anybody anything during the election at Bensonvale?—I do not think I was there then.

At Sterkspruit?—I don't remember.

Nobody?—No.

But the election before that?—I won't say that I did not give any; I do not remember.

Have you paid these accounts for the blankets?—I don't know that I have.

But were they not sent in?—The account was sent in, but a long time ago, almost immediately after our return.

And was not paid?—No.

Why was it not paid?—I overlooked it until the other day, when I came across it in some papers.

Was it not sent in to you after the 31st of December, when accounts are generally made up?—Long before that; it was sent to me almost immediately after I left the district. I asked them at the time to send the account to me.

But if you were so anxious about paying this money, why did you not pay it at once?—The account was sent to me almost immediately after I left the district.

But if you were so anxious to settle the account, why did you not pay it?—I am sorry to say that, like some other people, I do not always pay my accounts when they are sent in.

It was not on account of these proceedings?—Certainly not; I did not believe until the other day that this case would come on.

Re-examined by Mr. Searle: You say that Mr. Pearmain is the manager of this shop?—So I was told; I thought he was the proprietor too.

He is a supporter of Mr. Crewe?—Yes, he told me he supported Crewe and myself.

De Villiers, C.J.: When did you learn that Orsmond was the owner of the shop?—Quite recently.

Lawrence, J.P.: Since the election?—I knew that he had been connected with the business.

De Villiers, C.J.: But at that time did you believe it belonged to Pearmain?—Yes.

Mr. Searle: Mr. Pearmain was managing the business, and you thought it belonged to him?—Yes.

He was a supporter of Mr. Crewe?—Yes.

Lawrence, J.P.: Can you recollect having been at Bensonvale otherwise than at election time?—Yes.

You are sure?—Quite sure.

Can you suggest any reason why you gave the blankets to one man and not to the other?—I could not have given blankets to everybody.

One of the witnesses says that at one of the meetings, the second meeting, there was a certain amount of heckling from the natives, that they asked you certain questions?—They asked me several questions as to whether it was true as said in some of the newspapers that I was throwing the natives overboard because I was going with the Afrikaner Bond, which was very hostile to them. I explained to them that the Bond was very much misunderstood, and I explained to them the exact position.

Then we are told that some of the natives were satisfied and some were dissatisfied?—I thought they were all satisfied. They were very enthusiastic.

No signs of dissatisfaction?—No; I was told that everybody was going to vote for me.

Mr. Crewe is not here?—No.

You will swear that at the meeting you noticed no signs of dissatisfaction?—It was quite the contrary.

Robert Molali, living at Sterkspruit, said that he used to be a registered voter, but was not one now. At the last registration his name as well as that of his father was struck out. He was present when, before the meeting, his father spoke to Mr. Sauer about that. Witness also made a complaint. After the meeting they went into the shop to shake hands with Mr. Sauer. Witness deposed as to Mr. Sauer giving a blanket to

his (witness's) father for his wife. Witness supported Mr. Sauer, and had worked for him. He regarded Mr. Sauer as a friend, and had always asked his advice.

Cross-examined: Witness was a headman, and in his location there were between twelve and fifteen registered voters. He could not exactly tell how many. He was the only headman in the location. He tried to help Mr. Sauer. He told all his people when Mr. Sauer was coming so that they could go and listen to his address. That was the only way he helped him. Witness went himself. They never held little meetings among themselves. They were not anxious about the Glen Grey Act. He could not remember that anything was said about it at the second meeting. Witness was also at the first meeting. The Glen Grey Act was then talked about, and Mr. Sauer gave them satisfactory explanations of its provisions. There were two meetings at Bensonvale, because Mr. Sauer was hurried at his first meeting, and they told him that many people were absent and requested him to come and address another and larger meeting. Witness took great interest in politics. He could not tell if Mr. Sauer knew that. Witness had spoken at the first meeting. He had asked Mr. Sauer to rectify certain things, but was dissatisfied with the reply. He was dissatisfied because it was a mistake, and he left the meeting and went to Pearmain's store, and afterwards Mr. Sauer gave witness's father a blanket.

By Lawrence, J.P.: They were dissatisfied because their names had been taken out of the book, and he was dissatisfied with Mr. Sauer because he made it a very light matter.

Re-examined: Witness's people were always in favour of Mr. Sauer.

This closed the case for the respondent.

Sir H. Juta: This is no case of charity but clear bribery. The respondent has not given presents to these people before, only one coat during twenty years. The people did not ask for charity. When a candidate, on the eve of an election, gives money or valuable consideration to voters or to persons who can influence votes, *prima facie* that is bribery.

[Lawrence, J.P.: Would it be bribery if the respondent had asked for support at a general meeting and had afterwards made presents to a few individuals of whose support he was sure?]

The state of mind of the promisee has nothing to do with it. *Cooper v. Stade*

(6 E. and B., p. 447) *per* Alderson, J. "The same promise might or might not be lawful according to the disposition of the different persons to whom it was made with the same intent."

The mere giving just before the election is bribery *prima facie*. There is nothing to take the act out of that category. There was no philanthropy or charity about it; the defence of friendship is a hollow one; there could be no friendship between a man in the respondent's position and these people whom he hardly ever saw. Molali was a headman and had influence, and he was dissatisfied with the respondent's answer to the question put to him with regard to his name being struck off the list of voters and left the meeting; the present of a blanket to his wife was made to soothe his feelings. The fact of the respondent going to the country as early as April, and having two meetings there shows that he did not feel as confident about the election as he says he did. The natives were afraid that the Glen Grey Act was going to be put in force, and he says that he went up there to explain it to them. It seems clear that the powers were pretty evenly divided and that success lay with the man who could get the native vote. The gift to Molali's wife was a benefit to Molali himself. *The Limerick Case* (1 O'M. and H., p. 263); *The Launceston Case* (2 O'M. and H., p. 131).

Mr. Searle: The gist of the offence of bribery is the corrupt motive. If a gift is made to voters before an election, it may be corrupt *prima facie*, but it may be shown from the circumstances of the case that it is not corrupt. *Rogers on Elections* (p. 266). A wholesale distribution of gifts may be a fact from which the Court will infer a corrupt inducement to vote. But in this case there is no evidence that any inducement was given to these persons to vote for the respondent. Molali had been known to the respondent for a long time, and had always been one of his supporters—but he was not on the list of voters. The argument that the gift to Molali's wife was intended to influence the votes of Molali's bribe is too far-fetched to influence the Court. The open way in which the gift was made shows that it could not have been corrupt. When the second meeting was held the respondent's position was much more secure than it had been before; it had been openly stated that the opposition were not attempting to get votes away from him; the only question was, who was to get the second vote. The gifts were

merely the result of a kindly impulse. Had the purchases been made with the view of influencing votes, the respondent would not have had the account entered in Pearmain's book, especially as Pearmain was a supporter of Crewe. The gifts should be regarded in the light of charitable gifts. This is a criminal offence and depends on the intention of the offender. *The Windsor Case* (2 O'M. and H., p. 88), Judgment of Bramwell, J., *The Salisbury Case* (4 O'M. and H., p. 28), in which Pollock, B., after referring to the *Windsor Case*, said: "I should rather prefer, myself, to say we must take the whole of the evidence into consideration, and consider whether the governing principle in the mind of the man who gave away such gifts was, that he was doing something with a view to corrupt the voters, or whether he was doing something which was a mere act of kindness and charity." Can it be held that the governing principle in the mind of the respondent here was the getting these people to vote for him?

Mr. Graham in reply: A man can only be judged by his acts. The Court cannot dive into his mind. *The Westminster Case* (1 O'M. and H., p. 89); *The St. George's Division Case* (5 O'M. and H., p. 89), commenting on the *Windsor case*.

De Villiers, C.J., said: It is quite impossible for the Court to approve of what was done by the respondent on both occasions when blankets and rugs are alleged to have been given to the men. It was election time, and the respondent was on an electioneering tour, and at such a time more than any other he ought to have been careful not to have compromised himself in any way by making any gift of whatever sort to any persons who were voters in that district. It was, therefore, in my opinion a most injudicious, a most indiscreet act, on the part of the respondent to do what he admits to have done, and the question which the Court will have to determine is whether in making those gifts the respondent is guilty of bribery. The section relating to the charge is the first sub-section of section 1 of the Act, which says: "Every person who shall directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or offer or promise to procure, or endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or for any other person, in order to induce any voter to vote, or refrain

from voting, shall be deemed to be guilty of bribery." In the first place, there is here in this case clear proof that consideration was given. The important question which the Court has to determine is whether that consideration was given in order to induce those particular voters whose names appear on the schedule to vote or refrain from voting. The case mentioned in the schedule with which I shall first deal is that of Moss Molali. It appears that he was a supporter of the respondent, and had known the respondent for many years. This man Molali had a son named Robert Molali. Both these men were registered up to a certain time, but at the time of the last registration their names were struck off the register. On the first occasion upon which Mr. Sauer met Moss Molali, Molali had a conversation with Mr. Sauer, in the course of which he complained that his vote had been struck out. His son Robert made a similar complaint. Moss Molali also told Mr. Sauer of his wife's illness. After the meeting the respondent met Moss Molali in the shop, the respondent having, he says, gone to the shop for the purpose of getting change. While at the counter of the shop, without any solicitation on the part of Moss Molali, Mr. Sauer gave Molali a blanket to give to his wife. Shortly after that the respondent saw Josiah Molefane, and gave him a rug. It appears that then Moss Molali was not a registered voter at all, and application was made to the Court to so amend the schedule as to alter the words suggesting that the blanket was given to Moss Molali to influence him as a registered voter, to the words suggesting that the blanket was given to him to influence his son, who was a registered voter. Mr. Graham argued that the blanket was given with the view of influencing the son, Robert Molali, but seeing that Robert Molali was not then a registered voter either, and that the respondent knew from his previous conversation with these two men that neither of them was a registered voter, it is impossible to hold that the blanket was given to Moss Molali to induce him to vote, as he had no vote, or that it was given to him to induce his son to vote, because his son had no vote. I have already said that Molefane got a rug on the same occasion. It appears that Molefane also was a supporter of the respondent. He had known the respondent for over thirty years, and the respondent had known him for that time. We have the

evidence of Mr. Pearmain, who I think gave his evidence very clearly. Asked whether the natives were all strongly in favour of Mr. Sauer, Mr. Pearmain said yes. Asked further, he said that Mr. Crewe hoped to get the second vote, and that therefore Mr. Sauer and Mr. Crewe were not, so to speak, in opposition. That is the evidence given by Mr. Pearmain, and it goes to show that in the opinion also of a strong supporter of Mr. Crewe Mr. Sauer had the native vote of that place. Well then comes the important question whether the Court can believe that it was to induce Josiah Molefane to vote for him that the respondent gave him this rug. Many authorities have been cited as to the principles which the Court should apply in such cases. The principle laid down by Baron Pollock seems to me to be reasonable. This says that the Court must consider all the circumstances of the case, and judge by those circumstances as to whether there was any intention to bribe or not. That is really the only test which the Court can apply in the present case. No doubt if the evidence showed that when the gift was made there was no explanation or other concomitant circumstances that would be sufficient to justify any Court in holding that it was bribery, but if it is shown that particular circumstances affected the motive of the person who gave the present, the Court is bound to give effect to all those circumstances. There was no reason or reasons why the respondent should be anxious to get the vote of Josiah Molefane, who was a very old friend of the respondent. The respondent says he gave the rug to Molefane out of friendship, and that I think is a reasonable explanation of the gift. Immediately before the respondent had given a blanket to Moss Molali for Molali's wife. Then, another circumstance which must not be lost sight of in this case is that there was no secrecy whatever about the gifts, which were made in the shop kept by Mr. Pearmain, who was one of the strongest supporters of Mr. Crewe, and at a time when the respondent believed that the shop belonged to Mr. Pearmain. If there was any intention to bribe, the respondent was acting like a madman, because any person wishing to bribe would carry out his desire as much as possible in secrecy, and there is no secrecy whatever about this case. A short time after the rugs were bought by the respondent for the men, Mr. Pearmain dis-

covered that they had new rugs, a fact which struck him at once, and which I have no doubt led him to the discovery that these rugs had been given to the men by Mr. Sauer. No cash payment was made for the rugs, and if any person had wished to bribe, surely he would have paid cash, and so endeavour to keep the transaction secret. Instead of doing this, the respondent asked the assistant to put the purchase price to his debit. Now we come to the other cases. Cryfer and Martinus Suping, and the girl Emma, Suping's daughter. In regard to the girl, the respondent says that when he saw her in the shop he asked whether she was married or not—a very foolish proceeding on his part. However, he was told that she was not married, and he then gave her a rug, and gave a rug each to the two men. At that time there were no other people about. It was a most foolish thing for a public man to do, especially at a time when the respondent must have known that eyes were upon him, and when one might have expected he would have been most careful as to what he was doing. But we have seen there could have been no inducement for him to bribe people whom he knew to be his supporters to vote for him. I do not think that this case can be laboured much further. We think that while acts of this kind cannot be approved of, and while holding that the respondent is not guilty of bribery, we think it is a case in which each party should pay his own costs. The petitioner cannot be blamed for bringing the action. We declare the respondent to be duly elected.

Buchanan, J., said: I wish to state shortly the grounds upon which I base my judgment. The respondent, when a candidate for the representation in the House of Assembly of the division of Aliwal North canvassed that constituency, and held meetings in different parts of the district. Two of these meetings were held at Bensonvale, and were attended by a number of native voters. The first meeting took place shortly before the nomination day, and after the meeting the respondent gave blankets or rugs to two natives who were present. The second meeting was between the nomination and the polling day, and after this meeting the respondent again gave away three rugs to natives. The gift of these five rugs the petitioner alleges are acts of bribery, which should disqualify respondent from occupying the seat which he won at the poll. The law which affects

this case is stated in the first sub-section of section 1 of Act No. 21 of 1859, the operative words of the section, which are applicable, setting forth that every person shall be deemed guilty of bribery who shall give any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote, or refrain from voting. Three things, then, are necessary to constitute bribery under this section: first, that there was a gift; secondly, that it was made to or for or on behalf of a voter; and thirdly, that the gift was made in order to induce a voter to vote or to refrain from voting. As to the first, it is proved that gifts were made. This is not denied. As to the second, in four cases they were made to or on behalf of voters. I include the case of the gift to the daughter of the voter Suping, for if the next requirement is present I hold that this instance would come within the section. I exclude the gift to Molali, for he was not a voter, nor was his son Robert, whom it was alleged the gift was intended to influence. The third point is the crux, the real question in issue in this case. I will say as broadly as possible that the statement of the respondent is not conclusive as to what his intention was in making the gifts in question. His intention is an inference which the Court must draw from a consideration of all the facts of the case: but I must also say that the law requires that what may be called a corrupt intention must be established before statutory bribery can exist. The Court must be satisfied that the gifts were made in order to induce a voter to vote or to refrain from voting. I agree with petitioner's counsel that the fact that the voter had made up his mind to vote for the petitioner before the gift was made would not remove the gift from the operation of the Act. The intention would still be corrupt if the gift was made with the intention of sustaining the voter in his resolve, or as a recompense for his giving his vote for the donor. Still the statements of the parties are facts which the Court should consider among the other circumstances. Here the candidate disclaims any corrupt motive, and asserts he gave the rugs to the natives out of friendship. They were old supporters of his, and had been on friendly terms for a long period. They themselves were indignant at the suggestion that the rugs were given as bribes. The gifts were made publicly, and apparently in some instances in the



presence of the rival candidate. The gifts were not unusual between people of the class of the candidate and the natives, and they were not of any value or numerous. Of course one gift alone, if a bribe, is sufficient to annul the election, but when we are considering them as a matter of evidence, we must as a matter of common sense see on what scale and to what extent they were given. I fully endorse everything that has been said as to the conduct of the respondent. He was most unwise, and ran a great risk. Candidates cannot defend bribes at elections under the cloak of offerings made in the sacred name of friendship. But we must nevertheless decide in this case whether they were bribes or not. I have great doubts on the subject, and seeing the penal consequences which must follow an adverse decision, I feel it my duty to give the respondent the benefit of these doubts. I cannot say that I am satisfied, considering all the circumstances of the case, that the governing principle which induced the gifts was a corrupt one, and I therefore concur in dismissing the petition.

Barry, J.P., expressed his concurrence with the judgment given by the Chief Justice, and said he could quite understand the existence of sympathy between Europeans and coloured people. It was quite reasonable to suppose in this case that the gifts made by the respondent to the persons mentioned in the schedule were made out of a spirit of gratitude on the part of the respondent towards those of his friends who had stood by him in the past, and who still stood by him. The act of the respondent was a stupid act, but a spontaneous act. The evidence did not show that the respondent in making presents did so with the object of inducing those who received the presents to vote. Mr. Sauer had acted most indiscreetly and most unwisely in making these presents, and he thought that in the interests of public justice it was certainly wise to condemn such actions as these. The law provided that elections must be kept free and pure from such influences as bribery, but it did not prohibit influences such as candidates talking to the electors and canvassing them. Perhaps it was a wise thing that the law did not do that, because if it did it would perhaps prevent communication between candidate and elector, which would perhaps mean that the electors would never know what very wise and clever fellows they were asked to send to Parliament. In the pre-

sent case, he thoroughly and entirely concurred with what had been said by the Chief Justice.

Laurence, J.P., said: in this case, I should be glad, for some reasons, to confine myself to a simple expression of concurrence with the judgment which has been delivered by the Chief Justice. I do concur in that judgment; but there are some aspects of the case on which I think I ought to add a few observations. In other cases which we have had to deal with, the question has been whether something has been done, and if done, there has been no doubt as to the character of the act or the object with which it was done. In the present case there is very little dispute as to the material facts, and the question is as to the proper construction to be placed on them. The charge against the respondent is that at the recent election, when a candidate for the representation of Aliwal North, he bribed five natives by presenting them with rugs or blankets. With regard to one case, that of Moss Molali, who was not a registered voter, an application was made, when the case came on, to amend the particulars by adding an allegation that the object was to influence his son, Robert Molali, a registered voter. This application was not pressed, and it appeared from the evidence that in fact neither the father nor the son was on the register. The only suggestion was that the blanket was given to the father as a present to his wife, who was ill, in order to induce the son to exercise his influence with other persons in his location, where he was the headman, and I agree in thinking that this was altogether too far-fetched and remote. Then with regard to Martinus Suping, to whose unmarried daughter a blanket was given in his presence, I felt the force of Mr. Searle's argument that there was nothing whatever in the evidence to show that the respondent was aware that the girl was the daughter of Martinus, and if that is so, it seems to me sufficient to dispose of that charge. There remains the cases of the three men, Molifane, Cryfer, and Jantje, all voters, who are alleged to have been bribed in a similar manner. Now in what does the offence of bribery consist? It is defined in section 1 of Act 21 of 1859, which begins by laying down that "the following persons shall be deemed guilty of bribery, and shall be punishable accordingly." Then follows clause 1 of the section, which has already been read by the Chief Justice. But

there are four other clauses defining various forms of bribery, and by one of them—clause 3—"every person who shall . . . make any such gift . . . as aforesaid to any person in order to induce such person to procure, or endeavour to procure the return of any person to serve in Parliament, or the vote of any voter at any election," is guilty of the offence in question. It is unnecessary for the purposes of this case to refer to any of the other clauses; but the relation of briber and bribee is established by the commission of any of the specified offences, and therefore it seems to me that under the general charge of bribery contained in this petition, and under the schedule containing the "names of persons bribed," it is technically open to the petitioner to prove any of the offences specified in any of these five clauses. The case in this respect appears to me somewhat different from the *Barkly West case*, in which the petition was specifically based on clause 1 of the section, and therefore the Court refused, on the second count, as to Pokwane, to deal with the case as if there had been a charge under clause 3. Now I should like to add, while dealing with the Act, that I do not attach much weight to the argument of Sir H. Juta that it is unnecessary to prove that the thing was done "corruptly," because the clauses both say that the consideration must be given "in order to induce" the person who receives it to do, or to abstain from doing, certain things, and that, taken with the context, seems to be practically a synonym or equivalent to saying that it must be done corruptly. It is true that the actual word "corruptly" is used in a later portion of the same clause; but the words "in order to induce" would then be inappropriate, as the reference there is to things done after the election has taken place. Now I think it has been very fairly admitted by Mr. Searle that when things of this kind are done, in such circumstances, the presumption is that the object was to hold out an inducement to, or to corrupt, the voter. But that presumption is not what is called *presumptio iuris et de iure*; it is a rebuttable presumption, but one on which the Court is bound to act unless in any particular case it is very clearly rebutted. Now taking the wider view which I have thought it my duty to take of the scope of this petition, the respondent has to rebut the presumption that his object was to induce these persons either to vote for him them-

selves or to give him their influence or support. From this point of view I feel bound to take into consideration certain facts which I think the petitioner properly elicited. In the first place, the respondent seems on this occasion to have taken a somewhat exceptional course in paying two visits to and addressing two meetings of natives at Bensonvale, which, as I understand, is in rather an outlying portion of the constituency. The object of this second meeting seems to have been partly because the first was not very well attended, and partly because some of the natives wanted some fuller explanation as to the Glen Grey Act, and the probability of its application in their district. Moreover on this occasion it seems that of the three candidates for the two seats, one, Mr. Botha, was supported by the Bond, which appears to be an influential political organisation, especially among the Dutch voters; another candidate, Mr. Crewe, was supported by the League, a similar organisation, with some influence among the natives; and if the Dutch electors, or a large proportion of them, had decided to plump for Mr. Botha, and a large section of the natives, dissatisfied with Mr. Sauer's attitude towards the Bond, or with reference to the Glen Grey Act, had plumped for Mr. Crewe, the position of the respondent as a candidate standing independently of either organisation, might not have been quite so secure as he seems to have thought. Then there is the further fact that, according to one of the native witnesses, some of the people did not appear altogether satisfied with the respondent's answers to questions after the second meeting, though he himself does not seem to have noticed any signs of dissatisfaction. I am prepared to accept his statement, though in conflict with that of some of the other witnesses, that he did not explicitly ask for their support on these occasions; but the point is of no real importance, as of course a candidate on such occasions is known by everybody to be seeking the suffrages of those whom he comes to address. In these circumstances, I should certainly have held that anything like a general or lavish distribution of gifts among these people could only be construed as an inducement to them either to vote or to use their influence on behalf of the donor. But it is impossible to ignore the peculiar relations which existed between the respondent and these three men. They had known him as their member for over twenty years;

they had voted for him, one says four and another five times, and until this election the voting had been open, and so their conduct must have been notorious. Some of them had known his father; one of them tells us that he had succeeded his grandfather as headman, and that he also had been a supporter of the respondent. They all looked upon him as a friend, they wrote for his advice when in difficulties, and sometimes travelled long distances to see him; and with all respect to Sir Henry Juta, I fail to see why, in a case like this, notwithstanding the difference of race and disparity of position, the relation of genuine friendship should not have been of a mutual character. When these exceptional facts have been so clearly proved, I cannot conscientiously say that I disbelieved the respondent when he tells us that he was absolutely confident that in any event these men would have done their best on his behalf, and that, when he made these presents to them, the idea of inducing them to do so never crossed his mind. I attach no weight to the fact that nothing was said about voting at the time; but I must agree with the Chief Justice in attaching considerable weight to the circumstance that although his conduct was, as I should put it, recklessly indiscreet, there was about it nothing that was clandestine. The thing was done openly, in the light of day, in the presence of numerous witnesses, and at a time and place when it could not fail to be noticed by, or to become known to, his political opponents. In these circumstances I concur in thinking that the presumption to which I have referred has been sufficiently rebutted. I should not desire in any way to minimise, but rather to emphasise, what has been said about the folly of the respondent's conduct—conduct which I should have thought incredible on the part of a man of his ability and experience, who has so long played such a prominent part in the political life of the Colony. I quite think this was a proper case for judicial investigation, and I fully concur in the order as to costs.

Maasdorp, J., also concurred: He said that in this case the evidence was clear that the respondent did not make gifts to the persons mentioned in the schedule with intent to influence their voting, as he was previously assured of their support, and the petitioner had therefore failed to make out his case.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, V. A. van der Byl.]

## SUPREME COURT

[Before the Chief Justice (Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL LIST.

EDGAR V. SCOTT. { 1899.  
Feb. 1st.

Provisional sentence—Foreign judgment—Superannuation.

This was an application for provisional sentence upon a judgment of the Court of Melbourne, Australia, for the sum of £576 1s. 5d., with interest and taxed costs amounting to £13 2s. 1d. The judgment was dated May, 1893. The defence was that the judgment was obtained by default and without the knowledge of the defendant; the defendant denied the debt and alleged that he had a claim against the plaintiff for a very much larger amount than the amount of the judgment. He had filed a counter-claim in the action.

Mr. Molteno appeared for the plaintiff.

Mr. Innes, Q.C., for the defendant: The plaintiff should be ordered to go into the principal case. Provisional sentence has sometimes been granted upon foreign judgments, but in other cases pleadings have been filed. *Acutt, Blaine & Co. v. Colonial Marine Assurance Co.* (J. 1, p. 402). The judgment prayed upon is superannuated under our law and also under English law. *Garlick v. Broido* (7 Sheil, p. 159). We should be allowed time to give evidence that it is superannuated in Australia.

Mr. Molteno: By the practice of this Court the Melbourne judgment is a liquid document and provisional sentence should

be given, leaving it to the defendant to go into the principal case. It is only necessary to revive a judgment when it is required to issue execution upon it, that is why it was not done in this case; to do so the defendant would have to be summoned again, and there is probably nothing in Australia upon which to found jurisdiction.

De Villiers, C.J.: The Court thinks that this is a case in which the plaintiff should go into the principal case. The judgment is a very old one, and the Court ought to be satisfied that execution could issue in the country in which the judgment was given. It is also important that the pleadings should be before the Court. Cost to be costs in the cause.

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**ANDERSON V. VAN SCHALKWYK.**

Mr. Uington applied for provisional sentence on a mortgage bond for £800, with interest, and that the property specially hypothecated be declared executable.

Granted.

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**THE MASTER V. JONES AND NASH; THE MASTER V. KONGO; THE MASTER V. KRETMANN; THE MASTER V. FOWLE.**

In these cases Mr. Shell moved for orders upon the defendants to file accounts in the estates of which they were executors.

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**REHABILITATIONS.**

Mr. Molteno applied for the rehabilitation of A. Kaplan.

Granted.

Mr. Buchanan applied for the rehabilitation of Shepstone.

Granted.

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**ILLIQUID ROLL.**

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**LITHEMAN AND CO. V. HUNTER AND ANOTHER.**

Mr. Graham applied for judgment in terms of the consent paper filed by the parties.

Granted.

**COLONIAL BUILDING CORPORATION V. J. G. NEWLANDS.**

Mr. P. Jones applied for judgment for the sum of £40 7s. 6d., less £3 paid on account, for money lent.

Granted.

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**BAM BROS. AND CO. V. T. J. BOOS.**

Mr. Molteno applied for judgment for £8 1s. 4d. and costs.

Granted.

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**FINDLAY AND CO. V. VIVIERS.**

Mr. Close applied for judgment for £296 16s. 5d., for goods sold and delivered.

Granted.

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**SEALE'S ESTATE V. ZWEIFENHAFT.**

Mr. Molteno applied under Rule 319 for an order to the defendant to pass a bond for £75 and interest.

Granted.

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**WOOLF V. WOOLF.**

Mr. Close applied for an order detaining Robert Woolf from leaving the Colony, on the ground that he owed Mrs. Woolf, the wife of Victor Woolf, of Johannesburg, £4,981 12s. 8d., money lent. Mr. Close said that defendant was expected to arrive in Cape Town by that day's mail train, and intended to proceed to Europe, and not thereafter return to South Africa.

De Villiers, C.J., said the evidence, as shown on the affidavits, was not sufficient to justify the Court in granting the application, which would be dismissed.

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**CAPOEN AND CO. V. TABLE BAY HARBOUR BOARD.**

This was an application for the award of the arbitrators in respect of certain land owned by the applicants expropriated by the Harbour Board, to be made a rule of Court.—Mr. Innes, Q.C., appeared for the applicants.

Mr. Jones for the respondents consented.

The order was granted.

IN THE ESTATE OF THE LATE FRANCIS MURPHY.

Mr. Gardiner applied for a rule for the cancellation of a certain bond to be made absolute.

The application was granted.

IN THE MATTER OF THE MINORS GREEN.

Mr. Maskew applied for an order authorising the Master to pay out certain moneys to be invested on mortgage.

The order was granted.

IN THE MATTER OF THE MINORS READ.

Mr. Uington applied for leave to mortgage certain property, to pay for the erection of buildings thereon.

The Court granted an order in terms of the Master's report.

IN THE INSOLVENT ESTATE OF DE WET BROS.

Mr. McGregor on behalf of certain creditors applied for the appointment of Mr. Roos as provisional trustee, with power to liquidate the estate.

Mr. Molteno on behalf of other creditors applied for the appointment of Messrs. Roos and Chiappini as joint trustees.

At the meeting held for the election of trustees Roos and Chiappini had each received seven votes, but the votes of Roos represented a majority in value.

De Villiers, C.J.: In making the appointment of a provisional trustee the Court must have some regard to the wishes of the creditors. Chiappini has as large a number of votes as Roos. Then, however, Roos has more in value than Chiappini. But then Chiappini has a larger amount of unsecured assets. Under the circumstances the Court will appoint them jointly: but if either refuses to act jointly then the other is appointed alone. Costs to come out of the estate.

IN THE MATTER OF THE MINORS SMITH.

Mr. Gardiner applied for leave to mortgage certain property.

The order was granted as prayed.

IN THE MATTER OF THE ALLEGED LUNATIC, FREDERICK HENDRIK MULLER.

Mr. Joubert applied for the appointment of a curator ad litem.

The Court granted the application, and appointed Mr. J. G. Steyn to be curator ad

litem, the summons to be served on the lunatic as well as the curator, and to be returnable at the next Circuit Court at Swellendam.

IN THE ESTATE OF THE LATE PETER POTE.

Mr. Benjamin applied for leave to sell certain property to a firm of which one of the executors is a member.

The order was granted; the costs to come out of the estate.

CONSISTORY OF THE D.R. CHURCH, CRADOCK V. THE SUPERINTENDENT-GENERAL OF EDUCATION. { 1899. Feb. 1st.

School property—Trustees—Transfer.

*The Consistory of a Dutch Reformed Church in 1875 bought certain property and transferred it into the names of three trustees and established a public school thereon. No provision was made for the appointment of fresh trustees upon the demise of the three originally appointed. The Church subsequently spent large sums of money in improving the property but was unwilling to incur any further responsibility therewith. Upon an application by the Consistory for leave to transfer the property to the Committee of Management of the School, The Court appointed three trustees, to whom it gave power to transfer the property to the Committee of Management or to trustees appointed by them.*

This was an application on notice to the respondent that he would be required to show cause, if any, against the granting of the petition, and that if he opposed, costs would be claimed against him.

The petition set forth that an establishment known as the "Opvoedings Instituut" for the education of girls, and now commonly known as the Rocklands Seminary, was founded in Cradock in 1876 by the petitioners. That in 1876 the petitioners bought from the estate of one Du Plessis the property which now constitutes the said institute or seminary.

That as at the time of the purchase it was intended to use the said property for educational purposes it was deemed advisable to register it in the names of trustees, and not in the name of the Kerkraad, as is usually done with church property.

That in registering the property in the name of trustees there was no intention to divest the Church of its rights as owner, but it was merely done as a matter of convenience.

That on the 23rd January, 1877, the property was accordingly transferred to the trustees mentioned in the deed of transfer.

It was intended, the petitioners believed, to annex to this transfer conditions providing for the appointment of fresh trustees, and for regulating the disposal of the property and otherwise. Owing, apparently, to an oversight this was not done, and the property was registered unconditionally in the names of the trustees.

That, including the purchase price of the property amounting to £1,690, the Kerkraad has from time to time spent on the property in improving it, and otherwise, sums amounting to £6,000.

That owing to the success which has attended the educational work in the said institution the building accommodation has become altogether inadequate, and considerable additions to and alterations in the existing buildings are urgently required.

That the petitioners are not disposed to expend or render themselves liable for the further sums of money which may be required to be laid out on the property in order to keep pace with its development as a progressive school, and they are desirous of being relieved of all responsibility in connection with it.

That the "Opvoedings Instituut" is, and ever has, since the date of its purchase, been regarded by everyone in Cradock as the exclusive property of the Dutch Reformed Church at Cradock.

That it would be to the welfare of the institution and in the interest of education if the Kerkraad sold the property to the Committee of Management, and that it was desirable that authority should be given to the petitioners to sell the same.

That the congregation and the petitioners desire that the property should be sold for £5,000, and that of this sum £1,500 should be repaid to the Government, being the amount advanced on loan, and the balance, £3,500, be devoted to the permanent sustentation

funds of the Church for the support of ministers' stipends and the up-keep of the church.

That inasmuch as the deed of transfer of the property makes no provision for the appointment of fresh trustees, and the trustees named in the transfer are all dead, the Registrar of Deeds will not pass transfer of the property without an order of Court.

The prayer was for an order declaring the property in question to belong to the Kerkraad of the Dutch Reformed Church at Cradock, with authority to sell the same to the said Committee of Management for educational purposes, subject to the educational laws and regulations in force in this colony, for the sum of £5,000, and authorising the Registrar of Deeds to pass transfer of the property on a power of attorney, signed by the members for the time being of the said Kerkraad.

The Superintendent-General of Education opposed the application, mainly on the grounds that the money with which the property was originally purchased for school purposes was obtained by public subscriptions, and that the subscriptions were given by all for purely educational purposes.

The respondent alleged that the Educational Department never recognised the Kerkraad as having anything to do with the building, and that an offer made to the last surviving trustee to aid in purchasing from him would not have been made if it had been known that the intention was to divert the money to other than educational purposes.

Mr. Innes, Q.C., in support of the application: The trustees are dead and the Kerkraad does not wish to have the responsibility of the property and wish to sell it to the Committee of Management for £5,000. The respondent takes it that the property is public property, no matter how much the Kerkraad has spent upon it, and he says that as it is a public school it should be vested in three trustees according to the Public School Regulations. The Kerkraad says that it certainly is a public school but the property is not public property. Transfer was not given to the School Committee but to three trustees appointed by the Kerkraad. The money was raised by members of the Dutch Church congregation and not by the outside public. The only persons to succeed to the trustees are the Kerkraad. If the Court is against the present prayer of the petition I would apply for the appointment of three trustees nominated by the Church.

Mr. Sheil, Q. C., for the respondent: There is no precedent for such a declaration as is prayed for being granted on motion. There is nothing in the transfer deed to show that the Church had anything to do with the property. The application is really one for rectification of title, and that can only be granted where there has been *error, metus or dolus*. The executors of the trustees are really the persons who represent the school.

The Court made an order appointing the Rev. G. C. Reinecke, and Messrs. B. P. J. van Rensburg and M. J. du Plessis trustees of the property, with power to transfer it to the Committee of Management or to trustees nominated by them.

SCHOLTZ V. THE ASSISTANT RESIDENT MAGISTRATE OF CAPE TOWN AND DU PREEZ. { 1899.  
Feb. 1st.

This was an application for an order upon the first-named respondent to proceed with the hearing of an action in which the applicant was plaintiff and the second-named respondent was defendant.

The action was brought to recover the amount of a promissory note endorsed by the defendant. The defendant pleaded no consideration, and the Assistant Resident Magistrate thereupon postponed the hearing, from the 20th January until the 13th February.

The second-named respondent now filed an affidavit alleging that the note was an accommodation note.

Mr. Searle, Q.C. for the applicant: The application is in the nature of a mandamus upon the Magistrate to try the case in accordance with the rules of the Court. The plaintiff is entitled to have the case heard upon the day on which he sets it down. The Magistrate is bound to take evidence on oath and cannot act on the bare statement of the defendant's agent that there was no consideration for the note. Act 10 of 1856 Schedule B, Rules 14, 15 and 19.

[De Villiers, C.J.: If there were other contested cases standing over unheard would the Magistrate not be justified in postponing this case?]

There is no Rule of Court to that effect, and the Magistrate would be overriding Rule 19 if he did so. Such a course gives an opening to *malu fides* by the bare statement of an agent. It is admitted that no witnesses for the defence were present, and the case should have been treated as an undefended case. The Magistrate, being the creature of the

Statute, is bound by all the provisions of the Statute. *De Lima v. Breda* (1 M., p. 470); *Le Roux v. Hoffmeister* (8 Juta, p. 42).

Mr. Close for the respondent: It is admitted that witnesses were not present on the day of trial, but it is well known that in a contested case in the Magistrate's Court it is useless to subpoena witnesses for the day for which summons is issued owing to there being so many cases in arrear which have to be disposed of.

De Villiers, C.J.: The difficulty in the way of the applicant succeeding in this application is that the Court will effectually have to decide upon the case which the Magistrate still has to try. The evidence does not warrant us in holding that the defence raised is a *malu fide* defence and the application will therefore be refused. The Magistrate has set the case down for the 13th. After he has given his judgment it will be competent for either party to apply to this Court for the costs of this application. At present there will be no order.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Dempers & Van Ryneveld.]

REGINA V. GOEDEMAN. { 1899.  
Feb. 1st.

This was an appeal from the conviction of the appellant by the Resident Magistrate of Namaqualand on a charge of contravening section 26 of Act 28 of 1883.

The evidence showed that the appellant was in the habit of going to Springbokfontein for the purpose of getting brandy for people at Spektakel. He received the money from these people at the rate of 1s. 6d. a bottle, and 6d. for carriage; he paid for the brandy at the rate of 1s. 2d. a bottle. The Magistrate found him guilty and sentenced him to pay a fine of £6.

Mr. Benjamin, for the appellant, submitted that the appellant was merely the agent of the purchasers; he took the risk of broken bottles, and the amount which he received over and above the cost of the brandy to him was by way of insurance.

Mr. Ward, for the Crown, was not called upon.

De Villiers, C.J., said: Fortunately the terms of the Act are wide enough to embrace transactions of this kind, for if they did not the Liquor Licensing Act might become a dead letter altogether. If persons in the guise of agents could be allowed to deal in brandy as in this case there would be

no need to license any place at all. The evidence shows that this accused was in the habit of going to Springbokfontein for the purpose of getting brandy for people at Spektakel. The only thing that could be said in his favour was that he got the money beforehand, but that does not prove that he was not dealing in brandy, but only that he received payment in advance. He was getting 1s. 6d. a bottle, and in addition to that 6d. a bottle for carriage: but there was no limit to the amount which he could pay. He paid 10s. a dozen at the rate of 1s. 2d. a bottle. Clearly, his profit on the brandy was 3d. a bottle. In my opinion he dealt in this brandy; he disposed of the brandy to the people who employed him, and to all intents and purposes he sold the brandy within the terms of the Act. The appeal is dismissed.

Buchanan and Maasdorp, J. J., concurrd.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

CORNICK V. CONRADIE. { 1899.  
{ Feb. 1st.

This was an appeal from a decision of the Resident Magistrate of Montagu in an action in which the appellant claimed £7 9s. 3d. upon an account rendered for goods sold and delivered to the respondent. The respondent pleaded the general issue, and put in a counter-claim of £1 2s. 6d., money overpaid and balance of account for goods sold.

The appellant's account showed £1 14s. 3d. charged for certain dress-stuff, which he admitted had been returned; it also included two items of 11s. 6d. and £1 10s. for interest on the debt due, and it included a credit to the respondent of £1 14s. for two bags of beans sold by him to the appellant in May. The appellant produced his books in support of his account. The respondent alleged in evidence that he had paid the appellant £2 on account; also, that he had sold him six muids of beans in May, for four of which appellant had to pay 22s. 6d. each to go to account, and 20s. a muid for the two bags in cash. He had no receipt to show, but his evidence as to the beans was supported by his son. The appellant denied the respondent's allegations. The Magistrate gave judgment for the appellant for £5 7s. 9d., having deducted the items for interest. He allowed the respondent on the other hand £1 14s. 3d. and also £4 10s., the value of four bags of beans at 22s. 6d., giving judgment for him in the amount of £6 4s. 3d. He was not satisfied

with the evidence that £2 had been paid by the respondent, and he said that he did not think the two muids for which credit was given in the account formed part of the four muids referred to.

Mr. Howel Jones for the appellant: The Magistrate has given judgment for the respondent for an amount larger than he claimed in his counter-claim. He should, moreover, have placed more credibility in the appellant's books of account than in the respondent's bare statement of the transactions, especially as some of them were very old. In any case, the value of the two bags credited to the respondent in the account should have been deducted from the counter-claim as allowed.

There was no appearance for the respondent.

The Court dismissed the appeal.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

VAN ZALINGEN V. AEISA. { 1899.  
{ Feb. 2nd.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £250, with interest, and that the property specially hypothecated might be declared executable.

Granted.

### ILLIQUID ROLL.

CAPE TOWN TOWN COUNCIL V. PEDESEN.

Mr. Upington applied for judgment, under Rule 329D, for £246 13s. 3d., for arrear rates and cost of suit.

Granted.

CAPE TOWN TOWN COUNCIL V. F. E. FILLIS.

Mr. Upington applied for judgment, under Rule 329D, for £117 4s. 1d., for charges in respect of electric light and water, and costs of suit.

Granted.



**PETERSEN AND CO. V. POOLE AND ANOTHER.**

Mr. Buchanan applied for judgment, under Rule 329D, for £20 10s. 1d., for goods sold and delivered and printing.

Granted.

**STEER AND CO. V. ARISA.**

Mr. Buchanan applied for judgment, under Rule 329D, for £24 1s., for conveyancing fees and disbursements, and costs of suit.

Granted.

**VAN DER BYL AND CO. V. T. J. BOOS.**

Mr. De Waal applied for judgment, under Rule 329D, for £10 14s. 3d., goods sold and delivered, interest, and costs of suit.

Granted.

**VAN DER BYL AND CO. V. POOLE.**

Mr. Currey applied for judgment, under Rule 329D, for £31 11s. 4d., for goods sold and delivered, and costs.

Granted.

**WENDLANDT V. DUNCAN.**

Mr. Maskew applied for judgment, under Rule 329D, for £21, for rent, and costs of suit.

Granted.

**GENERAL MOTIONS.**

**IN THE MATTER OF THE FREE STATE PROSPECTING SYNDICATE, LIMITED.**

Mr. Close presented the final report of the liquidators, and applied for its confirmation and for an order that the company be dissolved.

The Court granted the order.

**AFRICAN BANKING CORPORATION V. MAYNIER.**

This was an application for the attachment of certain property to found jurisdiction, and leave to sue by edictal citation.

Mr. Currey appeared for the applicant.

The Court granted the order, personal service to be effected if possible, failing which one publication in the "Star," Johannesburg. The citation to be returnable on the 23rd February.

ROSS AND WILLIAMS V. HITE'S { 1899.  
EXECUTOR. { Feb. 2nd.  
" 9th.

Road - Right of way—General plan.

This was an application on notice for an interdict restraining the respondent from ob-

structing Mount-road leading from the main road at Rondebosch to the Newlands Avenue.

The applicant F. B. Ross filed an affidavit alleging:

That he was the registered owner of lots 42, 43 and 44 of the sub-divided estate Klein Westerford, situated in Mount-street, Rondebosch.

That respondent was owner of lots 1 and 2 of the same estate situated at the corner of Mount-street and the main road.

That Klein Westerford was divided in 1870 and the general plan showed a road 36 feet wide now called Mount-road running from the main road to the Newlands Avenue; this road was shown on the diagram of deponent's ground as well as on the respondent's diagrams.

That when he purchased his lots in April, 1896, there was a wood fence across Mount-road opposite respondent's property. This fence was broken down by some of the owners of ground in Mount-road on several occasions, and eventually the respondent or Mrs. Hite erected a galvanised iron fence across the road, completely obstructing it.

That Mount-road was the shortest way to and from the main road, and that in consequence of the road being closed deponent and others, resident in Mount-road, were put to great inconvenience, and were compelled to go round to Klipper-road to get to the main road, thereby lengthening the distance to Newlands Station, which was the nearest railway station by about 400 yards.

The applicant J. Williams, owner of lots 5, 6, 11 (situated in Mount-road), filed an affidavit alleging that when he purchased his property, about twelve months previously, there was a fence across the road in front of Hite's property; as Mrs. Hite refused to remove it, deponent and others pulled it down but it was re-erected, and finally a galvanised iron fence substituted.

That his house was near the main road, but in consequence of the obstruction he was compelled to go up Mount-road for some distance, and then along a cross road to Klipper-road and then down Klipper-road a distance of 500 or 600 yards.

G. W. Steytler, the respondent, deposed on affidavit that in the deed of transfer to the late John Hite from Mrs. W. P. E. Trower in 1886, the following condition was granted: "That the said John Hite and the future proprietors of the property transferred shall have the sole and exclusive right to a road

36 feet in width on the south side of lot No. 1, and 18 feet in width on the south-west side of lot No. 6."

That at the time Mrs. Trower was also owner of lots 7 and 10.

That about 1895, 1896 or 1897, Mrs. Trower sub-divided lots 7 and 10, and the property of the applicant Williams is a sub-division of those lots.

That the applicants have means of access to their properties by other roads, and the road now claimed is not one of necessity.

The affidavit of John Dyer set out that he had known the property since the sub-division of Klein Westerford, and that the road had never been used since then, but had been blocked at both ends, viz., at the corner of lot 1 and at the corner of lot 10, until Mrs. Trower sold lots 1 and 6 to Hite, when it was fenced in opposite to lots 1 and 6 as at present.

That no road ever existed; it was only a proposed road marked on the sub-divisional plan, and the lots on both sides of the said proposed road having been purchased by the late Mr. Jurgens, the same was never opened but was used by him as part of his property.

It was further proved that lots 1, 2, 6, 7 and 10, and also a lot marked "Cottage Lot" (on the opposite side of the road) were transferred in 1870 to Mrs. Jurgens.

The affidavit of Mrs. Trower, who had sold lots 1, 2 and 6 to Hite in 1886, set out that at the time of the sale she told Hite that Mount-street was a public road, and warned him that if people built higher up the road they would make him re-open it.

That she was present in 1879 when the property was put up to auction, and that the auctioneer then stated that the road now in question was a public road.

That for several years after that sale the road was used frequently, and particularly by carts bringing stone from a place above Newlands Avenue.

That she did not know how the clause referred to in the respondent's affidavit came to be inserted in the deed, as she had no power to grant such right and did not intend to convey it.

Other affidavits were put in on behalf of the applicants showing the user of the road by the public at various times.

Mr. Innes, Q.C., for the applicant: The lots of both the applicants adjoin the road in question, therefore there is a complete registration of the servitude. *Ohlsson's Cape Breweries v. Whitehead* (Juta 9, p. 85). It

was there laid down that the mere registration of the general plan did not give the owners of every lot the right to use the road, because he might possibly have other means of access, but the Court implied that in the case of adjacent lots the owner of one lot could not prevent the use of the road by the owner of another adjacent lot. The right of closing the road was granted by Mrs. Trower, but she could not grant what she had not got. In any case her act cannot affect Ross nor Williams as owner of No. 11. The road is reasonably necessary for convenient access to the main road.

Mr. Searle, Q.C., for the respondent, referred to *Ohlsson's Cape Breweries v. Whitehead*.

The Court granted the interdict with costs.

De Villiers, C.J. said: This case seems to me to fall within the terms of the judgment in the case of *Ohlsson's Cape Breweries v. Whitehead*, where it was held that where land has been subdivided into lots, and such lots have been sold and transferred, and in the general plans the sub-divisions and the different roads are laid down, the owner of each lot may use all such roads as may be reasonably necessary for access to or egress from the public roads of the district. The road which has been blocked up by the respondent in the present case is reasonably necessary for convenient access to and egress from a public road, and it is conveniently necessary for both applicants. One of the applicants, it is said, bought the land with the knowledge that the road was blocked, but the mere fact that he knew that does not deprive him of his rights. If those rights did exist, and if he subsequently discovered that by virtue of his title deeds he was entitled to use this road, the fact that he acknowledged the action of the respondent before in blocking up this road would not bar his remedy. In the judgment in *Ohlsson's* case it was pointed out that the cross road there in dispute was of no use in shortening the defendant's distance from any public road, unless he went over property which did not belong to him, and over which it was admitted he had no right of way. But the present case is a much stronger one, and there is such a strong *prima facie* case in favour of the road which is blocked up being a road which must be kept open that the Court grants the interdict, with leave, however, to the respondents to bring an action to set aside the interdict. But the present interdict must be granted with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorney, P. de Villiers.]

*Ex parte* MILNER.

Attorney — English Solicitor — Admission — Practice.

This was an application by Mark Percival Milner for his admission as an attorney of the Supreme Court.

The petition alleged that the applicant was admitted and still was at the time a solicitor of the Supreme Court of Judicature in England, as per certificate of admission annexed.

That he had not done or committed any act or thing which would cause his name to be struck off the rolls of the said Court.

That his name still remained on the rolls of the said Court, and on the rolls of the Incorporated Law Society of England.

That he was still entitled to practise in the Supreme Court in England, as per certificate annexed.

The affidavit of Abner Cohen, 35, Adderley-street, alleged that the applicant was well known to him in England, and that since the end of 1897 he had known him as a solicitor in practice in England, and had never heard of his being suspended for anything detrimental to his character.

Mr. Searle, Q.C., for the applicant: The applicant has not got the affidavit produced in the case of *Wiggins* (21st May, 1896), and apparently required by the Court, but *Wiggins* was not a practising solicitor at the time that the application was made. In the case of *McColla* (6 Sheil, p. 85) the Court said it would require some proof, that applicants for admission were still on the Roll of Solicitors in England. It is doubtful whether the Law Society will grant to a practising solicitor a certificate similar to that given to *Wiggins*.

[Buchanan, J.: The certificate does not say that the applicant has never been struck off, it is possible that he may have been re-admitted.]

Even if that were so, the Court would not go behind the re-admission. No definite rule has been laid down as to what documents have to be produced. The applicant took out this certificate for the express purpose of producing to this Court as proof: it could not be stamped unless he was entitled to practise.

Mr. Benjamin, for the Incorporated Law Society: The evidence produced by the applicant is not as strong as it would be if an affidavit were filed to the effect that he had never been struck off.

The Court ordered the application to stand over for evidence of identification by some person well known to the Court and also an affidavit to the effect that the applicant had never been struck off the Roll of Solicitors of the Supreme Court in England.

*Postea* (13th March).

Mr. Searle produced a certificate under the Solicitors Act, 1888, from the secretary to the Incorporated Law Society, Chancery Lane, to the effect that the applicant had not been struck off the Roll of Solicitors of the Supreme Court nor suspended from practice, and that no complaint of misconduct had been made against him.

Counsel produced further an affidavit from L. F. Zietsman, an attorney of the Court, identifying the applicant as a solicitor of the Supreme Court of Judicature and as a fit and proper person to be admitted in this Court; also the certificate of the secretary to the Colonial Law Society to the effect that proof had been produced to the society of the applicant's right to be admitted.

The order for the applicant's admission was thereupon made and the oaths ordered to be taken before the Resident Magistrate of Maclear.

[Applicant's Attorney; D. Tennant; Attorneys for the Incorporated Law Society, Messrs. Van Zyl & Buissinné.]

SONNENBERG V. PENNELL. } 1899.  
} Feb. 2nd.

Registration—Constitution Ordinance

—Salary or wages qualification

—*Bona fide* residence in electoral

division—Rectification of list

of voters—Fraud.

*A person cannot be registered as a voter in any electoral division under the salary or wages qualification, unless he actually resides in such division and bona fide intends continuing to reside there. A Civil Servant, residing and registered as a voter in Cape Town, served as a Volunteer in a campaign against certain natives in Vryburg, and while so serving, was registered along with hun-*

*dreds of other Volunteers from different parts of the country, as a voter in the Vryburg electoral division. No objection was taken either before the Field-cornet or before the Civil Commissioner, and only after an election for members of the House of Assembly an application was made to the Court by an unsuccessful candidate to expunge the voter's name from the Vryburg list of voters.*

*Held, that, although the respondent had been improperly registered as a voter in Vryburg, it was too late to apply to the Court for a rectification of the list of voters without alleging and proving fraud on the part of the respondent and the other Volunteers who were thus illegally registered.*

This was an application for an order expunging the respondent's name from the list of persons residing in the Electoral Division of Vryburg, whose names had been registered in 1897 as qualified to vote for members of Parliament.

The affidavit of V. A. van der Byl, the applicant's attorney, alleged as follows:

1. That the respondent is resident in the Electoral Division of Cape Town and registered there as a person qualified to vote in the election of members of Parliament on the qualification of salary and wages.

2. That he is similarly registered for the Electoral Division of Vryburg in Ward No. 12 of the Fiscal Division of Vryburg.

3. That he has not, to the best of deponent's knowledge and belief, been resident or earned salary or wages in the Electoral Division of Vryburg, although he was there temporarily in the year 1897 as a Volunteer for the purpose of quelling a native rebellion.

4. That the Electoral Division of Vryburg is one of the largest in the Colony, and is divided into twenty wards.

5. That the applicant carries on business in the village of Vryburg, and was unable to inspect the provisional lists of voters posted in all the other wards.

6. That respondent and other Volunteers were registered in the Langberg district, which is situate about 165 miles from Vryburg and the provisional list was, I am

informed, posted up within the sphere of military operations which is nine hours' drive away from the nearest point of civilisation, so that applicant, although he took a keen interest in the registration of voters for the division of Vryburg, was unaware that respondent's name had been placed on the provisional lists of voters until the list had become final, and therefore was precluded from and unable to object to respondent's name being retained on the list of voters in manner provided in Act 9 of 1892.

7. That respondent had not the necessary qualification to entitle him to be registered as a voter for the electoral division of Vryburg, and applicant feels seriously grieved and prejudiced by reason of respondent having been wrongfully and unlawfully placed upon the list of registered voters for the said division of Vryburg, and is desirous of having his name expunged therefrom.

8. That applicant has therefore instructed me as his attorney to make the present application.

The applicant filed an affidavit corroborating and confirming the above allegations.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Graham, Q.C., for the respondent.

Mr. Searle: There are two points in issue in this application: (1) Has the respondent's name been properly placed upon the list of voters? (2) If it has, can it now be struck off?

There is nothing in the Constitution Ordinance which admits double registration on a wages or salary qualification. Act 14 of 1887, section 5, requires that the residence of the claimant should be mentioned; he must be residing in the place where he claims to be registered. The respondent was not in actual occupation of premises in the Vryburg district, nor was he earning salary or wages there within the meaning of the Ordinance. Act 9 of 1892 shows that the residence must be more than a temporary residence; the intention is that salary must be earned in the district and residence must be there also. Volunteers cannot be said to be residing in a place whilst engaged there upon temporary service. Nor can it be said that Volunteers who are engaged in quelling a native rebellion in a certain district are earning salary or wages there: their salary or wages is earned in the place where they ordinarily reside—in this instance Cape Town.

[De Villiers, C.J., referred to section 2 of the Constitution Ordinance.]

But see Act 9 of 1892, sections 10, 15. We could not appear before the Civil Commissioner because we did not raise an objection in proper form and proper time; but the Civil Commissioner did not revise the list according to law. *Moll v. Civil Commissioner of the Paarl* (7 Sheil, p. 454).

[Maasdorp, J.: Do you contend that if the Civil Commissioner, after full argument, had held that in his opinion the claimant should be put upon the roll, you could ask to have the roll upset?]

That is my contention. This is a stronger case than *Moll's* case because there the Civil Commissioner had given a final decision. There is nothing in the law to oust the power of the Supreme Court to give relief to an injured person even after the names have been placed upon the list. This is a case of gross irregularity and therefore the Court should interfere. The applicant could not examine the list of voters because it was posted up inside the military lines, and he had therefore no opportunity of objecting to the respondent's name, but the respondent cannot be prejudiced through that not having been done. This matter was referred to in *Crowe v. Botha* (8 Sheil, p. 424) though the judgment turned upon the right to vote when registered.

[Buchanan, J., referred to *Murray and Another v. The Civil Commissioner of Cape Town* (7 Sheil, p. 487.)]

That case was decided upon the special provisions of Act 14 of 1874.

Mr. Graham: The list of voters is conclusive proof of the qualification of the persons thereon. Constitution Ordinance, section 51, *Crowe v. Botha*. The Court will only go behind the register in cases of fraud. There is no suggestion of fraud in this case. The respondent was perfectly entitled to be registered in the Vryburg district. Section 8 of the Constitution Ordinance does not require that the person claiming by virtue of a wages qualification should have been resident in the district for any particular length of time. Section 11 speaks of persons "resident" in the Field-cornetcy. Section 14 speaks of "inhabitants."

[De Villiers, C.J.: Supposing that the section had spread, and the Volunteers removed from one place to another, could they be registered in each place?]

If the campaign had been drawn out for a very long time, clearly they would be entitled to be registered in some district in which they were engaged. It is possible that the respondent is not properly registered in

Cape Town because of his not being resident there. But his qualification in Vryburg was good. In any case, the list once framed is the list of voters until a fresh registration. Act 14 of 1887, section 13. If persons do not take objection at the proper time they lose their right. There is no appeal from a registering officer upon a point of law, *Botha v. Garcia* (6 Juta, p. 86).

[De Villiers, C.J.: That was under the former Act.]

In *Pienaar v. Godden* (10 Juta, p. 132), the Court refused to review proceedings upon a mistake of law: there also there was no appeal from the Magistrate's decision.

Mr. Searle: In *Murray's* case the specific procedure laid down, by which alone a person could be put upon the roll, had not been followed. There is nothing in Act 14 of 1887 which bars an appeal to this Court.

Mr. Graham: Act 9 of 1892, section 25 says that the Civil Commissioner shall "finally determine all questions brought before him."

De Villiers, C.J., said: It is quite clear that the respondent had no right to be registered as a voter for the electoral division of Vryburg. He was registered in Cape Town on the qualification of salary or wages. According to the affidavit of the applicant, which has not been denied, the respondent was not at that time, nor has he at any time, to the best of the deponent's belief, been a resident or earning salary or wages in the electoral division of Vryburg. He was there temporarily in 1897 as a Volunteer for the purpose of quelling a native rebellion. The 8th section of the Constitution Ordinance specifies the qualification for a voter, and enacts that every male person not legally disqualified from voting shall to be entitled to vote have occupied a house or shop (or any other building of the value of £75 sterling) for the twelve months next before the day upon which any registration of voters shall take place, or he shall have been for the space of twelve months *bona fide* in receipt of a salary or wages at and after the rate of not less than £50 by the year. It may perhaps be a question whether the residence should not also be for the space of twelve months, but the section does not express this, nor does the section speak of residence. But even if there had been no other section which required residence, I am quite satisfied that the intention of the Legislature was that any such person occupying a building to the value of £75 should be a person *bona fide*

resident in that particular district. But it does not so much matter how long the residence has been, provided there is a *bona fide* intention permanently to reside in a place. Take, for instance, the case of a person earning a salary in Cape Town. At the time of registration, he goes, we will say, to the Paarl, with the intention of permanently settling at the Paarl. I take it that the Legislature intended that such a person, although he had not resided twelve months at the Paarl, if it were his *bona-fide* intention to reside there, should be qualified to be registered there. But residence, in my opinion, is required in any case. If there were any doubt upon the point, I need only refer to the 11th section, which refers to the Field-cornet's duty in making up the list, and which provides that he shall make out or cause to be made out for each field-cornetcy in each electoral division a list of all persons entitled to vote resident within such field-cornetcy. It is impossible, in my opinion, to hold that the respondent was resident at Vryburg at the time when this registration took place. If this registration could lawfully be done, there would have been nothing to prevent these Volunteers from being registered in other districts of the country. The rebellion might have spread from Griqualand West to Mafeking, and indeed to a great many other districts, and these Volunteers, who were moving from place to place for the purpose of quelling the rebellion, would, if Mr. Graham's contention is correct, have been entitled to register in each district to which they were sent. I cannot suppose that the Legislature ever intended that the electoral districts of the country should be swamped by Volunteers sent about the country. In this case the Volunteers were engaged in quelling a rebellion, but in another case they might have been engaged in manœuvres, and if they had been sent about the country manœuvring they could have been registered in all the electoral districts which they visited, if the contention for the respondent were sustained. I cannot suppose that the Legislature ever intended that such a course should be followed. I am, therefore, clearly of opinion that *bona-fide* residence in a district is necessary for the purposes of voting. There is no *bona-fide* residence in the present case. The defendant was qualified to vote for Cape Town, and the very fact that he was a Cape Town Volunteer would show that his permanent resi-

dence was in Cape Town, because persons do not generally join the Volunteer Forces except in the districts in which they permanently reside. The defendant earned his wages qualification here, he resided here, he joined the Volunteers here, and he was only temporarily absent, according to the affidavit, in Vryburg, for the purpose of quelling a rebellion which occurred there. Then comes the next and more important matter, the question whether the Court would now be justified in rectifying the register by striking out the name of the respondent. There is some force in the argument adduced by Mr. Searle that in the case of general irregularity there ought to be some power in the Courts for redress. But the great difficulty which I feel in this case arises from the fact that there has been such a long delay on the part of the applicant in making his application. There is the fact also that ample opportunities are given by law to persons to object before the register is final. It is urged for the applicant that he was not aware of what had taken place at the seat of war, away from civilisation. But still the applicant could have ascertained whose names were on the list before the Civil Commissioner finally decided upon the list; but even then it, seems, no interest was taken in the matter, the list was allowed to pass, and no objection was raised. By the time the Civil Commissioner had to deal with the matter at all events, the applicant or someone else could have seen that hundreds of Volunteers and others had been improperly registered in the district. No objection was taken. Even then it might be a question after the list had been made up whether objection might not have been raised, because at all events before the next election, the applicant must have known of the irregularity, and yet no application was made to the Court to rectify it, and now after this election has taken place application is made to the Court. That is one difficulty which is in the way of the application. But there is another difficulty. After all if the Court were to interfere in a case of this kind it would mean practically that there had been fraud. That is not the ground upon which this application is based. The Court has always held that fraud should not only be proved, but it should be clearly alleged, so that the parties will come prepared to meet the particular charge made against them. That charge is not clearly laid in the present case, and I think that if it had been clearly

held, not only the respondent, but the other Volunteers should have been made parties to it, and even the registering officer ought to have been made a party, because I cannot see by what process of reasoning the registering officer has satisfied himself that these persons do possess the requisite qualification. The fifth section of Act 14 of 1887 provides that "no person's name shall be so inserted in the said list unless the registering officer is satisfied that such person possesses the necessary qualifications to vote upon an election." How the registering officer of this particular place can have satisfied himself that a number of Volunteers engaged in quelling a rebellion had the necessary qualifications, I confess I do not understand, and if the matter had been opened up, if it had been sought to have this registration set aside, then it might also have been necessary to make this registering officer a party also. Under all the circumstances of the case, I see the greatest difficulty in the way of the applicant now succeeding. The application must therefore be refused with costs.

Buchanan, J., said: Two questions are raised by this application, both of which are of some importance. In the first place the right of the respondent to be registered as a voter for the division of Vryburg is denied. In my opinion, where as in this case the claim to vote is based on a salary qualification, no particular length of residence in the district is necessary, nor is it necessary that the salary or wages should all be earned in the district, but it is necessary that there should be residence. A mere visit or being in the district for a temporary purpose is not sufficient. If, then, we had now to decide on the respondent's right to be registered our decision would be adverse to him. But the second and more important question is, should the Court interfere under the circumstances which have been disclosed? I am of opinion it ought not. The duty is imposed on the Field-cornet to prepare the voters' roll, putting thereon the names of such persons as are qualified to be registered. He has a discretion vested in him in the matter. In the exercise of that discretion he has placed respondent's name on the roll, and there is not even a suggestion that in so doing the Field-cornet did not act with *bona fides*. The law further makes provision for objections being made to the list as prepared by the Field-cornet, and for having such objections duly adjudicated upon. These provisions have not been

acted upon by the applicant, but he now wishes the Court to go behind the Statute, and to decide in the first instance upon an objection now taken for the first time. Following the principle which underlies the decision of this Court in *Murray's case*, the Court ought not to assist the applicant, who has failed to avail himself of the remedy given by the several statutes regulating elections. This is altogether apart from the question in how far the voters' roll is final and conclusive. I am not prepared to say that in no case and under no circumstances would the Court interfere, but this certainly is not such a case. I concur in holding that this application must be dismissed, with costs.

Maasdorp, J., said: I also concur. The law has provided certain machinery and certain steps to be taken in cases of this kind, and unless these steps are taken there is nothing for the Civil Commissioner to decide. These steps were not taken, and even if they had been, I am inclined to think there was no appeal from the Civil Commissioner. This Court is not a Revising Court, and I do not think that the matter should now be brought before it. As to the necessity of residence, I think that unless there is a *bona-fide* residence, a claimant is not entitled to registration.

[Applicant's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

#### MAGISTRATES' COURT CASES REVIEWED.

De Villiers, C.J., said: Two cases have come before me from the Resident Magistrate of Riversdale, where twelve prisoners were each charged with theft under the ordinary jurisdiction, and sentenced to six months' imprisonment. That being beyond the jurisdiction, the sentences must be reduced to three months each.

Buchanan, J., said: A similar case has come before me from the Resident Magistrate of Bredasdorp, where the prisoner was charged with theft by means of false pretences. In that case also the sentence should be reduced from six to three months.

CAPE TOWN TOWN COUNCIL } 1899.  
V. SCOTT. { Feb. 2nd.

This was an application that a rule *nisi* should be made absolute restraining the respondent from proceeding with the erection of certain buildings pending such legal proceedings as the applicant Council should

be advised to institute forthwith. The petition on which the rule was granted alleged that the respondent had sent in plans for the erection of the buildings in question, but that the Council had returned them unapproved with a letter of objection. Thereupon the respondent, without having obtained the approval of the Council in terms of Regulation No. 112, proceeded with the erection of the buildings.

Mr. Graham, Q.C., appeared for the applicants.

Mr. Searle, Q.C., for the respondent, consented to the rule being made absolute.

The rule was made absolute.

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## SUPREME COURT

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[Before the Hon. Mr. Justice BUCHANAN  
and the Hon. Mr. Justice MAASDORP]

KELLOW V. KELLOW. { 1899.  
Feb. 3rd.

This was an action for a decree of divorce by reason of the alleged adultery of the respondent.

Mr. Close appeared for the plaintiff; the defendant was in default.

Francis Henry le Sueur, a clerk in the Colonial Office, produced a copy of the entry in the marriage register of the marriage of the parties in March, 1891.

William Charles Ernest Kellow, the plaintiff, said he was an accountant, and resided at Kimberley. He was married to defendant in March, 1890, at St. Alban's, Kimberley. Defendant's maiden name was Barker, and she was also known as Nellie. Four children were born of the marriage, but only one child, aged 6½ years, was living. Plaintiff and his wife lived very unhappily generally. They differed in disposition, and plaintiff found it impossible to get along with the defendant. Defendant had a very bad temper, which plaintiff tried to overcome, but failed to do so. At last things became so bad that in July, 1897, a notarial deed of separation was executed. Under that deed plaintiff paid defendant £15 a month, and agreed to defray all expenses incurred by the illness of defendant and the child. Plaintiff did not cohabit with defendant after the

first week in June. He paid the allowance monthly in advance. In January, 1898, he sent the money for February, when he was told that she had left Rouwkoop House, Rondebosch, where she had been residing since the separation. He supposed that the child was staying with her. Just before plaintiff sent the last allowance to defendant he received a letter from her asking him to send the money early. Nothing was said in the letter about leaving the Colony, but defendant spoke of leaving the house at which she was residing. Subsequently plaintiff received a communication from England, from a friend of his, a Mr. Smart, as a result of which the present proceedings were instituted. The letter produced was in his wife's handwriting, and was addressed to Messrs. Coghlan & Coghlan, Kimberley, plaintiff's attorneys. In that letter she stated that she had gone away, and did not intend to return. "He must please look after little G. (meaning the child George), and plaintiff had nothing to pay. Defendant hated plaintiff, who could do what he liked, as she would not return." The letter was dated February 18, 1898. Subsequently plaintiff sent a telegram informing defendant that proceedings for divorce would be instituted. After defendant left plaintiff she did not inform him that she was pregnant, nor did she ever tell him that since the parties had separated she had given birth to a still-born child.

By the Court: Plaintiff knew nothing about his wife's misconduct in Cape Town. He found that she had left. He visited Cape Town for the purpose of taking charge of the child. Defendant left the child at Mrs. Fry's house, Rondebosch. He had not seen defendant since July, 1897. In August, 1896, he lived with his wife, with two children, one of whom had since died, at the George Inn, Shoreham, Kent. He left England for the Colony before defendant, and when she arrived here he was in Kimberley.

Evidence taken on commission stated that in August, 1896, plaintiff and defendant resided at the George Inn, Shoreham, and gave the names of Mr. and Mrs. Kellow. In February, 1898, defendant again stayed at the George, and said her name was Mrs. Carr. When asked why she had changed her name, she said she did not want her husband to know that she was expecting a confinement, as her husband was not the father. She subsequently gave birth to a still-born child. A gentleman named Carstens or Carstairs visited the defendant,



Other evidence taken on commission stated that defendant sometimes got a little muddled about her name.

The Court granted a decree of divorce, plaintiff to have custody of the surviving child of the marriage.

[Plaintiff's Attorney, Gus Trollip.]

HODGES AND CO. V. CARDINAL. { 1899.  
Feb. 8rd.

This was an action in which the plaintiffs claimed from the defendant, a law agent residing in Cape Town, an account supported by vouchers of all moneys received and expended by him, and of all securities received by him on their behalf, and delivery of all documents, securities and papers received by him on their behalf; also a debate of the said account, and payment of such amount as might be found due.

Mr. McGregor appeared for the plaintiffs.

There was no appearance for the defendant.

The Court, without hearing evidence, ordered the defendant to furnish an account on or before the 13th instant, to deliver plaintiff his papers, and pay costs.

*Postea.*

H. P. Sonnenberg, plaintiff's attorney, sworn, stated that after defendant had rendered an account he debated the said account with him and found £23 10s. to be due to plaintiffs. Defendant had agreed to this amount.

Judgment was given accordingly for £23 10s. with costs.

[Plaintiffs' Attorneys, Messrs. Minchin & Sonnenberg.]

WATKINS V. BACON. { 1899.  
Feb. 8rd.

This was an appeal from a decision of the R.M. of Wynberg in an action in which the plaintiff claimed £7 10s. for rent due by the defendant. The defendant pleaded payment before the issue of summons, and he based his defence upon an alleged payment to the plaintiff's wife as the duly authorised agent of the plaintiff.

The Magistrate gave judgment for the amount claimed, holding that no implied agency had been proved, although he found that on previous occasions defendant had paid the rent to plaintiff's wife; she had never granted receipts however, these having been sent by the plaintiff himself; he also found that the rent was sometimes paid at the plaintiff's office in Cape Town.

The defendant appealed.

Mr. Buchanan appeared for the appellant. Mr. Ward for the respondent.

The Court dismissed the appeal.

Buchanan, J. said: In this case the appellant was sued in the Resident Magistrate's Court, Wynberg, for certain overdue rent. This rent was several times demanded, apparently in writing. Two letters were put in. In the first letter appellant said the application for rent would have his attention in the early part of next week, but no payment was made. On the 8th of August the appellant again wrote saying that he would pay the money in eight days. Apparently on the day after this letter was received the respondent called on the appellant and demanded the rent. He was met in a way which was not very satisfactory to him, and he was told that there was no money in the house, and no money was paid. The first thing on the following Monday morning respondent went to his agent, and took out a summons against the appellant. The appellant thereupon went to the plaintiff's wife and paid her the rent. The wife then said that she had no authority to receive the rent, but she received it. Her husband was not then at home, but when he returned the money was returned to the appellant. Counsel for the appellant has argued that the wife was the duly authorised agent of the respondent, but the Magistrate found that she was not, and the wife's evidence supported that finding. That is, of course, a question of fact, but there is another fatal objection to the appellant. Payment must not only have been made before the issue of the summons, but he must have from that time and away been prepared to pay, and the tender must be open to acceptance. In this case it is not alleged that the appellant was prepared to pay before the issue of the summons. There might have been a tender, but there was no readiness on the part of the appellant to pay the money before the summons was issued. Under these circumstances the appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Innes & Hutton; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

GREATHEAD V. VIKSEBOXSE. { 1899.  
Feb. 8rd.

This was an appeal from a judgment of the Resident Magistrate of the Cape in an action in which the plaintiff claimed payment of the sum of £220 upon a promissory

note, the amount being the balance of the purchase price of 100,000 bricks. The broker's note of the sale was as follows: "Sold to Mr. W. Greathead, 101,000 bricks or thereby, now lying on ground at the foot of Camberwell-road, Sea Point, for the sum of £215. The buyer to remove them off the seller's ground within two months from this date. The seller to intimate to the buyer when Mr. Pedersen will remove those he has bought, and the seller to have a man on the ground to give delivery to Mr. Pedersen, who shall not have the right to select, but to take his 20,000 as they come, so that proportionately he shall take his share of the broken bricks."

The defendant pleaded failure of consideration, and claimed in reconvention for £127 on the ground that only 50,000 bricks had been delivered, and £5 for damages sustained by reason of delay in his building operations caused by the non-delivery of the proper number.

The Magistrate gave judgment for the plaintiff for the amount of the note. The defendant appealed.

Mr. Benjamin appeared for the appellant.

Mr. Graham, Q.C., for the respondent.

The Court dismissed the appeal.

Buchanan, J., said: This was an action in the Court below to recover the sum of £220 on a promissory note given by the defendant to the plaintiff. The action was brought in the Magistrate's Court, Cape Town, and the Magistrate gave judgment for the amount of the note. The defence set up was, first, the plea of general issue, and secondly, failure of consideration. The onus, therefore, was on the defendant to prove his plea. The argument for the appellant is that there has been partial failure of consideration. This note was given for certain bricks which were lying on the ground at the foot of Camberwell-road. They were apparently carted from the kiln to the spot, and they were on the ground for some time. The defendant said that he had had a full opportunity of inspecting the bricks, both with regard to their quantity and quality, and he employed a broker to buy them, and this broker bought them for defendant as they were lying there, 100,000 bricks or thereby. When the bricks were carted to the spot they amounted to within 750 short of the number mentioned in the note, which would be sufficient compliance, as the note said 100,000 bricks or thereby, as the bricks were not sold for so much per 1,000,

but for £245 for the lump lot. It is true that a couple of months afterwards, when he began using the bricks, the defendant found that there was a greater quantity of waste than he anticipated, but he took that risk upon himself. This was not a contract of sale of a certain number of bricks, but a contract of sale of certain specific bricks as they lay on the ground. Under the circumstances, the appeal would be dismissed, with costs.

[Appellant's Attorneys, Messrs. Innes & Hutton; Respondent's Attorneys, Messrs. Dampers & Van Ryneveld.]

WILD V. LILIENTHAL BROTHERS. { 1899.  
Feb. 3rd.

This was an appeal from a judgment of the Resident Magistrate of Hope Town in an action in which the plaintiffs the present respondents, sued the appellant upon a promissory note for £109. The note was signed by the appellant in favour of J. C. de Villiers, dated 1st April, 1896, and payable in twelve months afterwards. The note had been endorsed by De Villiers to the respondent. The respondent denied his liability, pleading payment to De Villiers personally upon the 4th September, 1897. He alleged that De Villiers did not return the promissory note, but said that it was lost and gave him a receipt for the £109. This receipt he now produced, and it purported to be given in acknowledgment of payment of the amount due upon the note in question. The Magistrate gave judgment for the plaintiffs.

The defendant appealed.

Mr. Close for the appellant: De Villiers is insolvent and cannot repay the amount. Either appellant or respondents must bear the loss. Appellant paid the amount on the allegation that the note was lost. No notice was given to him of the endorsement to the respondent. There has been no negligence on the part of the appellant. *Byles on Bills of Exchange* (15th ed., p. 294); *Chitty on Bills of Exchange* (11th ed., p. 276). It is the holder's duty to give notice that he is such, and his failure to do so is negligence.

Mr. Innes, Q.C., for the respondent was not called upon.

The Court dismissed the appeal, with costs.

Buchanan, J., said: No doubt one would sympathise with the appellant in this case. He was certainly deceived by De Villiers, but there is nothing with regard to De Villiers' action before the Court. The appellant has his own negligence to blame for losing this

money. A promissory note is a negotiable document, and is made payable to the payee, or order. In the present case the note was not produced to the appellant, who, when told that it was lost, paid De Villiers the money. Appellant is now responsible for the sum to the plaintiffs. The appeal must be dismissed with costs.

[Appellants' Attorney, Gus. Trollip; Respondent's Attorney, C. W. Herold.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA V. JACOBS. { 1899.  
Feb. 6th.

Mr. Justice Buchanan said that this case had come before him as judge of the week. The prisoner was charged with contravening the Masters and Servants Act, in that he committed a wilful breach of duty tending to the immediate loss of ten sheep placed in his charge. The prisoner pleaded not guilty, but he was found guilty, and sentenced to pay compensation in the sum of £20. This was a criminal prosecution, and the crime alleged consisted in committing an act tending to the immediate loss of sheep. There was no evidence at all as to neglect or the commission of any criminal act, but there was this evidence, that when the accused entered into the service of the prosecutor the latter had fully explained to him that he would have to pay for the loss of the sheep or provide other sheep. A special contract on this ground was entered into, and on this special contract, without any evidence of a criminal act, the accused was found guilty. The conviction must be quashed for want of evidence.

SPECKLEY V. SPECKLEY. { 1899.  
Feb. 6th.  
" 7th.

This was an action for restitution of conjugal rights, failing which a decree of divorce, with the custody of the children of her marriage, and costs of suit.

Mr. Benjamin appeared for the plaintiff. Defendant was in default.

Reginald Douglas Herold Barry produced the register of the marriage of Thomas Parkinson Spreckley and Sarah Magdalena Morkel.

Plaintiff said she was married to defendant in community of property in 1886. After their marriage they resided at Simon's Town for five years, after which they resided at Cape Town. At Simon's Town defendant was in the employ of Messrs. E. K. Green & Co., and in Cape Town he was in the employ of Mr. Ohlsson. He lived with her until 1894, when he left, and since 1894 she had not seen him. She did not know why defendant left her. He left her without a moment's notice. She last heard from defendant from Johannesburg. She had constantly written to him asking him to support her, but he always replied that he was unable to do so. She last heard from him three years ago. She destroyed his letters in May last, as she did not know that they would be required. There were three children of the marriage, all living.

De Villiers, C.J., said that as an error had been made in the copy of the citation in the Natal newspaper as to the date of the trial, February 7 instead of February 1, judgment would be delivered on the following day.

*Postea* (February 7th).

The Court granted an order on the defendant to return to plaintiff on or before March 1, or show cause on March 12 why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Van Zyl & Bulassinè.]

MARSHALL V. AFRICAN BANK- } 1899.  
ING CORPORATION, LIM- } Feb. 6th.  
TED.

Company—Promoter—Contract with Bankers—Remoteness of Damages.

*The plaintiff alleged that being about to promote a company he entered into an agreement with the defendants, a banking corporation, whereby they undertook to distribute copies of the prospectus and forms of applications for shares through their various offices. After the formation and incorporation of the company the de-*

*defendant refused to distribute the said forms and applications or to receive applications for shares by the public and deposit money in connection therewith. In consequence of an insufficiency of subscriptions coming in the company did not proceed to allotment.*

*Held, that the plaintiff was not entitled to recover from the defendants as damages the loss which he sustained owing to the company being unable to carry out its purposes.*

This was an action for the recovery of £25,000, damages for breach of contract.

Mr. Graham, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff, and Mr. McGregor for the defendants.

Mr. Graham applied for leave to make certain amendments in the declaration.

Mr. McGregor objected.

After argument, the amendments were allowed, on the understanding that the defendants should not be prejudiced.

The declaration as amended was in the following terms:

1. The plaintiff is an engineer residing at Cape Town; the defendant is a duly incorporated company, carrying on business in the Colony and elsewhere as bankers under the name of the African Banking Corporation (Ltd.), having its head office in Cape Town, and branches in various towns in the Colony and in the South African Republic.

2. In or about the month of April, 1898, the plaintiff entered into certain negotiations for the promotion and starting of a duly incorporated company for the purpose of carrying on the business of butchers, both wholesale and retail, and importers and dealers in food-stuffs generally, and for the further purposes of erecting and working cold storage chambers in connection therewith, and of taking over from plaintiff, who was to be a director of the said company, certain options of contract obtained from sundry persons in relation to the aforesaid purposes.

3. On or about the 15th April, 1898, it was agreed between the plaintiff and one Allan Wright, acting for and on behalf of the defendant corporation, that in consideration of the plaintiff presently appointing the defendant corporation as the bankers of the aforesaid company, and getting the com-

pany when duly incorporated to confirm the said appointment, the defendant corporation would receive applications by the public for shares in the aforesaid company, and also the deposit money payable on such applications, at the head office of the corporation in Cape Town, and also at the various branch offices throughout the Colony and the South African Republic.

4. The defendant corporation further agreed and undertook to distribute copies of the prospectus of the company and forms of application for shares when provided by the plaintiff through the head office and the various branch offices as before mentioned.

5. Thereafter on the 18th April, 1898, a company called the S.A. Food Supply and Cold Storage Co. (Ltd.) was duly incorporated under the provisions of Act 25 of 1892, for the purposes in paragraph 2 hereof mentioned, and the defendant corporation was subsequently duly appointed bankers of the said company through the instrumentality of the plaintiff.

6. A prospectus was, after being approved of by the defendant corporation, issued by the plaintiff on the 29th April, 1898, and two thousand copies thereof, together with forms and application for shares, were furnished the defendant corporation on the following day for distribution as aforesaid.

7. The defendant corporation wrongfully, unlawfully, and in breach of contract in paragraphs 3 and 4 hereof mentioned, not only failed and neglected to send the copies of the prospectus and the application forms to its various branches, and to distribute them through its head office and the various branches, but also refused to accept and receive applications by the public for shares and deposit money in connection therewith, when tendered to them and further advised many applicants not to take shares in the said company.

8. In consequence of the aforesaid wrongful conduct and breach of contract of defendant, the aforementioned company was prevented from proceeding to allotment of shares, and from otherwise being able to carry out the purposes for which it was started as in paragraph 2 hereof mentioned.

9. By reason of the premises the plaintiff has lost the benefit of certain contracts which he, to the knowledge of defendant had made with the said company by virtue of which the company had agreed to take over from the plaintiff all his rights in and to certain butchers' businesses, abattoirs, paddocks, yards, and shops in Cape Town

and the Cape Division, and also certain agreements for the supply of meat in consideration of the payment to plaintiff of the sum of £10,000 in cash and £15,000 in shares, or wholly in cash, at the option of the company. The plaintiff likewise lost the benefit of the money expended by him, and of his services in or about the promotion, formation, and starting of the said company.

10. By reason of the aforesaid wrongful and unlawful conduct and breach of contract by defendant corporation, the plaintiff has by reason of the premises and otherwise suffered damages in the sum of £25,000.

Wherefore the plaintiff claims :

(a) Payment of the sum of £25,000 as and for damages as aforesaid.

(b) Alternative relief.

(c) Costs of suit.

The defendant corporation pleaded as follows :

1. It admits the allegations in paragraph 1.

2. It has no knowledge of the allegations in paragraphs 2 and 5, and refers this honourable Court to such proof thereof as the plaintiff may adduce.

3. With reference to paragraphs 3 and 4, it says : (a) On or about the 28th April, 1898, one Arthur Bell, the secretary of the company referred to in the declaration, approached the defendant corporation through its manager, one Allan Wright, and submitted certain printed copies of the prospectus of the company, wherein it was indicated as such company's bankers. The said Wright, so acting thereupon, agreed to allow the bank's name to remain on the said prospectus, but in his said capacity refused formally to act for the company until a proper account was opened with the defendant corporation, and certain formalities, not material to be here set out, had been complied with. The said account was not, and has not been, opened, nor were the said formalities ever complied with, nor has the defendant ever agreed to act as aforesaid. (b) The defendant corporation did nevertheless for the convenience of the company, at Cape Town and at other branches, accept deposits for shares. Save as above, the defendant corporation denies all the allegations in paragraph 3 and 4.

4. With reference to paragraph 6, the defendant admits that the copies of forms therein mentioned were furnished to it, as alleged, but craves leave to refer to the matters in the preceding paragraph pleaded as to the circumstances wherein those

copies of forms were received. The defendant denies that it approves of the prospectus.

5. With reference to paragraph 7, the defendant craves leave to refer to clause (b) of paragraph 3. Save as above, it denies the allegations therein, and specially denies that it acted wrongfully, unlawfully, or in breach of contract.

6. The defendant denies the allegations in paragraph 8 (this was paragraph 10 in the declaration as amended; paragraphs 8 and 9, being fresh paragraphs put in in court, were not pleaded to).

The replication was general, except that it admitted that in some few instances the defendant corporation did accept certain deposits for shares at the head office in Cape Town, but said that this was in accordance with the agreement in the declaration referred to.

William Marshall, the plaintiff, said he had resided in the Colony for twelve months. In April, 1898, he saw Mr. Wright, the manager of the African Banking Corporation. Witness asked him if he would act as banker for a company which he proposed to form for the selling of meat and other stuff, as there was a very good opening for such a company. The manager said he would do so. Witness pointed out that he would get all the Malay trade. Mr. Wright then asked that a prospectus of the company should be sent to him before it was published in the papers. Before witness could see Mr. Wright again witness was laid up with an attack of gout, and he sent the prospectus to Mr. Wright by the acting secretary to the company. The prospectus said that applications for shares could be made to the African Banking Corporation. The company was registered on April 18. Subsequently witness again saw Mr. Wright, sometime in the beginning of May. Applications were to be made from April 29 until May 16, but the time was afterwards extended until May 31, in order to get in applications from the country. When he saw Mr. Wright on the second occasion, he told him he had heard that branches of the bank had declined to receive applications for shares. Mr. Wright replied, "It's untrue, we are all desirous of helping you." At this time Mr. Jolly had agreed to take 10,000 shares in the company if he were made a director of the company. Witness had verbal applications for shares from Mr. Graham and

others. Several Malays subsequently complained to witness that they could not get shares at the bank.

By the Court: The defendants agreed with plaintiff to receive applications for shares, and to take payment for them. In consideration of this plaintiff used his influence with the directors of the company to get the defendants appointed bankers of the company. The defendants ought still to have received applications for shares after they were appointed bankers, but they declined to do so. That constituted the breach of contract. All the money received by the bank from applicants for shares had been repaid by the bank so far as he knew.

Examination resumed: He had a contract with the company that they would take over all his options on large butchery establishments, and pay him 15,000 shares fully paid, and £10,000 in cash. The £10,000 in cash, of course, covered, or nearly covered, the options for the goodwill and certain premises. If he had gone to allotment he would have received the 15,000 shares, which would have stood at more than par, as there was a great demand for shares, and the £10,000 in cash.

De Villiers, C.J.: You would have made £25,000 out of it?—Yes. The £10,000 in cash and the 15,000 shares.

De Villiers, C.J.: Of course the shares might not have been at par? The whole thing might have failed?

If I had gone to allotment it could not have failed for me. People would have to pay up their shares until they had paid up 20s. on each share.

De Villiers, C.J.: But if it was such a good thing, how did the action of the bank damage it?

It was the talk of the city that the bank were turning away applicants for shares, saying that the company was a fiasco. It was said that Combrincks had sent a man over to Australia, and had done me some harm——

Examination resumed: Did all this damage the company?—Absolutely ruined it.

You have had some experience in floating companies?—Yes, I have floated some of the largest and most successful concerns—the Broken Hill Mine, the Mount Morgan Mine, and others.

What has been your expenditure?—Nearly £2,000.

By the Court: Witness was absolutely responsible for £600 or £700 which had not yet been paid,

De Villiers, C.J.: Supposing the bank had done what it promised to do, would the company have gone through?—I had a great many offers to take shares.

Why did you not accept the offers?—The parties would not carry out the offers after they had seen the bank.

Cross-examined: Witness was a mining and electrical engineer. He was now engaged in boring in Johannesburg for a syndicate. He declined to give the name of the syndicate. He did not think that the Cape Town press had much influence on the flotation of the company. He declined to give the names of the underwriters. None of the underwriting was done in London.

Mr. McGregor: At the public meeting which you addressed in Cape Town you said you had secured the greater portion of the capital?—I did not use those words.

Had you secured the greater portion of the capital?—I had.

De Villiers, C.J.: But how is that?—Because I had 3,500 people who said they would take shares in my company. I had an offer to take 50,000 shares, and 10,000 from another firm in Johannesburg, and another 10,000 from two other firms in Johannesburg.

Why did you not accept it all?—Because if I had done it in that way I should have had to pay commission.

Buchanan, J.: But how came you to say that you had secured the greater portion of the capital?—I had offers.

De Villiers, C.J.: Who was underwriter for the £5,000?—Graham Bros., of Cape Town.

Mr. McGregor: There was actually £5,000 underwritten?—Yes.

By the Court: 3,500 people in Cape Town had signed contracts to take from his company all the meat that they required.

Cross-examination resumed: In his contract with the company he did not mention how much had been underwritten.

By the Court: He would have had to pay about £10,000 for the options, which he would have got back from the company. He would have made no profit out of that. All his profit would have been the 15,000 shares which he was to have received.

Cross-examination resumed: While he was engaged in floating the company he possessed £1,500 of his own, but he could have got whatever money he required. The "Cape Times" obtained judgment against him for certain printing work done. He did not defend the case, as he owed the money. Mr.

Bell, the secretary of the company, was an engineer, and was now in the employ of Messrs. Perrott & Co. All the directors lived in Cape Town, with the exception of Mr. McIlwraith, who lived at Port Elizabeth. About 30,000 prospectuses were printed and circulated.

Re-examined: His action had never been called in question with regard to the flotation of other companies.

By the Court: For some time the bank refused to pay the money back to applicants for shares.

Arthur Bell said he came out to this country with Mr. Marshall. He was employed as an engineer with Messrs. Thornycroft & Co. in England for sixteen years. He acted temporarily as secretary to the Cold Storage Company. While Mr. Marshall was ill, on April 27 or 28, witness submitted the company's prospectus to the bank. The manager was engaged, and witness submitted the prospectus to the accountant, who showed it to the manager, and the latter approved of it. The pass-book produced was handed to him as secretary for the company by the bank authorities. He could not say how many applications for shares went through the brokers.

By the Court: Most of the applications went through the brokers or witness.

Charles Duncan Coxwell Smuts, assistant timekeeper at the Docks, said he took an interest in Mr. Marshall's scheme, which promised well at the Docks. He called a meeting of working-men, at which about 2,000 were present. All the men agreed to support Mr. Marshall. After witness had disposed of 300 shares in the company, a report was circulated, and the men dropped the scheme. Witness took an interest in the matter, as he thought it would benefit the working-men.

By the Court: Some of the men took thirty shares each. More shares would have been taken, but there was an interference.

Walter D. Sheil said he formerly resided at Claremont. He visited the Claremont branch of the African Banking Corporation for the purpose of applying for ten shares in the company, and when he applied for the shares the bank refused to take the money. They said they had been taking money on behalf of Mr. Marshall, but they had been instructed from the head office not to receive any further money. At this time he was the agent at Claremont of the company, but after his reception by the bank he resigned the agency.

Joshua E. Hyde said that when he visited the bank to tender money for shares, a teller, named McKenzie, said the bank was not taking any more money for shares.

Thomas George Ross, manager of the Christian Temperance House, Long-street, said that early in May he took out two parcels of shares in the company at the head office of the bank. Later on he proposed to take up twenty-five shares, when he was told by a teller in the bank that they were not taking any more money, and witness should go to the brokers. After that he took no more shares.

Frank Graham, of Graham Bros., importers, Cape Town, said he first suggested to Mr. Marshall that he should float a company. Witness and his friends were prepared to take 5,000. Witness cabled to a man in Australia, and as a result of his visiting the Cape this man agreed on behalf of his firm to take 50,000 shares, provided that the firm was represented on the Board of the Cold Storage Company. The Australian firm was the biggest of its kind in Australia, and could supply meat at 4d. per lb. Witness called on the defendant in the matter, and was told by them that they would not receive money for shares.

By the Court: He was to have received 15 per cent. of the returns of the company.

Cross-examined: He had not yet received any money for acting as underwriter. He was waiting for it. He had never written a letter to the "Cape Times" on the subject of cold storage.

Re-examined: He knew Mr. Marshall by repute in Australia.

George Gilbert said he had intended to take shares in the company when he was at Constable Station. He therefore went to the Matjesfontein branch of the defendants' bank to take out shares: the clerk said he knew nothing about it, but having read through the advertisement, the clerk communicated with the manager, who asked witness to wait a few days, while he wrote to town. Witness wrote to the headquarters of the bank, sending the money for the shares, and the receipt of the money was duly acknowledged. Friends of witness decided not to take any shares when they found they could not get shares at Matjesfontein.

Edward Walter Thomas said he knew Mr. Marshall in Australia for nearly sixteen years. When he went to the bank about the matter, Mr. Littlejohn said he thought he would have to apply to the Court.

This closed the case for the plaintiff.

Mr. McGregor applied for absolution from the instance. The evidence shows that everything that was done, was done on behalf of the company. If any action lies it should be brought by the company and not by the plaintiff. The damages proved are too remote. *Hanslip v. Padwick* (5 Ex., p. 660); *Mayne on Damages* (4th ed., p. 67).

Mr. Graham: There are three points to be decided: (1) Was there a contract? (2) Was there a breach? (3) If so, what are the damages? The evidence shows that there was a contract. The company could not have any action. The contract was with the plaintiff.

[De Villiers, C.J.: Do you not admit that the bank could at any time refuse to be bankers any longer?]

No, because that would ruin the plaintiff; it would be useless then to go to another bank and hopelessly to attempt to float any company. As to the damage, it is quite clear that the action of the bank had a great deal to do with the action of Mr. Graham and Mr. Ross.

Absolution was granted.

De Villiers, C.J., said: It is quite clear that the original arrangement was, according to the plaintiff's evidence, that the defendants were to become bankers to a company about to be formed. Then the company was formed, and arrangements were made with the bank as to the manner in which their duties should be carried on. A form was sent by the bank to the directors for signature, and the directors signed it, and if there was a contract at all, it was a contract between the company and the bank that the bank should act as the bankers of the company. If there has, therefore, been a breach of this contract, the persons to sue for that breach would be the company, and not the plaintiff who had introduced the company to the bank. But it may be said that this is only a technical objection. Then I proceed to the second difficulty, which seems to me to be a still greater one. I confess that I can see no evidence whatever to show that it was in consequence of the bank's refusal to receive further deposits that the company fell through, and that the subscriptions did not come in. It is quite consistent with the evidence that if the bank had continued to act as bankers the same thing would have happened—that the company would never have been formed, and the same damage which the plaintiff now

alleges that he has sustained would have been sustained in any case. There is no doubt that there were a great many people, poorer people, who were willing to take shares—the Dock people were prepared to take 2,000 or 3,000—but that was a very small proportion of the shares required to be taken, as the capital of the company required that 125,000 shares should be taken. The witness Graham had underwritten about 5,000 shares, but there were then still 120,000 shares to be subscribed. But with these shares, and the shares which the Dock people and the Malays were to take, it does not appear that more than 5,000 shares would have been taken up, and that would leave 115,000 shares to be subscribed. But supposing that there remained only 50,000 shares to be subscribed, that would be no evidence that it was in consequence of the failure of the bank to receive deposits that these shares were not all subscribed. There seems also to be a third difficulty, and that is as to the remoteness of the damages. The plaintiff claims £25,000 as damages, which he assesses in this way: £10,000 as the amount which was to be paid to him in cash, but he admits that he was to pay £10,000 in cash for his options, and therefore all that he would have got would have been the 15,000 shares which he says he was to receive in addition to the £10,000. But there is no proof whatever as to what the value of these shares might be. But it seems to me that the second difficulty is the greatest one—that even supposing the plaintiff had proved that he is the person with whom the contract was made, and that he is entitled to the benefit of the breach of contract, there is no evidence to satisfy any Court that it was in consequence of the refusal of the bank to receive deposits in money that the whole thing fell through. Upon that ground, I think there should be absolution from the instance with costs.

Buchanan, J.: I concur. The point which weighs most with me is the second ground. I am convinced that there was not a breach of contract as alleged, and that the refusal of the bank to take deposits was not an insuperable obstacle to the formation of the company. It is quite possible that the bank was not inclined to receive all these odd half-crown deposits for shares, and it was quite possible for all applicants who could not deposit at the bank to apply to the brokers or the secretary of the company; indeed, some of them did so. It has not been proved that the refusal of the bank to



take these odd half-crowns was the cause of the failure of the scheme going through, and there is no evidence whatever to satisfy my mind that if the bank had not refused to take these deposits the company would have been floated. The remoteness of the damages is another great obstacle. But the second objection is the one upon which I think the Court should grant absolution from the instance.

Maasdorp, J., also concurred.

[Plaintiff's Attorney, Gus Trollip; Defendants' Attorney, Messrs. Sauer & Standen.]

## SUPREME COURT

[Before the Chief Justice (Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice)), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

HIDDINGH V. SCHADE. { 1899.  
Feb. 7th.  
" 8th.

Sale and purchase—Price payable in instalments—Non-payment of price — Conditions — Time — Essence of contract—Rescission of contract.

*Where in a contract for the sale of land it is agreed that the price shall be paid in several instalments, the vendor is not entitled, on the purchaser's failure to pay one instalment, to claim immediate payment of instalments agreed to be paid at a later date, unless such right is reserved to the vendor in the contract. Nor is the vendor entitled to claim a rescission of the sale unless it appeared from the contract that time was of its essence.*

This was an argument on an exception taken by the defendant to the plaintiff's declaration.

The declaration was in the following terms:

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1. The parties reside in the Cape Division of this colony.

2. On the 17th of February, 1897, the plaintiff sold to the defendant certain land, with the buildings thereon, situated in the Cape Division, on the Claremont Flats, for the sum of £5,000, on the following terms and conditions, to wit, the sum of £5,000 was to bear interest at 5 per cent, and was payable in the following instalments, namely, the sum of £333 6s. 8d., with interest on £5,000, on the 11th of May, 1897; the sum of £333 6s. 8d., with interest on the balance of the purchase price, on the 11th of February, 1898; and the sum of £333 6s. 8d., with interest on the balance of the purchase price, on the 11th February, 1899, and for the balance of the £4,000 the defendant was to pass a mortgage bond hypothecating the said land.

3. The plaintiff gave possession and delivery of the said land to the defendant, and has been ready and willing to perform his part of the said contract, but the defendant, although he has paid the first instalment, and the sum of £200 on account of the second instalment, has neglected and refused, and still neglects and refuses to pay the balance, or to carry out the aforesaid terms and conditions, and to perform his part of the said contract though requested so to do.

4. The defendant took possession of the said land from the date of the said sale, and has enjoyed and taken the rents and profits arising and accruing therefrom, and has cut down and removed wood from the said land, and has allowed and suffered the said property and the buildings thereon to fall into neglect and disrepair, and to deteriorate in value.

The value of the said rents and the said wood, and the sum which will be required to place the said property and the buildings thereon in the same state and condition in which they were at the date of sale amounts to the sum of £1,000.

5. The plaintiff is entitled to claim that the defendant shall pay him the amount of the purchase price of the said land, less the amount already paid by the said defendant, or that the defendant should forthwith give up possession of the said land and the buildings thereon to the plaintiff, and should restore the plaintiff to the same position in which he was at the date of the said sale, but the defendant refuses to pay the said sum or any part thereof, and refuses to give up possession of the said land as aforesaid.

Wherefore the plaintiff claims :

1. An order declaring that the defendant shall forthwith pay the said sum of £5,000, less the amount paid by the defendant, with interest *a tempore moræ*, the plaintiff tendering hereby to pass transfer upon the said payment.

2. An order declaring that on failure of the defendant to pay the aforesaid sum forthwith, the defendant shall give up immediate possession of the said land and buildings thereon to the plaintiff, and pay him the sum of £1,000 as aforesaid.

3. Alternative relief.

4. Costs of suit.

The defendant excepted to the declaration on the ground that the allegations made therein did not justify the relief asked for.

He denied that the allegations made in the declaration as to default in the payment of a portion of the second instalment of the purchase price entitled the plaintiff to claim either that the defendant should pay the whole amount of the purchase price less that already paid, or that the defendant should give up to the plaintiff possession of the said land and buildings, and restore plaintiff to the position he was in at the date of the said sale.

Wherefore he prayed that the declaration might be dismissed with costs.

Mr. Searle, Q.C., appeared for the defendant, the exceptor.

Sir H. Juta, Q.C. (with whom was Mr. Benjamin), appeared for the plaintiff.

Mr. Searle: The declaration does not allege any condition under which the plaintiff is entitled to call upon the defendant to take transfer or pay the whole amount. All that the plaintiff can claim is payment of the second instalment; he can take judgment for that, but for no more. For any other remedy he must wait until the last instalment is due. The condition is not a resolute condition; it would be dangerous to import a resolute condition into a contract of this nature, especially as a condition is often inserted in these contracts, that where the instalments are not paid on the due date the whole amount shall become payable. If a vendor likes to sell his property upon easy terms, he is bound by those terms.

Sir H. Juta: The exception is bad because the declaration states that £333 6s. 8d. is due and the exception does not affect that.

[De Villiers, C.J.: You do not claim £333 6s. 8d.]

That is included in the £5,000.

[De Villiers, C.J.: But the £5,000 is conditional upon the plaintiff giving transfer. He would not give transfer on payment of £333 6s. 8d.]

The exception is not taken to any particular paragraph of the declaration; it is that the declaration does not disclose any cause of action. In the form in which it is drawn it is not known to our law. If the declaration discloses some form of action, but asks for the wrong relief, then the plaintiff is entitled to alternative relief.

Payment by instalments is a condition precedent to the defendant getting transfer: he could not at any time sue for transfer without alleging that he was ready and willing to fulfil his part of the contract, namely, payment of the instalments. If he cannot sue for transfer he is in the position of not being able to compel the plaintiff to carry out the contract and yet remains in possession. The fact that he is in the position of making use of the land to the vendor's detriment shows that payment must be a condition precedent.

[Maasdorp, J.: Enjoyment without payment is the case of a lessee who does not pay his rent and yet he cannot be ejected within two years.]

The defendant here has already committed a breach, so that even after the third instalment has become due he will not be able to claim transfer. Where a defendant has put it out of his power to perform his part of the contract the contract is at an end.

[De Villiers, C.J.: Then you must go so far as to say that if the purchaser is one day late in the payment of his instalments he cannot claim transfer.]

Legally, it does not make any difference whether it is a day or more. The true question is whether the due payment is not a condition precedent to the plaintiff being bound to carry out the contract.

[De Villiers, C.J.: There is no prayer in the declaration for the cancellation of the contract.]

That is not necessary if the Court grants the alternative order asked for because the dominium is in the plaintiff.

Mr. Searle in reply: Failure to pay the instalments does not cancel the contract. *Wolff & Co. v. Bruce Meyers* (7 Juta, p. 133); judgment of De Villiers, C.J., at p. 135. *Foot* (19, 1, 21).

Sir H. Juta: *Benjamin on Sales* (p. 763.)

*Postea* (February 8th).

Judgment was given allowing the exception.

De Villiers, C.J. : There is no claim for part of the instalments due nor is there a claim for an interdict to prevent any deterioration of the property. The exception raises two questions, viz., whether on non-payment of the second instalment of the purchase price at the stipulated time the plaintiff is entitled to claim that the whole purchase price shall be paid, and whether, in the alternative, the plaintiff is entitled, on such non-payment, to claim a rescission of the contract of sale. With regard to the first question it is by no means an unusual clause in contracts for the sale of land for a price payable in instalments, that on failure of the purchaser to pay one of the instalments the whole amount shall be immediately claimable. Where such a condition is not inserted the Court cannot import it without some other indication of the intention of the parties to modify the agreement that the price is to be payable in instalments. In the present case the right is not reserved to the vendor by the contract, and the plaintiff is therefore not entitled to claim immediate payment of instalments agreed to be payable at a later date. The second claim is that the defendant be ordered to surrender possession of the land, and practically amounts to a claim for a rescission of the contract. It is clear law that where the property sold has been delivered to the purchaser, the non-payment of the price does not entitle the vendor to claim rescission of the contract and restitution of the thing sold. (*Voet* 19, 1. 21; 7 *Juta*, 135). Where there has been no delivery and consequently no transfer of ownership to the purchaser, his refusal to accept delivery and pay the price would entitle the vendor to claim rescission, but mere inability on the purchaser's part to pay the price could not have the same effect unless time were of the essence of the contract. As stated by Story (*Sales of Personal Property*), "if there be an utter refusal or total inability of the one party to perform his part of the contract, the other party will be able to rescind, but partial failure by one party would not entitle the other party to rescind unless time was the essence of the contract." In the present case the defendant, as purchaser, took occupation of the property, but no transfer was passed, and the ownership was therefore not transferred to him. He paid the first instalment but failed to pay the second when it became due. The mere fact that a time was fixed for the payment does not show that time

was intended to be of the essence of the contract. It is not necessary to decide what form of words would be required to show that such was the intention of the parties to the contract. It is sufficient to say that in the present case no such intention has been expressed. The exception must be allowed with costs.

Buchanan, J., said : I think the plaintiff would have been wise to have delayed a little longer. It is quite possible that if the third instalment had become due, and it had not been paid, and the defendant was not prepared to pass a bond, and the plaintiff had then come before the Court, this failure on the part of the defendant might have been taken to be absolute failure on the part of the defendant to carry out his contract, and it might have entitled the vendor to rescind. But the fact that the balance of the one instalment has not been paid is not sufficient to entitle the plaintiff to succeed. As to the allegation made in the declaration of the plaintiff that the defendant refused to carry out his contract, I think that this only amounts to an allegation of neglect or refusal to pay the balance of the instalment.

Maasdorp, J., said : It seems to me that the plaintiff in this case attempts to graft upon the contract, set forth in his declaration, certain legal consequences and obligations which ought to have been made the subject of special agreement and which do not spring from the contract by mere operation of law. It is alleged that it was agreed that the purchase price of certain landed property was to be paid by instalments, some of which fell due on fixed days before the day appointed for the transfer of the property, and that the defendant, who was placed in possession of the property, made default in the payment of one of the instalments. The plaintiff therefore claims the whole of the purchase price as having become due in consequence of the defendant's default, and in default of the payment of the purchase price he prays for the recovery of the property. The rescission of the contract is not asked for in the declaration, but if I understand the contention of the plaintiff's counsel, it amounts to this, that the defendant having failed to pay the instalment when due, cannot hereafter demand the fulfilment of the contract, because having committed a breach of it, he will be unable to say that he was at all times ready and willing to perform it. Suppose this was a case in which a debt was due in respect of a contract already executed

on the part of the creditor which the debtor has promised to pay by instalments. In that case it seems to me no authority could be found for the contention that the failure to pay an instalment makes the whole debt payable without a special agreement to that effect. But it is argued that as this is an executory contract, the non-payment of the instalment constitutes the failure of a condition precedent to any right on the part of the defendant to claim fulfilment of the contract, and in some way or other has given the plaintiff the right to claim at once the entire performance of the contract, or the recovery of his property. This seems to me a confusion of ideas, and necessitates the inquiry whether the non-payment of the price or any part of it is ground for the rescission of a contract of sale. The grounds upon which the rescission of a sale is allowed are given in the authorities, and this is certainly not one of them. It is expressly laid down in the authorities that the non-payment of the price is no ground of rescission unless it is expressly agreed that it shall be so. I may refer to *Voet* (19, 1, 21); 2 *Burge* (572); *Noodt Prob.* (Book 4, c. 2); *Van Leeuwen* (4, 20, 2); and *Huber* (3, 4, 43). It was open to the plaintiff to protect himself by a special and express agreement, but having failed to do so, he seeks the benefit of such agreement by implication of law. It is complained that the defendant, while he fails to pay the instalments, enjoys the benefits of the property, but *Voet* (19, 1, 18) points out that if the purchaser has the enjoyment of the property, the interest, on the other hand, on the price due runs in favour of the seller. *Voet* gives a case (19, 1, 22) in which it is held that upon failure of the payment of an instalment after transfer of the property, judgment can be obtained for such instalment, and the property can be attached for sale and execution. I think the declaration does not set forth any grounds upon which the plaintiff is entitled to claim the relief asked for, and the exception should be sustained.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. O. Silberbauer.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ABRAHAMS V. ABRAHAMS. { 1899.  
Feb. 8th.

This was an action for restitution of conjugal rights, failing which, a decree of divorce.

Mr. Buchanan appeared for the plaintiff; the defendant was in default.

Francis Henry le Sueur, a clerk in the Colonial Office, produced the marriage certificate of the parties.

The plaintiff, Sabina Aletta Abrahams, said she was married to the defendant, Johannes Jacobus Abrahams, on March 14, 1881, in the Dutch Reformed Church, Cape Town. She identified the signature of herself and the signature of her husband in the register produced. After the marriage the parties resided at Stellenbosch for a few years; she could not state the exact period. After that defendant went to Queen's Town, and stayed away about a year. Then he returned to Stellenbosch, and lived with witness for some time. In 1891 he again left Stellenbosch, because he could not pay his debts. He went to Port Elizabeth, and subsequently to Natal. In 1891 defendant wrote only two letters to her, and since 1891 she had not heard from him. In one of the letters written by defendant in 1891, he asked her for a sovereign, which she forwarded. She had received no reply to letters which she had written to defendant since then. Since 1891, he had not contributed to her support. Plaintiff supported herself by dressmaking. There were no children of the marriage. She had heard from a friend that defendant was in difficulties in the Transvaal. Defendant had no property. Witness believed that some money had been left to him by an aunt, but the difficulty was that he could not be found.

De Villiers, O.J.: This is very vague. We require the production of a will to show whether it is a contingent benefit or not.

The Court granted the order with costs, defendant to return to plaintiff on or before March 31, failing which to show cause by April 12 why a decree of divorce, with costs, should not be granted.

[Plaintiff's Attorney, G. J. O'Reilly.]

ROBB V. MEALEY'S EXECUTOR { 1899.  
DATIVE. { Feb. 8th.

Privileged will—Children—Adoption—The Roman law of adoption is not in force in this Colony.

*The provisions of the law under which a holograph will made by a parent in favour of his children is privileged, do not apply to wills made in favour of adopted children.*

This was an argument on an exception to the plaintiff's declaration. The plaintiff was Ellen Amelia Robb (born Griffin), who as the adopted daughter of the late John Mealey prayed for an order that the holograph will of the latter was good and valid in so far as any benefits were thereby conferred upon her, notwithstanding that the said will was not signed by the testator, and attested on each leaf in accordance with Ordinance 15 of 1845.

The declaration was in the following terms:

1. In the year 1877 one John Mealey and Eliza Jane Mealey, his wife, to whom he had theretofore been lawfully married in England, did there adopt as their daughter an orphan girl, then named Ellen Amelia Griffin, who then, and ever since, until the respective deaths of the said Eliza Jane Mealey and John Mealey, was accepted, educated, maintained, and supported as their only child and daughter, and as the only child and daughter of the said John Mealey after his wife's death.

2. The said Ellen Amelia Griffin received from the said John Mealey, and at all times after her adoption as aforesaid bore, and still bears, the name of Ellen Amelia Mealey, but was usually called and known as Nellie Mealey.

3. The plaintiff annexes hereto, marked A and B respectively, copies of: (a) A letter, dated the 31st July, 1877, to the said John Mealey, signed by the grandmother and elder brother of the plaintiff, namely, by Mary Griffin and Herbert J. Griffin, and also by one John Humble, the superintendent of the orphanage in which the plaintiff was then living, embodying an agreement made by them on behalf of the plaintiff; (b) an agreement, dated the 6th August, 1877, signed by the said John Mealey, to the terms of both of which the plaintiff begs to refer this Honourable Court.

4. By virtue of and in accordance with the said lawful agreements, the plaintiff was handed over to the care, guardianship, and adoption of the said John Mealey, and the said John Mealey thereupon became, and till his death continued lawfully to stand towards her in the position of her lawful father, in like manner as though the plaintiff had been born to him of his marriage aforesaid.

5. By reason of the premises, the plaintiff became, and at the time of the death of the said John Mealey was, entitled in law to be for all purposes regarded and treated as the lawful child of the said John Mealey, who died on the 22nd day of March, 1898, his wife having predeceased him on the 28th day of October, 1893.

6. The said John Mealey and his wife left no child or descendant born or issue of their marriage, her or him surviving.

7. On the 7th day of July, 1897, the said John Mealey, being then of sound mind and capable of making his last will, did with his own hand in writing, make his last holograph will, copy whereof is hereunto annexed and marked C, and the said last will has been duly filed in the office of the Master of this Honourable Court.

8. The said will is written on three leaves, and is signed by the testator, the said John Mealey, at the foot or end thereof on the third leaf, in the presence of two witnesses, who there have also signed in attestation of his signature in conformity with law, but the second leaf of the will does not bear the signature of the testator, and the first and second leaves do not bear the signatures of the attesting witnesses.

9. By reason of the matters set forth in the last preceding paragraph, the Master of this Honourable Court declined to recognise the said will as of any legal validity, and, notwithstanding protest on the part of the plaintiff, did thereafter appoint the defendant to be executor dative of the estate of the said late John Mealey.

10. The plaintiff contends that in so far as the said will confers benefits upon her, as the adopted child and daughter of the testator the said will is a good and valid will, being by law privileged as the holograph will of a father in favour of his child, but the defendant denies the plaintiff's contention, proposes to administer the said estate according to the law of succession *ab intestato*, and refuses to recognise the plaintiff as lawfully entitled to any part of or share in the said estate,

11. In the alternative, the plaintiff submits that the last leaf of the said will is valid as the last will and testament of the testator.

Wherefore, the plaintiff prays for: (a) An order declaring that the said holograph will is privileged, and is good and valid as the last will of the late John Mealey in so far as in and thereby any benefits are conferred upon the plaintiff; (b) an order setting aside the appointment of the defendant as executor dative of the estate of the late John Mealey, and declaring the plaintiff entitled to be appointed, with or without William Townsend Randall, as this Honourable Court shall determine, executrix testamentary of the said estate, or in the alternative, if this Honourable Court shall decline to grant the aforesaid orders, then for (c) an order declaring the last leaf of the said will to be the valid last will of the late John Mealey. And the plaintiff also prays for such other or further relief in the premises as to this Honourable Court may seem meet, together with costs of suit out of the said estate.

The will bequeathed to the plaintiff certain landed property, £500 in cash, 106 shares in the United Boating Company at East London, the testator's furniture, and all other goods and effects not otherwise disposed of. There were many charitable bequests. On the third leaf was a bequest of £100 to an orphanage; of £100 for the purpose of keeping the burial place of the testator's wife in good order; and a bequest of the residue of all moneys after payment of legacies to the plaintiff in trust to distribute in her discretion among distressed widows and orphans and other charities.

The defendant excepted to the declaration as showing no cause of action.

Mr. Innes, Q.C., appeared for the exceptor. Sir H. Juta, Q.C., and Mr. Jones appeared for the plaintiff.

Mr. Innes: The Court has always refused to extend the privilege of privileged wills beyond the case of children. *Re Herbert* (11 S.C.R., p. 105); *Voet* (28, 1, 15 and 16). The privilege is entirely one for children and if third persons are mentioned they should be treated as non-existent: the privilege must not be extended to natural children. Adoption is no longer resorted to. Even if resorted to adopted children do not succeed in intestacy. *Voet* (1, 7, 7); *Van Leeuwen's Commentaries* (1, 13, 3); *Grotius* (1, 6, 1); *Groenewegen de leg. abrog.* (Institutes 1, 11).

I cannot find any authority to the effect that the law of adoption as known to the Roman law was known either to the law of Holland or the law of this colony. The case made in paragraph 11 of the declaration was settled in *In re Lloyd* (12 S.C.R., p. 117.) In this case the testator would probably never have made the provisions contained on the third leaf if those on the first two leaves had not been made: the third leaf is unintelligible without the first two.

Sir H. Juta: The question is whether the principle which underlies the doctrine of privileged wills would not include and extend to the plaintiff. Grandchildren are included in the privilege: therefore the principle is not that it should apply only to those who would be heirs in intestacy. *Van Leeuwen* (*Censura Forensis*, 23, 2, 21) says that it is unsettled whether or not natural children are included, but says also that Carpovius holds that they are. *Voet* (28, 1, 16) gives as one of the reasons why natural children should not be included the fact that they are born out of wedlock. The principle at the bottom of the doctrine is that of natural affection: the reasons which would operate in the case of children are the same reasons which would operate in the case of the plaintiff. *Burge on Colonial Laws* (Vol. 4, p. 398).

Mr. Innes in reply.

De Villiers, C.J.: This is a grievously hard case. The plaintiff had been adopted by the testator and his wife, and had lived with them for twenty years until the testator's death. The testator clearly intended to make ample provision for her, but, unfortunately, the will was not duly executed. It was in the handwriting of the testator, and the plaintiff now contends that, as the testator's adopted daughter, she is entitled to claim that the instrument be treated as a privileged will, in so far as it makes provisions in her favour. It is a fatal objection to this contention that the law of this colony does not recognise adoption as a means of creating the legal relationship of parent and child. Under the Roman law this relationship was created, but the Dutch law did not, in this respect, follow the Roman law. In matters of succession, the adopted child is regarded as a stranger to the adopter, so that an adopted child could not under the former law of the Colony claim the legitimate portion and cannot, under the still existing law, claim a right of succession *ab intestato* in respect of the adopter's estate. It would therefore be an unwarrantable extension of the doctrine a

privilege to hold that, because the plaintiff was the adopted daughter of the testator, his holograph will, although not duly attested, is valid in so far as it confers benefits on her. The declaration further prays that the last leaf of the will be declared to be the testator's last will. That leaf was duly signed and attested, but *non constat* that the bequests thereon appearing would have been made if the testator had known that the provisions on the previous leaves would have no effect. These provisions form an integral portion of the instrument and therefore, on the principle laid down in *In re Lloyd* (12 Juta, 117), the will must stand or fall as a whole. The exception must be allowed, but the costs may fairly come out of the estate.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

*Ex parte* VAN HOYTEMA. } 1899.  
Feb 9th.  
Advocate—Admission—Act 6 of 1896.

This was an application for the admission of the applicant John Pieter Renaud van Hoytema as an advocate of the Court. The applicant had passed the B.A. examination of the Cape University and been admitted to the B.A. degree in 1895. He had then proceeded to England and taken the LL.B. degree at Cambridge. He was not aware of the provisions of Act 6 of 1896 until his return to the Colony. He had been admitted to an *ad eundem* LL.B. degree of the Cape University and based his application on that ground.

Mr. Innes, Q.C., for the applicant: The applicant's case is different from *McIlwaine's case* (8 Sheil, p. 265). The Court there laid stress on the fact that the applicant had no B.A. degree of the Cape University. The

Court has a wider discretion in this matter than in the interpretation of other statutes, inasmuch as it is a question of admission to practice before this Court.

De Villiers, C.J., said: The Court would have been very glad to have assisted the applicant in the present case, but it is not able to do so in face of its previous decision. That decision is wide enough to embrace the case of persons not only who have not passed the B.A. examination, but those who have passed the B.A. examination in the Cape University before being admitted to the LL.B. degree elsewhere. We think, however, that this is a case in which Parliament might well be asked to amend the Act, the construction of which prevents the applicant from being admitted. A short Act would do it. It would, of course, be confined to those persons who have passed the B.A. degree at the Cape University before our decision, but it would certainly include the case of the present applicant. I am sure that this recommendation coming from the Court and supported, as it will be, I hope, by the Cape University, will pass Parliament without any difficulty. That would entail a delay of a few months, which will probably be usefully employed by the applicant. It would be well, however, for the applicant to prepare himself in the meanwhile for the examination to be held in June, so that in case Parliament should not pass that Act he would then be prepared to pass his examination, the local examination of the Cape University. I should think that there would be no difficulty for anyone who has passed the LL.B. examination elsewhere to prepare himself for the local examination in five months. I regret that the application cannot be granted.

Buchanan, J., in concurring said: Both as a member of this Court and as a member of the University Council I shall support such a measure.

Maasdorp, J., also concurred.

*Ex parte* KRAUSE. } 1899.  
Feb. 9th.

Mr. Innes, Q.C., applied for the admission of Frederick Trangott Krause as an advocate of the Court.

Ordered.

*Ex parte* BRADY.

Mr. Upington applied for the admission of Christopher Brady as an attorney.

Ordered.

*Ex parte* WATERMEYER.

Mr. McGregor applied for the admission of Claude Joubert Watermeyer as an attorney, notary, and conveyancer.

Ordered

## REHABILITATIONS.

On the motion of Mr. Molteno, George Andries Fourie was rehabilitated.

## PROVISIONAL ROLL.

## BOARD OF EXECUTORS V. DE KOCK.

Mr. Buchanan applied for provisional sentence for £157 10s. 6d., interest on a mortgage bond, and £3 12s. 6d., insurance premium, and costs.

Granted.

## ILLIQUID ROLL.

## BINSBERGER V. VAN WYK'S EXECUTRIX.

Mr. Buchanan applied for provisional sentence for £25 11s. 9d. on a kinderbewys, less £25 10s. paid on account, and costs, amounting to about £15.

Granted.

## PITT V. STARKE.

Mr. Gardiner applied for judgment under Rule 319 for £34 11s. 9d.

Granted.

## GARLICK V. SYRKIN.

Mr. Benjamin applied for judgment under Rule 329d, for £115 5s. 10d., goods sold and delivered, and costs.

Granted.

## S.A. MILLING CO. V. ROOM.

Mr. P. Jones applied for judgment for £20 11s. 6d., for goods sold and delivered.

Granted.

STEWART AND OTHERS V. MZIMBA { 1899.  
AND OTHERS. { Feb. 9th.

This was an application to have a rule *nisi* made absolute.

The rule had been granted upon the petition of the Rev. James Stewart and others, trustees of the Free Church of Scotland, and called upon the Rev. Jeremiah Mzimba and others, elders, deacons, and office-bearers, to show cause why they

should not be restrained from using certain churches at Lovedale and elsewhere, and from taking forcible possession and occupation thereof in defiance of the petitioners, and why they should not be ordered to deliver up the keys thereof, and give to the petitioners the use of the said churches and property pending the result of an action to be instituted.

It appeared from affidavits filed by the petitioners that the congregation of Lovedale was constituted under the jurisdiction of the Free Church of Scotland, and was governed by a body called a Deacons' Court. The title deeds of the property belonging to the Free Church were registered in the names of the petitioners. The main church building was at Lovedale, but at various out-stations, six in all, there were supplementary buildings, all vested in the congregation. The Rev. Jeremiah Mzimba was the pastor of the Presbyterian Native congregation at Lovedale, and the out-stations until May, 1898. In 1898 certain differences arose between the Kafir and Fingo sections of the congregation, and in May of that year Mzimba and many of the deacons, elders and office-bearers connected with the churches voluntarily severed their connection with the Presbyterian Native Church. Mzimba sent in his resignation and publicly announced his intention of founding a new denomination, to be called the Presbyterian Church of Africa to extend from Cape Point to the North, and stated that he was going to hand over the churches and the ground upon which they were built to that body. After such resignation, the Rev. D. Stormont was appointed acting pastor of the Native Church and congregation and the out-stations thereof, and the other vacancies created were filled up by fresh appointments. Notwithstanding this Mzimba and the other respondents refused to allow the petitioners or their representatives the use or occupation of the said out-station churches, and refused to deliver up the keys thereof. The petitioners stated that they were about to institute an action for a declaration of rights as to the property in question. Answering affidavits were filed by the respondents.

Mr. Innes, Q.C., appeared for the applicants.

Mr. Searle, Q.C., for the respondents.

After argument,

The rule was made absolute.

De Villiers, C.J., said: At this stage it is impossible for the Court to give a final



decision upon the matters in dispute between the parties. Before a perpetual interdict can be granted, an action will have to be brought and the matters in dispute between the parties thoroughly sifted. All the Court can do at the present stage is to decide who is to remain in occupation, and possession of the property in dispute—whether the Free Church of Scotland is to remain in possession, or whether the so-called Church of Africa is to remain in possession. It is clear from the evidence, so far as it goes, that the native church at Lovedale was founded by the Free Church of Scotland; that that was the central institution, and that the different congregations which were formed at the out-stations were but offshoots of this central institution. All these out-stations were used for purposes connected with the Free Church of Scotland. The congregations which were there established were all under the control of the Free Church of Scotland. The respondent Mzimba, who seems to have taken the most active part in the secession, was ordained by the Free Church of Scotland, and he received his stipends from the Free Church of Scotland. It is true that collections were made by the congregations, but it is stated, and it is not denied, that the stipend of Mzimba was guaranteed to him by the Presbytery of the Free Church, and there is evidence to show that from time to time sums of money which had been obtained from Scotland were paid to Mzimba as part of his stipend. His allegation, therefore, that the whole of the funds from which these buildings were erected came from the natives, from the different congregations, is not borne out by the facts proved in the present case. Well, it seems that Mzimba, after having been for several years a minister of this Free Church, ministering to congregations belonging to the Free Church, came to the conclusion that it was advisable to secede from that church, and to form what he calls the Presbyterian Church of Africa, and in this secession he seems to have carried with him several office-bearers of the Church. But the very fact that they admitted that they seceded from the Free Church shows that at one time they must have belonged to the Free Church, and if the property did belong to the Free Church, the fact that there has been no transfer to and no title deeds in the Free Church, ought not to affect the present case. The respondent, however, claims that inasmuch as he is in possession of these different

churches, and as the other seceders with him had been in actual possession, and as the applicant can show no title, the applicant is not entitled to dispossess them from these churches. But if once it be admitted that the possession by Mzimba and the other seceders was possession on behalf of the Free Church of Scotland, the fact that the applicant has no title does not really affect the present case. The two parties, so far as title is concerned, stand on the same footing. I do not consider it advisable at the present stage to go more fully into the merits of the case, and I do trust that what I have said will be a sufficient indication to the respondents that it is not desirable for them to have any further litigation. If I could give them any advice, independent of the law, it would be this, that it would be better for them not to waste any further money upon litigation, because the *prima facie* case against them is so strong that I cannot conceive how by any further evidence that can be given in this case the position of the respondents will be in any way improved. The Court will therefore now make the rule absolute, and I think it must be done with costs, it being understood that, in case the case should go further and, contrary to what one might expect at present, the ultimate decision should be in favour of the respondents, they should be entitled to claim any costs which they may pay by virtue of the Court's present order.

Buchanan, J. : I concur, and fully endorse the very wise suggestion made by his lordship.

Maasdorp, J, also concurred.

De Villiers, C.J., said that in the event of an action being brought, an opportunity would be given to place the deacons' court in the position of plaintiffs instead of the trustees.

[Applicant's Attorneys, Messrs. Innes & Hutton; Respondent's Attorneys, Messrs. Sauer & Standen.]

GARDNER V. EXECUTORS OF JONES. { 1898.  
Feb. 9th.  
March 13th.

Interdict — Transfer — Damages — Sale.

*The lessees of certain property had the right, under the contract of lease, to buy the property for the same price as should be offered to the lessors by others. The*

lessors wishing to sell the property had certain interviews with the lessees, at the last of which the lessees, according to the version of the lessors, positively refused to purchase the property for £20,000, which was the price which the lessors could obtain for the property. The lessors thereupon sold the property to M. The lessees, whilst denying the version given by the lessors, admitted that they had not, before the sale to M., offered to buy the property for the sum named to them by the lessors. Held that the lessees were not entitled to an interdict restraining transfer of the property to M., whatever claim for damages they might have against the lessors.

This was an application for a rule *nisi* restraining the respondents from passing transfer to Adolph Mosenthal & Co. of certain property in Market-street, Port Elizabeth.

The applicants, Charles Edward Gardner and Philip Thomas Dixon, stated on affidavit that they had for some time carried on business in the premises in question, rented by them from the respondents, the executors of the late William Jones.

That for the five years expiring on the 14th January, 1899, they had occupied under a written lease containing a proviso that if the executors contemplated selling the entire premises of which the premises occupied by the applicant formed a part, they would not do so until they had given the applicants the option for a period of seven days of purchasing the entire premises at the same price and on the same terms as they could obtain from any other person proposing to purchase the same.

That a further written agreement was entered into in July, 1898, by which it was stipulated that the applicants' further tenancy of the premises then under lease to them, should after the 14th January, 1899, be subject to a six months' notice, and it was further stipulated that the seven days' option should continue during the extended period in the event of the sale of the said entire premises taking place by private arrangement, and not in the event of their sale by

public auction. The applicants now occupied under this further written agreement.

That on the 31st January, 1899, the entire premises were submitted to public auction, but declared not sold at a bid of £18,750.

That the applicants thereafter submitted certain tentative offers to the executors for the purchase of the said entire property, but they did not entertain the same.

That on the 3rd February, 1899, the executors gave them notice that they had sold the entire premises to Adolph Mosenthal & Co.

That at no time had the executors given the applicants the seven days' option to purchase above referred to.

That by their not having done so the applicants would sustain irreparable damages unless the executors were restrained as prayed.

Sir H. Juta, Q.C., appeared for the applicants.

The Court granted a rule *nisi*, returnable on February 16, to operate as an interdict in the meanwhile.

*Postea* (March 13th).

Mr. Searle, Q.C., moved that the rule be made absolute.

Mr. Innes, Q.C., appeared for the respondents.

The affidavits of the respondents set out that formal notice of the sale by public auction was given to the applicants. That subsequently to the property being publicly offered, negotiations ensued with the applicants, with the result that they unconditionally refused to buy the property for £20,000 plus the auction fees. That the respondents thereafter sold the premises to the Mosenthals for £20,000 with auctioneer's commission.

The applicants in replying affidavits denied that they had unconditionally refused to purchase the property.

Mr. Innes: This is not a matter which can be settled except by action. If the applicants have suffered any damage, they should bring their action: if an interdict is granted the respondents' relations with Adolph Mosenthal & Co. will be affected: they will want transfer. The applicants had a month's notice of the sale: they had a firm offer of purchase at £20,000 and refused it.

Mr. Searle: The agreement is clear and the meaning of it is, that the respondents should first of all be in the position of getting a firm *bona fide* offer, and that they should give the applicants seven days in which to take that offer.

The applicants would sustain more damages than Mosenthal & Co.

The Court discharged the rule with costs, with leave to applicants to claim repayment of such costs, in case they should succeed in the action for damages: respondents to retain £5,000 to meet the claim for damages, for a period of four months.

De Villiers, C.J.: The condition in the lease was that in the event of a *bona fide* acceptable offer being made for the purchase of the property leased to the applicants, they should have the refusal thereof for seven days, at the same price and upon the same conditions as contained in the offer. Subsequently this condition was modified to this extent, that the seven days' notice should only be given in the case of a private sale and not if the property were sold by public auction. The respondents afterwards decided to sell the property by public auction, and gave three weeks' notice of the sale to the applicants. It does not appear that the applicants made any bid at the auction; at all events they were not the highest bidders when the property was declared not sold. The respondents, having failed in obtaining their reserved price at the auction, entered into negotiations with the auctioneers for the sale of the property out of hand. They also had interviews with the applicants, and according to the respondents' version of the last interview, there was a positive refusal on the part of the applicants to pay the sum of £20,000 and auctioneer's commission. The applicants deny that there was such a positive refusal. The fact that the applicants had declined to bid at the auction as high as £18,750 would lend some probability to the statement that they afterwards positively refused to pay £20,000 and commission, but it is not necessary at this stage to decide this question of fact. The important point is that after their last interview with the applicants the respondents sold the property to Mosenthal. There is no suggestion that Mosenthal was aware of what had previously taken place between the applicants and respondents. The Court is now asked to restrain the transfer of land to the purchaser at the suit of persons who do not even allege that they had previously purchased the property themselves, but merely rely upon a right of pre-emption given to them in their contract of lease. The applicants may have a claim for damages against the respondents for breach of contract, but they have not such a clear prior right to transfer as to justify the Court in restrain-

ing the transfer to Mosenthal. The Court will discharge the rule with costs, with leave to the applicants to claim repayment of such costs in case they should succeed in their action for damages, the respondents to retain the sum of £5,000 to meet any claim for damages.

[Applicant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

*Ex parte* BATHIA CHOULER: In 1899.  
re RENNEY'S ESTATE. (Feb. 9th.

Wife — Succession in intestacy —  
Authorities cited.

This was an application for an order directing the Master to pay out to the applicant as stepdaughter of John Renney (deceased) a certain sum of money in his hands belonging to the estate of the said John Renney, or part thereof.

The petition stated that the applicant was one of three step-children of the late John Renney, who died in August, 1888, at the age of 70 years.

That the applicant's mother died in July, 1887.

That under the ante-nuptial contract of her mother and John Renney, community of property was excluded.

That the said John Renney attempted in 1886 in London to trace out his relatives, but was unsuccessful.

That after his return he informed the applicant that he had made his will in favour of her children, but that no will was discovered after his death, and his estate being administered as intestate, the balance for distribution, being about £3,000, was paid over to the Master for account of his unknown heirs, there being no child of the marriage.

That the said Renney had one brother who lived with him at King William's Town, but who predeceased him there unmarried.

That although the said amount had been annually advertised in the "Government Gazette" for the past nine years, no direct relatives had been discovered.

Mr. Searle, Q.C., appeared for the applicant and referred to *Spies v. Spies* (2 M., p. 254); *Van de Kessel* (Ines. 365); *Grotius* (2, 3, 2) and Schorer's Note thereon. *Tennant's Notary's Manual* (edition of 1877, pp. 169 and 175); *Cape Law Journal* (Vol. 12, p. 34); *Voet* (38, 18, 26); *Burge* (Vol. 1, pp. 33 and 460); *Someren de jur. notere* (C. 10);

*Barry de succession* (18, 4, 10); *Stryhuis de successione* (1, 2, 8).

The Court refused the application.

De Villiers, C.J., said: It is unnecessary for the Court to decide whether by the law of this country a wife can succeed as heir to the estate of her husband. If she has any such right at all, it must be because she has survived her husband. The right to succeed could not apply to wives who have died before their husbands, because a man may have married four or five wives, and it could never be supposed that all the heirs of the deceased wives could afterwards lay claim to the estate of the testator. In the present case the wife died before the testator, and it is clear therefore that her child can have no right to succeed. The application must be refused.

Buchanan and Maasdorp, J.J., concurred.

[Applicant's Attorneys, Messrs. W. E. Moore & Son.]

RUFFEL V. THE REGISTRAR { 1899.  
OF DEEDS. { Feb. '9th.

Trade-mark—Inventive words.

This was an application for the registration of certain trade-marks. The applicant set forth that he sold certain patent medicines in connection with which he had been in the habit of using the following trade-marks viz.: "Stomatol," "Dr. Jameson's Rheumatico," "Ruffel's Cough and Croup Syrup," "Dr. Williams' Dolorine Elixir," "Digestive," "Cutine," "Ruffel's Tusso," and "Diarrhol."

The Registrar of Deeds had refused to register "Cough and Croup Syrup" on the ground that it had reference to the character of the goods.

He refused to register Rheumatico on the ground that it differed so slightly from the ordinary word "Rheumatics" and also from the previously invented word, already registered, "Rheumaticuro" (registered prior to Act 12 of 1895), that it could scarcely be considered an invented word.

He refused to register "Dr. Williams' Dolorine Elixir," "Digestive," "Cutine," "Ruffel's Tusso" and "Diarrhol" on the ground that they were not invented words.

Mr. Molteno appeared for the applicant.

Mr. Searle, Q.C., appeared on behalf of James Jones, the registered owner of the trade-mark "Rheumaticuro," who opposed the application in as far as it related to the registration of "Dr. Williams' Rheumatico."

Mr. Molteno said he would not press for the registration of "Rheumatico."

Mr. Searle; In *Eastman Photographic Materials Co. v. Comptroller of Patents, &c.* (14 T.L.R., p. 527); *Reports of Trade Mark Cases* (Vol. 15, No. 194, p. 476), it was held by the House of Lords that an invented word can be registered even if it has reference to the character of the goods. That case overrules all other cases bearing upon the interpretation of "fancy words" in the old Acts, now changed into "inventive word."

De Villiers, C.J., said: Applying the principle clearly laid down by Lord Herschell to the present case, I think that the word "Cutine" ought to be allowed to be registered, because it is an inventive word. There is no such word in existence, nor does it appear to me to be a mere variation in the termination of an existing word. The Registrar seems to have thought that the word had something to do with the word "cutting," but this clearly was not its origin. The origin of the word was *cutis*, consequently I think it is a sufficiently inventive word to be allowed to be registered as a trade mark. The same remark applies to "Tusso." Although the word is derived from *tussis*, a cough, yet I think that like the word "Solio," it is a sufficiently inventive word to pass. The word "Diarrhol" is perhaps not so clear an invention, but on the whole I am of opinion that it is sufficiently inventive to be allowed to be registered. Then I come to the word "Dolorine-elixir." In my opinion that is not a sufficiently inventive word. "Elixir" clearly is a known word, which is to be found in ordinary dictionaries. "Dolorine" seems to me to be another way of saying *dolorus*, what Lord Herschell would call a different termination for the same meaning, and in my opinion "Dolorine-elixir" is not sufficiently inventive to be allowed. And the same may be said with regard to "Digestine." That simply is a different termination to the word "digest," "digesting"—instead of a "g" this is an "e." Clearly that is not an invented word. The Court will therefore support the Registrar so far as the different words are concerned, with the exception of "Cutine," "Tusso," and "Diarrhol," which will be allowed to be registered.

Buchanan, J.: I concur in this decision. I think we are indebted to the House of Lords for having laid down so clear and definite a

principle, which can be acted upon in cases of this kind.

Maasdorp, J., also concurred.

[Applicant's Attorneys, Messrs. Scanlen & Syfret; Attorney for Jones, D. Tennant.]

#### GREGG V. GREGG.

This was an application for substituted service of an edictal citation of the respondent in an action for restitution of conjugal rights.

Mr. Gardiner appeared for the applicant.

The Court granted an order for publication in the "Star" and in the "Government Gazette" returnable on April 12.

#### IN THE MATTER OF THE PETITION OF MOLYNDIA JOSE.

This was an application for an order allowing the petitioner to sue her husband by edictal citation for restitution of conjugal rights.

Mr. Buchanan for the applicant.

The Court granted the order, to be made returnable on April 12, personal service to be effected.

#### KOCH V. THE DIVISIONAL COUNCIL OF THE CAPE

This was an application for leave for the trial of the action by a jury.

Mr. Innes, Q.C., for the applicant, and Mr. Benjamin for the respondent.

The Court granted the application, and set the case down for March 2.

#### IN THE MATTER OF THE PETITION OF JOHANNES GERHARDUS VAN ALPHEN.

This was an application for an order authorising the examination of the petitioner as a sworn translator.

Mr. Buchanan for the applicant.

The Court granted the application.

#### IN THE MATTER OF THE PETITION OF HENDRIK JACOBUS KOTZE.

This was an application for an order authorising the Registrar of Deeds to cancel a certain bond.

Mr. Buchanan for the applicant.

The Court granted the application.

#### IN THE MATTER OF THE PETITION OF JOHANNA HENDRIKA LIEBENBERG.

This was an application for an order compelling applicant's husband to provide her

with sufficient funds to enable her to institute an action for judicial reparation and to maintain her pending the suit, and an interdict restraining defendant from disposing of the joint property.

Mr. Molteno for the applicant.

The Court granted an order, calling on the defendant to show cause by February 23 why he should not pay £60 towards the payment of applicant's costs of action, and why he should not be interdicted from alienating any portion of the joint property, pending the action for restitution of conjugal rights.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA V. SCHERM. { 1899.  
Feb. 14th.

Buchanan, J., said the case of the Queen v. Scherm had come before him for review as judge of the week. In this case Scherm pleaded not guilty before the Resident Magistrate of Willowmore to stealing two sheep, and was found guilty. The case originally came up for review before Mr. Justice Solomon, but as he had some doubts as to whether the conviction should stand, he referred it back to the Magistrate for explanation. Apparently prisoner was a European herd in the employ of one Botha. Botha had to pay him 10s. a month, three slaughter sheep, and three bags of meal as wages. A drought subsequently prevailed in the district, and Botha gave prisoner permission to kill other sheep in lieu of the slaughter sheep due to him. At this time Botha owed prisoner part of his monetary wages, and prisoner sold a sheep to a man, named Van Rooyen, telling him that he had the permission of his master to sell the sheep. Van Rooyen paid prisoner 10s. for the sheep. Van Rooyen then came to prisoner for another sheep, and prisoner sold another sheep to him for 10s., telling Van Rooyen that he must hand the money over to Botha. Botha, however, refused to take the money, and prosecuted prisoner for the theft of sheep. The Magistrate found the prisoner guilty, and sentenced him to five weeks' imprisonment, with hard

labour, an altogether inadequate sentence for the theft of two sheep. The Magistrate admitted prisoner to bail pending the approval of the sentence on review. When asked to explain his sentence, the Magistrate informed Mr. Justice Solomon that he had admitted the prisoner to bail so that if the conviction were quashed he would not have been in gaol. The Magistrate had doubts as to the case, and Mr. Justice Solomon had doubts, and he (Mr. Justice Buchanan) thought it would be acting in accordance with legal usage to quash the conviction.

FOURIE V. GOUWS' EXECUTOR. { 1899.  
Feb. 14th.

This was an action to set aside the will of M. G. Gouws on the ground that it had not been signed by the said Gouws, and that it had not been validly attested.

Mr. Innes, Q.C. (with whom was Mr. Upington), appeared for the plaintiff; the defendant was in default.

Petrus Jacobus Fourie, a farmer, residing at Blaauwkrantz, in the district of Jansenville, said he was married to a daughter of M. G. Gouws. She was a daughter by the first marriage. Witness had seen a copy of the document purporting to be the will, but the signature to the document produced was not the signature of Gouws. When Gouws died he was blind. Some time before his death he was paralysed, and had been bed-ridden for two years. Mrs. Gouws could not write at all. He knew the executor, Stoffel Gouws, who received a notice that the case was coming on. Stoffel declined to come to court, saying the signature to the document produced was not his father's signature. The property dealt with under the will was the only property which actually belonged to the deceased. A man called Willem Blignaut had Meerlust now. He bought it from Jan Gouws and Stoffel Gouws.

By the Court: Stoffel Gouws told him that Blignaut wrote the will.

Maria van Niekerk, residing at Blaauwkrantz, said her husband was a "bywoner" on the farm; the deceased was very old when he died. For two years previous to his death deceased was blind in one eye, and for eighteen months previous to his death he was blind in both eyes. Mrs. Gouws had told witness that she could not write. About two years ago Blignaut asked witness to sign the name of M. G. Gouws to the document purporting to be the will of M. G.

Gouws, Blignaut told witness that the document was a subscription list for the benefit of "the old blind man," meaning M. G. Gouws.

Johannes Jacobus van Jaarsveld, a son-in-law of old Mr. Gouws, said his wife was a daughter of the deceased by his second marriage. On one occasion witness signed a document at the request of Blignaut. Blignaut said it "was a little matter to be arranged between us children so that we can keep the ground." He added that the document had something to do with a case which was coming on. One of the signatures to the document purporting to be a will was his signature. Witness did not read the document.

The Court gave judgment in terms of the prayer, the costs to come out of the estate.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew]

SMITH AND OTHERS V. MARTIN'S } 1899.  
EXECUTOR DATIVE. { Feb. 14th.

Prescription — Possession — Occupation.

*To support a claim of title to land by prescription, there must be proof that the adverse possession was so patent that the owner, with the exercise of reasonable care, would have observed it.*

This was a matter in which a rule nisi had been granted under the Derelict Lands Act calling upon all persons concerned to show cause why certain landed property should not be registered in the petitioners' names. Upon the return day cause was shown by the executor dative in the estate of one Martin, in whose name the land was registered. The Court then made an order allowing the question as to the prescriptive occupation of the petitioners to be tried without pleadings, both parties being at liberty to produce oral evidence this day before the Court.

Mr. Graham, Q.C. (with whom was Mr. Cloee), appeared for the petitioners, and Mr. Joubert appeared for the respondent.

Augustus Horsley Stubbs, chief distributor of stamps, said he would be thirty-six years of age next May. He had lived at Rochester House all his life. Rochester House was on the property of his uncles and aunts, the petitioners, who had always occupied the

piece of land shown on the diagram which they now claimed. Their right of occupation had never been questioned. All the petitioners resided on the property, and had resided there all their lives. A few years ago a portion of the land was leased for brick-making purposes. The land was valued for municipal and divisional purposes as Rochester House and grounds. Cattle had frequently been impounded for straying on the ground.

Cross-examined: Rochester House was on one side of the main road, and the land in question on the other.

Re-examined: Witness's family had occupied Rochester House and the land adjoining since 1849.

By the Court: The occupants of Rochester House had never cultivated the land in question, but had used building material from it.

George Henry Stevens, one of the petitioners, said he was born in England in 1846. He had resided at Rochester House since 1849, when his father occupied the property. The Stevens's of Rochester House had always occupied the property, and had always exercised rights of ownership over it, and had grazed goats and cattle on it.

Calcutt Maximilian Stevens and Thomas Hopkins gave evidence of a corroborative nature.

This closed the case for the petitioners.

For the respondents.

Gordon Murison was called. He said he was executor in the estate of the late John Martin. Witness knew the land in question. The late John Martin made a will, in which he bequeathed all his property to his children. Deceased left some land which could not be found until a rule *nisi* was published with reference to the land referred to in the present case, which was advertised as land coming under the provisions of the Derelict Lands Act.

Cross-examined: The Martins, so far as he knew, had never occupied the land in question.

George Edward Ross said he resided near the land in question, which he had known for about fifteen years. He had never seen the petitioners occupying the land. He had seen cattle belonging to Mr. Versfeld on the ground. He had never seen cattle belonging to the petitioners on the ground.

Cross-examined: Versfeld's cattle had been on the ground since Versfeld lived there. Witness did not know who the ground belonged to.

William Twine, residing at Woodstock, said he had known the ground for eight or nine years, but he had never seen the petitioners occupying the ground. The only person whom he saw occupying the ground was a man who made bricks there. Witness had never tried to lease this piece of ground from Stubbs.

Melt van der Spuy Versfeld said he was the owner of lot No. 12 adjoining the land in dispute. When he saw the rule *nisi* advertised he filed an affidavit. Since he had occupied lot 12 (for about eight years) he had used lots 13 and 14 for his cows and carts. About a year ago a man made bricks there, but witness stopped him, and made bricks for him. The man did not tell witness from whom he obtained the right to make bricks on the ground. Witness had never been warned off the land in question, but his cattle had been impounded on ground higher up. Witness had fenced in a portion of the ground.

Cross-examined: He knew the ground twenty-five years ago, but he did not know to whom it belonged.

This closed the case for the respondents.

After argument by Mr. Graham.

The Court, without calling upon Mr. Joubert, discharged the rule, the costs to come out of the estate.

De Villiers, C.J.: The land in question is registered in the name of the late John Martin, and therefore belongs to his executor as representing his estate. The petitioners, however, allege that they have been in occupation for upwards of thirty years, and have thus acquired a right to the ownership of the land. The burthen of proving such occupation lies upon them. The occupation must have been not only peaceable and as of right but open, that is to say, visible to others. The right to acquire by prescription is founded upon the negligence of the owner in not protecting his interest against strangers in possession, but this foundation fails where the adverse possession is not patent to him and others. It may not be necessary to prove that the whole of the land has been cultivated or fenced in, but there ought to be proof that the adverse possession was so patent that the owner, with the exercise of reasonable care, would have observed it. In the present case evidence of that nature is wholly wanting. The petitioners occupy a house on one side of the main road. On

the opposite side they have for more than thirty years hired some property belonging to one Maynard, and as such leasees they say that they have extended their occupation beyond the property leased on to the land in question. They neither fenced this land nor cultivated it. Their cattle occasionally grazed on it and on one or two occasions they impounded cattle trespassing on it. They say that they treated the land as their own, but there was not sufficient visible proof of their possession. The owner might have passed the land daily without knowing that it was in the occupation of any one else, until lately, when a portion was let to one Boswara for brick-making purposes. The doctrine of prescription would become an engine of injustice if, under such circumstances, the owner were to be deprived of his rights of ownership. The rule must be discharged.

Buchanan, J.: My reasons for concurring have been fully stated by the Chief Justice. The occupation by the petitioners is not such an occupation as would give notice to the owner of their claims being set up. As to costs, it was owing to the petitioners that the owner was able to find out where the property is, and therefore the costs ought to come out of the estate.

Maasdorp, J., concurred.

Applicant's Attorney, Gus Trollip;  
Respondent's Attorney, C. W. Herold.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

DIX V. DIX. { 1899.  
Feb. 15th.  
.. 22nd.

This was an action for a decree of divorce by reason of the alleged adultery of the defendant.

Mr. Benjamin appeared for the plaintiff. The defendant was in default.

Francis Henry le Sueur, clerk in charge of the marriage register at the Colonial Office, produced the marriage certificate of the parties, Alice Minnie Dix, the plaintiff, and Edward James Marriott Dix, the defendant, which showed that they were married on June 11, 1892.

The plaintiff identified the photograph produced as the photograph of her husband. She stated that there were four children of the marriage, but only one child, aged four or five years, had survived. At the time of the marriage the defendant was carrying on the business of a furniture dealer at Mowbray, and subsequently occupied other situations in Cape Town. The parties lived happily together until October, 1897, when witness had reason to doubt defendant's fidelity. The first occasion was when she received a letter addressed to defendant from a young woman at Kenilworth, whom, it appeared, defendant had promised to take to the theatre. That letter was delivered at plaintiff's house, and she opened it according to custom. Defendant always opened her letters. Plaintiff taxed defendant with reference to this letter, but he made no admission of intimacy with the young lady. In October, 1897, plaintiff again had occasion to doubt defendant's fidelity as a result of a "word dropped" by plaintiff's servant. Plaintiff then taxed defendant with infidelity, which he at first denied, but subsequently admitted. Indeed, he admitted intimacy with several persons—with a Mrs. Horne, residing in Cape Town, with plaintiff's servant, Esther van der Byl, and with two women of bad repute, who resided in Cape Town. After some conversation plaintiff forgave the defendant, and he promised to reform. Witness forgave him for the sake of the child, who was then about two years old. Witness lived with defendant until October, 1898, when he left Cape Town. Between October, 1897, and October, 1898, she had no suspicion of defendant's fidelity, but on going to Mr. Karie she found that defendant had told her an untruth in connection with a little business matter with Mr. Roux, chemist. Witness called on Mr. Roux, who, after speaking on various subjects, said defendant had admitted everything to him, and from what defendant had told him, he (Mr. Roux) did not believe that defendant had been faithful to plaintiff since he had promised to reform and since she had forgiven him. Defendant was now in Natal. Witness identified the signatures in the register produced as the signatures of defendant and herself.

By the Court; The parties were married out of community of property. Plaintiff's father was alive, and was residing in England. At present plaintiff was staying with her brother. She desired to have the custody of the surviving child of the marriage, as



she could support it. The child was staying with her now.

John Henry Anschutz said he knew the parties in the case. He had known defendant for ten years or upwards, and on several occasions he had seen defendant in the society of Continental women. He had seen defendant walking with these women, and he had seen him in cabs with women other than his wife. In September, 1898, defendant asked witness to have a cup of tea with him at a place described as a café, and witness assented to the proposal, as at the time he did not know the nature of the place. Witness subsequently discovered that the café was practically a house of ill-fame, and he walked out immediately. Several of the assistants employed in the café were very free, and appeared to be women of loose character. On several occasions defendant spoke to witness regarding his relationship with women of ill-fame. He said he was intimate with Mrs. Horne and other women. He boasted of these things in company.

By the Court: Witness saw defendant walking with Mrs. Horne in Adderley-street six months ago, and after October, 1897 witness had seen defendant in the company of women who looked very loose. During the last six months defendant had gone on so badly that witness quitted his company and asked him never to come into witness's office again, either on business or otherwise. Witness was employed by Messrs. Sedgwick & Co.

Andrew Goslett, a cabdriver, recognised the photograph produced as the photograph of the defendant, and said he had frequently driven the defendant in his cab. On one evening when witness was driving down Adderley-street, defendant stopped him and told him to drive round St. George's-street, and to go round to the Standard Bank and meet defendant there. Witness followed out defendant's instructions. Meanwhile defendant had picked up a certain lady, and drove off with her to the foot of Hope-street, near a house of ill-fame. Witness did not call for defendant, but waited for him according to instructions. Witness had frequently driven defendant to the neighbourhood of houses of ill-fame.

After argument as to proof of the adultery,

Anschutz (recalled) said that defendant admitted to him that during August and September, 1898, he was leading a very fast life.

The Court decided that the case should stand over *sine die* for the production of more tangible evidence.

*Postea* (February 22nd).

Mary Smith, a flower-seller, said she had known the defendant for many years, and she identified the photograph produced as being the photograph of the defendant. About seven months ago defendant committed adultery with her in Cape Town.

The Court granted a decree of divorce with costs, the plaintiff to have the custody of the surviving child of the marriage.

[Plaintiffs' Attorneys, Messrs. Innes & Hutton.]

CLINGEN V. ROSS. } 1899.  
Feb. 15th.

Land owner—Excavation Injury—  
Damages — Negligence — Treas-  
pass.

*The owner of land is not liable for damages for an injury sustained by a child through falling into an excavation made by such owner on his land, at a spot not resorted to by children, and away from any public or private road.*

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This was an action for £258 5s., damages sustained by the plaintiff, owing to the death of her minor child by drowning in a pond belonging to the defendant. The declaration alleged the following:

1. The plaintiff is Ellen Jane Clingen, married in community of property to James Charles Clingen, and is assisted by her husband as far as need be in this matter.

2. The defendant is George Edward Ross, jun.

3. The defendant is the owner of certain land situate on Rutler's Field, at Salt River, in the Municipality of Woodstock, and upon the said land there existed until recently, and had existed for a considerable time past, a certain excavation—large quantities of clay having been removed for brick-making purposes.

4. The said excavation was dangerous to life and limb, and was a great risk to the public passengers and inhabitants, it being situated within a few yards of a road which is free and open for the use of the public.

5. The defendant was repeatedly warned, and called upon by the municipal authorities in the month of April, 1898, and at

other times to fence in the brick-holes on his property aforesaid in terms of the municipal regulations, but the defendant negligently and in breach of his duty generally and specially under the said regulations, wrongfully and unlawfully failed and refused to fence in the said brick-holes. The plaintiff annexes hereto a copy of Regulation No. 40 of the Municipal Regulations of Woodstock, and craves that the same may be considered as inserted herein.

6. On or about the 26th August last the plaintiff's son, one Edward Charles Clingen, a boy aged 7½ years, while lawfully on the property of the defendant, fell, in consequence of the defendant's negligence and breach of duty as aforesaid into the excavation referred to in paragraphs 8 and 4 hereof and died from drowning in the water which was collected in the said excavation. The said excavation was to the knowledge of the place attractive to children, and one to which children were in the habit of resorting for purposes of amusement and otherwise.

7. The plaintiff and the said Edward Charles Clingen were on the said 26th of August last inhabitants of the Municipality of Woodstock.

8. The plaintiff has sustained damages in the sum of £258 5s, through the death of her son, which was due to the defendant's wrongful and unlawful negligence and breach of duty as aforesaid.

*Regulation 40 of the Woodstock Municipality:* "Any person permitting any brick-making holes, or other dangerous holes, ponds, ditches, or drains on his property, or for which he is manager or agent, to remain unprotected by proper fencing or rails to the danger of passengers, or of any of the inhabitants, or to the danger of any animal falling therein, shall, for each day such holes, ponds, ditches, or drains remain unprotected after being desired by the Council or their officers to protect the same, be liable to a penalty not exceeding £5."

The defendant in his plea:

1. Admitted paragraphs 1, 2, and 3, save that he said that the excavation in question was on portion of the estate Varsche Valley, and not on Rutter's Field.

2. As to paragraph 4 he said that the excavation was about nine yards from a temporary road used by the Council of the Woodstock Municipality for the conveyance of gravel; he denied that the road was a public one, and denied the other allegations.

3. He admitted that the Municipality of Woodstock had adopted the regulation annexed, but denied the other allegations in paragraph 5, and denied that the regulation was binding and valid in law.

4. He admitted that the plaintiff's son, being of the age stated, was on the 26th August last drowned in the water collected in the said excavation, but denied the other allegations in paragraph 6, and specially denied that the death was due to any breach of duty on his (the defendant's) part, and said it was due to the negligence of the plaintiff's son.

5. He admitted paragraph 7, but denied paragraph 8.

The replication was general.

Mr. Close appeared for the plaintiff, and Mr. Innes, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

John H. Beresford, Clerk to the Municipality of Woodstock, said there was a municipal regulation which said that any person making a hole for brickmaking and not filling in the same was liable to a penalty of £5. In pursuance of this regulation, witness sent two notices to defendant calling upon him either to fill in or fence round holes in his ground. Witness received no reply to these notices.

Cross-examined: There were no houses near the excavation referred to in this case. Since the accident the hole had been filled up.

Ellen Jane Clingen, married in community of property to Charles James Clingen, said her husband was at present employed at Oudtshoorn. In August last they had a son, William Charles, aged 7½ years, and at this time witness was living with her sister. at No. 6 Street, Rutter's Field, Woodstock. On August 26, her son William went to play at defendant's place, and he never returned. The next day his uncle found his cap floating on the water. The funeral expenses amounted to £3 10s. 1d., and the mourning expenses amounted to £4 15s. Witness also paid a man £2 in consideration of the time he lost from his ordinary work in connection with the case.

Cross-examined: If the boy had lived he would have contributed to her support. It was in consideration of this that she asked for damages beyond the expenses entailed by her in funeral and other expenses.

Elizabeth Marian Miskey gave corroborative evidence, and said that the edge of the pond in which the boy was drowned was three or four yards from the road.

Carl Gustav Miskey proved the finding of the body of the deceased, and said children frequently played about near the pond.

Augustus Horsley Stubbs said this pond was not fenced in. In its deepest part the pond was ten or twelve feet deep.

James A. Stewart gave evidence as to the recovery of the body. The pond was 300 yards from Mrs. Olingen's house.

Bisting said he knew the brick pond where the boy was drowned. There were two ponds on defendant's property.

This closed the case for the plaintiff.

For the defence,

George Edward Rose, jun., the defendant, said the hole where the boy was drowned was made during January and February, 1898. There was another hole lower down. After a conversation with Mr. Healey, the late Municipal Inspector of Woodstock, witness filled in the lower hole. He would have filled in the upper hole if he had been instructed to do so. After the accident he filled in the hole in which the boy was drowned.

Cross-examined: The whole of the property was unfenced, but before the accident he did not consider that the hole was dangerous.

By the Court: If he saw a child playing near the hole he would chase it away.

Examination resumed: The edge of the pond was 8 yards from Cecil-road. There was no fence or embankment round the pond. After the declaration had been filed he tendered plaintiff £8 5s. 6d. in settlement of all expenses.

By the Court: He had not been prosecuted by the municipality for not filling up the hole.

Re-examined: The plaintiff's attorney declined to accept the £8 5s. 6d. There were other excavations of this kind, dangerous places, in the municipality.

William Henry Dobson, Municipal Inspector of Woodstock, said the nearest point of the excavation in which the accident happened was not less than 20 or 25 feet from Cecil-road.

James Henry Twine, a brickmaker, residing at Woodstock, said that on the afternoon before the fatality he saw defendant's little boy with another little boy, presumably the deceased, playing near the pond. Witness had also made an excavation. After receiving a notice from Mr. Healey witness filled in his excavation. Defendant's excavation was about 18 to 20 feet from Cecil-road. The deepest part of the excavation was farthest from Cecil-road.

William Versfeld, residing near Chatham-road, said he knew the excavation where the accident took place. He was present when the body was found, and assisted in recovering it. The body was found in the deepest part of the excavation, which was 5 or 6 feet deep, and was the part of the excavation which was further away from Cecil-road than the other parts of the excavation.

By the Court: Witness could not say that he had seen children playing near the excavation.

This closed the case for the defence.

Mr. Close: The defendant is to be considered negligent upon three grounds, viz.: (1) There was a duty upon him to fence the pond because it was so near to a public road. (2) The same duty lay upon him because it was a spot alluring to children. (3) The duty was imposed by municipal regulation. These three grounds cause an exception to the rule that a proprietor of land is under no obligation to protect a mere licensee. The English authorities lay down that an excavation must be fenced if it is substantially near to a road.

[De Villiers, C.J.: There is no evidence to show that the proximity to the road had anything to do with the accident, as the child was found about 70 feet from the road.]

The proximity to the road shows negligence on the defendant's part in not fencing. The Scotch cases lay down the same rule, and according to them even trespassers are entitled to damages. As to the alluring nature of the spot, *Beven on Negligence* (pp. 188, 189); *Schmidt v. Kansas City Distilling Company* (59 Am. R., p. 16); *Jewson v. Gatti* (2 T.L.R., p. 441); *Clark v. Chambers* (L.R., 3 Q.B.D., p. 327). The evidence of the defendant himself shows that the place was attractive to children. Further, a special duty was cast upon the defendant by Regulation 40, framed under Act 45 of 1882, section 109, subsection 27. If this statutory duty exists the plaintiff had a right of action on account of it. *Jordaan v. Worcester Municipality* (10 Juta, p. 161); *Huachoff's Trustee v. Friesliak* (11 S.C.R., p. 344); *Wright v. Paterson, Bristol v. Paterson* (S. 5, p. 29; E.D. 5, p. 890). Notice was sent to the defendant that he would have to fence in the holes. Though he fenced in one and the Inspector was satisfied that was not sufficient. The statutory duty could not be waived.

[De Villiers, C.J.: Was there not negligence on the mother's part in allowing the child to go out unattended?]

*Breen on Negligence* (p. 185) says that this was not negligence; *Underhill on Torts* (p. 96); the question of her negligence depends on circumstances; according to her circumstances the mother took every precaution. As to the negligence of children, *Jynch v. Nirdin* (1 Q.B., p. 29); *Morgan v. Atherton* (L.R., 1 Ex., p. 239); *Breen on Negligence* (p. 187) says that children of tender years are not capable of negligence. As to the damages claimable, *Voet* (9, 2, 11). The test to be adopted in awarding damages is, what benefit might reasonably be excepted from the life of the child. *Franklin v. S.E. Railway Co.* (2 H. and N., p. 214); *Duckworth v. Johnson* (4 H. and N., p. 657); *Williams v. S.W. Railway Co.* (4 H. and N., p. 57).

Mr. Innes: Regulation 40 is *ultra vires*. Section 109, sub-section 27, does not authorise such a regulation; sub-section 4 deals with nuisances, but this was not a nuisance. As to a general duty to fence in places on one's own land, *Housell v. Smythe* (7 C.B.N.S., p. 731); *Judgment of Williams, J.* (at p. 742); *Harcastle v. South Yorkshire Railway* (4 H. and N., p. 67); *Judgment of Pollock* (C.B., at p. 74).

[*De Villiers, C.J.*, referred to *Norman v. Town Council of East London* (12 S.C.R., p. 61).]

By Roman-Dutch law all such questions are founded on the *Lex Aquilia*. *Klir v. Nieman* (60 Am. R., p. 854) is very much in point. The child was a trespasser before he reached the pond, and was not there lawfully. The hole was not so close to the road as to reasonably and appreciably interfere with the use of the road by people. No damages can be claimed under the *Lex Aquilia* on the ground of sentiment. There are only two grounds allowed for compensation, viz.: failure of support to persons, and funeral and medical expenses. *Grotius* (3, 33, 2) and *Schorer's* note. *Voet* (9, 2, 11) says nothing about funeral expenses. *Matthaeus de Criminibus* (48, 5, 11).

Mr. Close: Regulation 40 is neither illegal nor unreasonable as to damages. *In re Kuop* (10 J., p. 193) laid down that a son was bound to support his parents if in indigence.

*De Villiers, C.J.*, said: There is no doubt in this case that the plaintiff's child met with its death from drowning, and that the accident did take place in an excavation on land belonging to the defendant. There seems also no doubt that the child's going over the road had no connection whatever

with the accident; in fact there is no proof at all that the child went by way of Cecil-road to its destination, but as far as the evidence goes it would seem to show that this child, together with another child, had gone deliberately to this excavation, and that while playing there the child fell into the water, and not at the point nearest to the road, but at the further end, some sixty or seventy feet from the road. It seems to me therefore that there was no connection whatever between the fact that the excavation was near to the road and the fact that the accident did take place. But as some considerable stress has been laid upon the fact that a portion of the excavation is near to the road, I should like to say a word upon that point. I quite agree that if there is an excavation on a man's land, so near to the road as to be a source of danger to people who are lawfully using that road, then the owner of the land who made the excavation is responsible for any damage which ensues to any of the public who shall meet with an accident in this excavation; but every case which has arisen yet, in this court at all events, has been a case where a person, in the ordinary use of the road, has by some means or other gone off from the road and fallen into the excavation. In the present case, as I said before, nothing of the kind took place. The accident which happened had no connection with the road, but was occasioned by this child going to a point away from the road, and there falling into this excavation. But then it is contended on behalf of the plaintiff that there has been a kind of invitation, and implied invitation, held out by the defendant to the plaintiff's child and to other children to come and play near this particular pond, near to this excavation, but upon that there is no evidence whatever except the evidence of Mr. Miskey, who said that he did on some occasions see children playing there, but then the defendant on the other hand says that he very seldom saw children near there, and that upon the few occasions upon which he did see children going towards this excavation he warned them off, so that so far from holding out any invitation to children to go to that place for the purpose of playing there he did all he could to keep the children away. The cases which have been cited, the American cases, may not perhaps be quite consistent with each other, but even in the case which Mr. Close relies upon mainly, *Schmidt v. The Kan-*

as *City Distilling Company*, I find it laid down by the Chief Justice, "that the owner of property may not place temptations upon it to allure anyone to a dangerous place upon his premises and escape liability for injury sustained, nor may he place machinery or other dangerous things so near to a public street or highway as to endanger persons using that street or highway without liability. But to apply this to the owner of the property, that he might not place things upon his own property which might be dangerous only to himself, would be to deny his dominion over his property, and to compel him to use it not for his own but for the public convenience." In the American case (proceeded the authority) "the petitioner should have contended that the place where Laura, the child in question in that case, lost her life was attractive to children, because they would go there in the hope of playing there and seeing steam escape from a pipe." In the present case there has been no evidence to show that the excavation of the defendant was a resort of children. In the second American case quoted (*Kline v. Norman*) it was held that the owner of vacant land in the city is under no legal obligation to fence in a hole or pond, nor was he liable for the death of a child who had fallen into the pond. In another case where a child fell down a precipitous place, it was held that the plaintiff could not recover "because (said the Judge) abstaining from driving the children away from this place is not an invitation which would impose any duty or responsibility upon him." Then there are further cases to the same effect. In this case I do not think that there is sufficient proof of any implied invitation to the children of the neighbourhood to make the defendant liable. The only point upon which there seemed to be anything to support the plaintiff was in regard to the municipal regulation. No doubt if the municipal regulation had the very wide meaning which is contended for it on behalf of the plaintiff, it might fairly be said that it was prohibitive against the defendant making this excavation without its being properly fenced. But I think that this regulation must receive a reasonable construction. The regulation says that any person permitting any brick-making holes or other dangerous holes, ditches, or drains upon his property to remain unprotected by proper fences or rails, to the danger of passengers or any of the inhabitants, or to

the danger of any animal falling therein, shall for each day after having been desired by the Municipality to protect the same be liable to a penalty not exceeding £5. The reasonable construction is "to the danger of the inhabitants or of passengers or of animals who are lawfully in the neighbourhood." That is my opinion of the reasonable construction of it. If therefore there is an unfenced excavation so near to the road as to be a nuisance to the public passing along that road, then there is the danger which this rule was intended to provide for, but where it is a considerable distance away, as in this case—one witness said as much as twenty feet, another as little as ten feet, but taking it at about fifteen feet—such an excavation is not necessarily a danger to the public using that road, and it is with that limitation that this regulation should be read. If the regulation goes further, then I confess that I think it is beyond the powers of the Municipality to make such a regulation. The Municipality has to protect the public, but the Municipality has no right to protect an individual against himself. If the defendant had a dangerous hole on his own property, when he himself only would be exposed to danger, I say that in such a case the Municipality has no right to make provision to guard against it. As I said before in the present case, the proximity of this excavation to the road has no connection whatever with the actual accident. The child fell into the hole because he went trespassing upon the man's land—he went to this pond and fell into it. It is an unfortunate accident, and one sympathises with the parents who have lost their child, but we have only to do, in the present case, with the legal liability of the defendant, and in my opinion no such legal liability as is alleged by the plaintiff has been established, and the judgment of the Court must be for the defendant with costs.

Buchanan, J.: I concur; and I would only like to say that I am sorry that the legal adviser of the plaintiff did not accept the offer made by the defendant in this case.

Maasdorp, J., also concurred.

[Plaintiff's Attorney, D. Godlonton;  
Defendant's Attorney, P. de Villiers.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1899.  
{ Feb 16th.

Mr. Graham, Q.C., moved for the admission of Michael James Farrelly as an advocate of the Supreme Court. Counsel said that unfortunately the applicant did not have his certificates of admission with him at present, but affidavits were read to show that he was admitted to King's Inn, Ireland, in 1891, and the Middle Temple, London, in May 1892. There was also an affidavit made by an English barrister at present on a visit to this country, and certifying that Mr. Farrelly was to his personal knowledge a member of the English Bar.

De Villiers, C.J.: When will he be able to file the certificate?

Mr. Graham: Within three months.

The Court granted an order as prayed, subject to the certificate being filed within three months.

Mr. Close moved for the admission of Arthur Bertram Savory as an attorney and notary.

The order was granted, the oaths to be taken before the Resident Magistrate of Oudtshoorn.

### PROVISIONAL ROLL.

MAIR V. JAMES M. HORN AND CO.

Mr. Buchanan applied for provisional sentence on two promissory notes, one for £162 19s. 6d. and the other for £75, with interest at the rate of 6 per cent. from the due dates.

Provisional sentence was granted, in terms of a consent paper put in.

IRWIN AND CO. V. JAMES MERCER.

Mr. Buchanan applied for the final adjudication of defendant's estate.  
Granted.

PHILLIPS V. JOHN GEORGE HART.

Mr. De Waal moved for provisional sentence on a mortgage bond for £1,600, with interest at the rate of 6 per cent. from

November 1, 1897, and that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest. Counsel asked that judgment be given subject to the production to the Registrar of the original bond, which was at present on its way from Namaqualand.

De Villiers, C.J., said it would be better to postpone judgment until the bond was produced. He would like to see it before giving judgment, and the Court would therefore order the case to stand over until Thursday next.

VAN HEYST V. G. J. VISSER, G. J. COETSJE, AND D. J. COETSEE.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £1,500 against the two first-named defendants only, and that the case against the third-named be postponed until March 13. It appeared that the first-named defendant passed a mortgage bond in favour of the plaintiff, and by reason of the non-payment of the interest the bond had become payable. The second-named defendant had signed as surety, and had specially hypothecated a part of a certain farm. The summons prayed that the property specially hypothecated by the first-named defendant, and the part of the farm specially hypothecated by the second-named defendant be declared executable. The third defendant resided in the Transvaal, and the citation, which was returnable that day, had not yet come to hand.

Provisional sentence was granted as prayed against the two first-named defendants, and their property specially hypothecated declared executable. The case against the third-named defendant was postponed until March 13, the return day of the citation being extended until then.

*Postea* (March 13th).

Provisional sentence was granted against the third-named defendant.

### ILLIQUID ROLL.

LENNON AND CO. V. J. A. B. BAYLY.

Mr. Upton applied for judgment, under Rule 819, for £169 ls. 11d., goods sold and delivered, with interest *a tempore morae* and costs of suit.

Judgment granted as prayed.

SEARLE V. R. E. JONES AND ANOTHER.

Mr. Close applied, under Rule 329D, for judgment for £20 on a promissory note, with costs of suit.

The Court ordered the plaintiff to proceed by way of summons for provisional sentence.

PURCELL, YALL & P, AND EVERITT V. J. C. GIBSON.

Mr. Buchanan applied, under Rule 329D, for judgment for £22 8s., balance of account owing for goods sold and delivered, with costs of suit.

Judgment granted as prayed.

BOSMAN AND CO. V. TIELMAN J. BOSCH.

Mr. De Waal applied, under Rule 329D, for judgment for £17 3s. 6d., wines sold and delivered, with costs of suit.

Judgment granted as prayed.

HOWARD AND BEST V. FIRTH.

This was an action for £26 0s. 4d., the balance of an account for work and labour done, and an order compelling the defendant to render a proper account of moneys due to the plaintiffs under a certain contract.

The plaintiffs' declaration was as follows:

1. The plaintiffs in this case reside at Cape Town, and during the times and matters hereinafter referred to carried on business there in partnership under the style or firm of Howard & Best; the defendant is an engineer and contractor residing at Sea Point.

2. In or about July, 1896, an agreement was entered into between the plaintiffs and defendant in terms of which the defendant sub-let to the plaintiffs certain work connected with and forming part of the Green Point and Sea Point drainage works, the terms of the agreement being substantially embodied in two letters from the defendant to the plaintiffs, dated respectively the 23rd July and 3rd August, 1896.

3. The agreement aforesaid provided *inter alia* as follows: (a) That the defendant should sub-let certain work to the plaintiffs to be by them done for reward in that behalf in connection with the outfall to the sea, to wit, all the concrete work in the outfall for 11s. per cubic yard, and rock excavation at 10s. per cubic yard, together with certain other work not material to this

statement, subject to certain conditions and further stipulations not necessary to be here inserted. (b) That the plaintiffs should prepare and manufacture, and deliver or have at the disposal of the defendant certain concrete blocks to be used in connection with the said drainage works, and that the defendant should pay them therefor at the rate of 5d. per block for each block taken over or used by him.

4. The drainage works hereinbefore referred to were works to be constructed by the defendant for the Green Point and Sea Point Municipality.

5. Thereafter the plaintiffs entered upon and duly performed their duties, and did certain work as agreed upon in terms of the said agreement, and the defendant became liable to them for payment of moneys in respect of the work so done under the said agreement.

6. On or about the 21th April, 1897, the defendant rendered to the plaintiffs an account, dated 24th April, 1897, showing a balance due to them by the defendant of £26 0s. 4d. in respect of the said work— which said sum is still unpaid and due to them.

7. In order to enable the plaintiffs fully and effectually to construct and complete the work connected with the outfall into the sea hereinbefore mentioned, it was necessary and it was the duty of the defendant, and he undertook to construct a screen to protect the said work against the action of the sea and waves, but the defendant wrongfully failed and refused to erect such screen, by reason whereof the plaintiffs were unable fully and sufficiently to construct and complete the said work. Subsequently thereto the defendant appointed a ganger or employé of his own over and in charge of the said works. Thereafter, on or about the 21th April, 1897, the plaintiffs gave the defendant notice of the termination of the said contract agreed to as aforementioned, and the defendant acquiesced in and ratified such termination of such agreement, and the plaintiffs therefore became and were released from all liability therefor and thereunder.

8. At or about the time of, or subsequently to, the termination of the agreement as aforesaid, the defendant had received or taken over to his use, or had caused to be taken over on his behalf from the plaintiffs, a large number of concrete blocks aforesaid, and it then became and was his duty to

return plaintiffs a true and proper account thereof supported by vouchers, and to debate the same and to pay to the plaintiffs what is due to them therefor, all of which the defendant has neglected or refused to do.

9. All things have happened, all times elapsed, and all conditions been fulfilled to entitle the plaintiffs to demand from the defendant payment of the said sum of £26 0s. 4d. and a full and true account, supported by vouchers, of all moneys due to them in respect of the said blocks, to debate such account, and to demand payment from the defendant of whatever sum may be found due to the plaintiffs.

Wherefore the plaintiffs claim: (a) Payment of the sum of £26 0s. 4d. as aforesaid, with interest from 21th April, 1897. (b) An order compelling defendant to render a true and proper account supported by vouchers of all money due to them in respect of the blocks aforesaid and to debate the same. (c) Payment for such amount as shall be found due after such debate with interest thereon *a tempore morae*. (d) In default of such account, payment of the sum of £50 for and in respect of the blocks so used or taken as aforesaid. (e) Such further or other relief as to this Honourable Court may seem meet, with costs of suit.

The defendant's plea and claim in reconvention was as follows:

I For a plea the defendant says as follows:

1. He admits the allegations in paragraphs 1 and 2 of the declaration, and begs to annex hereto, marked "A" and "B," copies of the two letters therein referred to.

2. As to paragraph 3 of the declaration, he begs to refer for greater certainty to the terms of the said letters, and specially says that thereby the plaintiffs agreed that the work done by them should be subject to the approval of the Engineer of the Green Point and Sea Point Municipality.

3. He admits the allegations in paragraphs 4, 5, and 6 of the declaration, save that he denies that the plaintiffs at any time duly completed the performance of their duties under their agreement, and that any sum is now due to them by him.

4. He denies that he was under any duty to erect any screen, that he received the notice alleged in paragraph 7 of the declaration of the termination of the plaintiffs' agreement, and he denies that he ever acquiesced in any such termination or released the plaintiffs from their liability under their agreement,

5. In the month of April, 1897, it was arranged between the parties that the defendant should for account and on behalf of the plaintiffs carry on the work by them undertaken in accordance with their aforesaid agreement, allowing them the amounts agreed upon and debiting them with the cost of the work so carried on, and thereafter the plaintiffs accordingly ceased to carry on the said work, which the defendant carried on for their account.

6. He annexes hereto and marks C a copy of a true and correct account, heretofore duly rendered to the plaintiffs, which embodies the balance of £26 0s. 4d. shown on the account referred to in the declaration, and shows the further items of account between the parties, save and except certain sums of £38 and £122 1s. 10d. hereinafter referred to.

7. At the foot of the said account the plaintiffs are indebted to the defendant in the sum of £440 19s.

8. He further says that it was under their aforesaid agreement the duty of the plaintiffs to make and supply proper blocks of concrete, the cement being supplied by the Municipality to the defendant, such concrete to be supplied to the satisfaction of the engineer of the said Municipality.

9. Of the blocks made and supplied by the plaintiffs 4,186 were condemned by the said engineer by reason of the negligence of the plaintiffs in making the same, and the defendant was lawfully debited by the said engineer with the sum of £10, for the value of the cement wasted in the said blocks by the negligence of the plaintiffs, and the defendant moreover lost in respect of the said blocks the sum of £122 1s. 10d., being the amount of 7d. per block, to which, as the plaintiffs well knew, he was entitled out of the sum of 1s. per block payable by the Municipality for each proper block in terms of its contract with the defendant, after deducting 6d. payable to the plaintiffs. (This paragraph was amended in court, the effect of the amendment being to reduce the £40 to £17 4s.)

10. Of the said sum of £17 4s. only £2 is brought into the account marked "C," and the defendant is entitled, by reason of the negligence of the plaintiffs as aforesaid, to claim from them, in addition to the sum of £44 19s. aforesaid, the further sums of £38 and £122 1s. 10d. by way of damages.

11. He denies the allegations in paragraphs 8 and 9 of the declaration,



Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

11. For a claim in reconvention the defendant, now plaintiff, says as follows :

1. He begs to refer to the matters set forth in the above plea.

2. All things have happened, all conditions have been performed, and all times have elapsed and passed necessary to entitle him to payment of the sums of £440 19s., £28, and £122 1s. 10d. aforesaid, but the plaintiffs, now defendants, refuse to pay the same or any part thereof.

Wherefore he prays for judgment for (a) £440 19s. at foot of the account marked C, (b) £38 and £122 1s. 10d. by way of damages as aforesaid, or that he may have such further or other relief as to this Honourable Court may seem meet, together with costs of suit.

The replication denied negligence on the part of the plaintiffs in making the blocks, and said that if they were defective it was on account of the defendant not supplying, in accordance with his duty, proper moulds and shedding for the construction of the same.

Mr. McGregor and Mr. Upington appeared for the plaintiffs.

Mr. Innes, Q.C., and Mr. Benjamin for the defendant.

Thomas Howard said that he was in partnership with Best and undertook to do certain work for the defendant at Sea Point. He had known defendant before that in Australia. When defendant had secured the contract for the drainage works at Sea Point he offered witness and Best the out-fall work and then the making of the concrete blocks, and stated the prices he could afford to give them. Subsequently witness received the two letters (put in) setting forth the terms of the contract. Those terms were correct. Before then, however, they had commenced the work. After they had been at work for some time witness wrote a letter, dated November 21, 1896, to the defendant, stating that certain conditions arranged between them had not been carried out, and that therefore they would leave him to carry out the work himself. Without the shield which they contended defendant ought to have put up to break the force of the waves, the cement they put in was washed away as fast as they put it in, and ultimately the engineer stopped the work. They were paid for all the cement put in, whether it was washed away or not.

By the Court: Witness anticipated at the time he received the letters that the water would interfere with the work, but he did not insist upon the erection of the shield, because he understood that was agreed upon. According to the paysheets the work was commenced about the middle of July.

Examination continued: When defendant was going to tender for the work he asked witness how to prevent the waves washing in, and witness from his general knowledge stated that a shield should be erected. Defendant then told witness that he had made preparations for a shield in his contract, for when he tendered for the work he allowed a sum of money for the shield, although that might not appear in writing. There was no necessity for the shield during the first part of the work. Afterwards defendant came to witness, and the latter gave him a rough diagram of the work. The shield was not erected. Subsequently a coffer dam was made. In April letters were received from defendant as to Mr. Cooper, the engineer, taking over and carrying on the work. Witness and his partner agreed to that.

By De Villiers, C.J.: Why did you go on with the work before the shield had been made?

Witness said they were doing their best to push the work on.

Examination continued: On April 24 an account was rendered by defendant, showing £26 0s. 4d. due. The plaintiffs received payments weekly, up to about 90 per cent. of the amount due. After the rendering of the account on April 24 they did no further work at the outfall, but went on for a little time making the blocks. On May 20 they received a letter telling them to discontinue making blocks, owing to the moulds being in such a bad state of repair. They had made no blocks after that letter, and no complaints or references to the blocks were made to them afterwards. Witness had received £245 in payment of blocks taken over. (Correspondence dated April and May, 1896, as to the accounts rendered more than a year before, was then read.)

Witness said that he never authorised the defendant in April, 1897, to carry on work on his (witness) behalf, crediting him with the amount due for the work, and debiting him with the cost. Cement blocks should be kept out of the sun and wind for six months after casting, otherwise the weather would have an effect on them, and a wonderful effect too. Witness then described the manner in which the blocks were treated by him

Plaintiffs received bags from defendant to cover the cast blocks. Those bags were not sufficient. They did well enough to keep the blocks damp, but stones had to be placed on them to keep the wind from blowing them away, and naturally the stones made marks on the green cement. The wind there was generally strong, and the bags were blown about. A shed ought to have been erected to protect the blocks. The defendant also provided the moulds for making the blocks. These moulds were not sufficient for the purpose, and were not in accordance with suggestions witness made to defendant. The moulds were not strong enough to stand the wear and tear, and that was a cause of many blocks being rejected, not from any fault in the making, but owing to the blocks being out of shape. They went on making the blocks, because they had to earn their money by their daily labour, and had to do the best they could with the material provided them. When they received notice to stop making blocks, there were a number of blocks stacked for the Municipality to take away, as they wanted them. Since he left off making blocks he had not received anything from the defendant, and only heard of those complaints and objections to the blocks after the matter was in the hands of his lawyer.

Cross-examined: Witness knew that the work had been completed without a shield, but then he had been tied to time. The work was a profitable one to him. He could not say why he never mentioned the shield in any of his letters. He never went to defendant and complained about the want of the shield hindering his work, but his partner had done so. Witness had not examined the accounts with which defendant had debited him. He knew the work at the outfall was being carried out by defendant, and that he had the most difficult part of the work to do. Complaints might have been made against witness's son or his partner's son, who were in charge of the making of the blocks, to the effect that they left the work at one o'clock. The officials had to have a "smack" at somebody if they were a bit bilious. The engineer stopped the work in May because the blocks were bad. The Municipality had ordered 18,000 blocks.

Re-examined: Witness had taken on piece-work in this country since 1882, and had never had a dispute before.

George Kilgour, a member of the Institute of Civil Engineers, said he had had long experience in different parts of the world.

Last Tuesday he visited the scene of operations and saw some blocks there which had been rejected. One class was hard and out of shape, probably owing to improper moulds, while the other was porous, which might be due to its not having been kept wet during the time the block was setting. In his opinion seven days was not sufficient to keep blocks wet. He had inspected the material of which the blocks were made, and found that it was fairly good.

Cross-examined: Witness merely inspected the remnants of the rejected blocks.

William Thomas Olive, a member of the Institute of Civil Engineers, said he had had many years' experience. He agreed with the evidence given by Mr. Kilgour. Witness at the time was the consulting engineer for the Sea Point Municipality in connection with those drainage works.

Cross-examined: Witness had several months ago examined some of the condemned blocks.

John Best, one of the plaintiffs, corroborated his partner's evidence as to the work, and the difficulty that existed owing to the want of a shield. He was not present at any conversation between Mr. Howard and the defendant as to a shield. He agreed with his partner's evidence as to the moulds warping. A shed would undoubtedly have helped them. After witness left, his son and Mr. Howard's son had charge of the making of the blocks. Witness thought the blocks were properly made. Witness never spoke to defendant about a shield. Mr. Howard used to do all the speaking in connection with the work. Witness had certainly never agreed to any of the work being done by defendant. He had agreed to it being done by Mr. Cooper.

Cross-examined: The moulds were made under Mr. Howard's direction, and witness had seen some of them made. He did not remember ever asking for new moulds or making any complaints about the old moulds. He had not examined the accounts. He left all such matters to Mr. Howard. After witness's son took over the making of the blocks there were frequent complaints by the inspector, Mr. Smith.

Re-examined: Defendant knew that the moulds were bad.

James Howard Best, the son of the last witness, said that he was a bricklayer by trade. He had worked on the concrete blocks. Mr. Howard had told witness how to make the blocks, and his father had sometimes come over in the morning to show them

what to do. Witness had tried to be careful in the making of those blocks. The Inspector (Mr. Smith) had often complained about the insufficient covering of the blocks when in the moulds. There were not enough bags to cover all the blocks. Witness had complained to defendant's brother about that, and the latter had said he would see about it, but they never got any more bags. Mr. Smith had also complained about some of the blocks being out of shape. Some of the moulds were all right, and some were warped.

Cross-examined: Mr. Smith never complained about the slovenliness of the work or the material put in.

Lemuel Howard, a son of the plaintiff Howard, gave corroborative evidence.

John Woollacot, a contractor and builder, deposed to the bad effect the sun would have on the blocks if they were not properly protected by a shed.

David Arnott, clerk of works to Mr. John Parker, architect, said he had twenty-seven years' experience in his business, and he had seen some of the condemned blocks in question. He had been told those blocks were condemned. That had been done on account of the blocks being out of shape. It was not possible to make the blocks there without protection. It was the worst spot that could be chosen, but if it was necessary to make them there there ought to have been some shed protection. He was surprised if they made 12,000 good blocks out of 15,000 there.

Cross-examined: Witness only inspected two blocks, which was all there was to inspect when he was there.

This closed the case for the plaintiffs.

George Septimus Firth, the defendant stated that he was a member of the Institute of Civil Engineers, and had had considerable experience as an engineer in Australia as well as in this country. The letters of July and August set forth the agreement. There was no agreement that witness was to put up a shield. Witness heard nothing about a shield until after the dispute had arisen. As a matter of fact, a shield was no good, and witness had finished the work without a shield. They could only work there at ordinary low tide and in calm weather. About 11,760 blocks had been used by the Municipality. In his account witness had credited plaintiffs with a further number, viz., 2,079. The number of blocks ordered by the Municipality was 10,000. About 15,000 blocks, good and bad, had been made by

plaintiffs. Witness got 1s. per block from the Municipality, and sublet the contract to plaintiffs for 6d. per block. Witness agreed to supply the moulds, and he believed the moulds were made according to Mr. Howard's own direction. There were ninety-nine moulds made altogether. The work of the two young men who took on the moulding after Mr. Best left was not satisfactory. Witness said little to them, but complained to Mr. Howard. Mr. Smith stopped the work in January, but on February 5, after Mr. Howard had promised amendment, they were allowed to go on again. Before the stoppage took place in May there were no complaints by Howard Best as to the moulds. Witness, however, or had personally seen that the moulds were getting warped. He attributed that to their being thrown aside after being used and kept in the sun, instead of being kept wet. For cement used in the condemned blocks witness was to be debited with £17 4s., of which amount witness had already charged £2 against Howard & Best. The condemned blocks had been carted to witness's ground. They might be of some use in house foundation work, but the expense of carting would be as much as they were worth. Howard & Best could have those blocks if they wanted them at the cartage price. The stopping of the sub-contract was the result of a mutual understanding between witness and the plaintiffs. It was on account of the difficulty of the work through the strength of the water. At the meeting in April, in consequence of that, an understanding was come to that witness was to carry on the work under the superintendence of Mr. Cooper, and he was to pay the wages and debit the plaintiffs with all costs. After that witness met Mr. Cooper on the ground, and got instructions from him as to the work at the outfall. He believed the man Peters was put there as a ganger by Mr. Cooper. Witness made the payments because the whole work was his liability. Mr. Cooper had the right to remove men under that agreement. The accounts put in were correct.

Cross-examined: Witness got 1s. for each block, but the 7d. difference did not go into his pocket, as he had to cart the blocks to the manholes. Then he had all the responsibility, and supplied the plant. He did not carry out the condition in the specification, and supply sufficient suitable shedding. Witness had, over and above receipts, lost £230 on the work left unfinished

by plaintiffs and completed by him. He did not supply the fresh water for the blocks, because the salt water was just as serviceable. He did not supply the shedding, because he was not called upon to do so. The work never stopped except on account of the weather.

Re-examined: The cost of carting each block would be about 1d., so that witness's net profit would be 6d. per block.

On the suggestion of the Chief Justice the defendant withdrew his claim in reconvention with regard to the extra cost of completing outfall work.

After hearing Mr. McGregor, and without calling on Mr. Innes,

De Villiers, C.J., said: It is not necessary in giving judgment to say much about the circumstances connected with the outfall works. There is no evidence that if the work had been constructed by Mr. Cooper himself, instead of only under his supervision, the expense would have been any the less, and it is quite possible that if the defendant had pressed for his claim in reconvention he might have succeeded, but it struck me throughout the case that the defendant simply defended the case, and set up the claim in reconvention because he was sued for this amount of £26 and for the account. With regard to the account, I think the plaintiffs had a sufficient statement of account from the defendant before summons was issued, and that therefore there was no necessity in this case to make the claim for an account at all. The question now is whether the plaintiffs are entitled to payment for the blocks which were condemned. The reason why they were condemned was that they were not properly manufactured, owing to the negligence of the people placed in charge by the plaintiffs. So long as Mr. Best was there himself the work was done fairly well, but afterwards when the two young men were in charge they were sometimes extremely negligent in the work. I am inclined to think that the reason why these blocks were bad was that they had not been sufficiently watered. If for seven or eight days these blocks had been sufficiently watered there is no reason why they should not have turned out as well as the others which were accepted. If it was through the fault of the plaintiffs that the blocks were condemned they are clearly not entitled to recover for the blocks. Then comes the question as to whether the defendant is not entitled on his part to re-

cover some damage for the breach of contract, and the profit he would have made might be taken as the amount of damage to which he is entitled. What he would have obtained from the Municipality, viz., 1s. per block, is the only evidence we have as to the value of them. If the Municipality was prepared to pay 1s. per block for them, then in the absence of other evidence, that may be taken as a fair test of what the blocks were worth, and 1,500 at 7d., the amount of profit, gives £43 15s. Then it is not denied that £14 were paid in cash, and it is not denied that £15 4s. is what the defendant is liable to have to pay the Municipality for the loss of cement. Taking these together, they amount to £72 19s. There is a question also whether the £6 15s. should not be allowed, which would still further increase the defendant's claim, but as that is a somewhat doubtful item, and as the defendant does not press his claim strongly, it may fairly be omitted. From this £72 odd there must be deducted £26 0s. 4d., which is admitted to be the balance of plaintiffs' account, and that leaves £46 18s. 8d. But the defendant admits having received £43 13s. 9d. for the blocks, which leaves £4 4s. 11d., and for that amount judgment must be given for the defendant. Judgment will therefore be for the defendant in the claim in convention, and for the defendant for £4 5s. in the claim in reconvention, and the plaintiffs must pay the costs. I think the plaintiffs have got very well out of it.

Buchanan and Maasdorff, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

	1899.
STANDARD BANK V. DU PLOOY.	Feb. 17th.
STANDARD BANK V. COETZER.	" 18th.
	" 20th.
	" 21st.

Fraud—Negligence.

*The defendants at the request of  
H. signed certain documents by*

which they agreed with the Standard Bank, and undertook in consideration of certain banking facilities being granted to H., to guarantee the repayment of all sums of money owed by H. to the bank. In actions instituted by the bank upon these guarantees the defendants pleaded that their signatures had been put to the document through the fraud of H. and that they were in ignorance of the nature or contents of the documents.

Held that fraud had not been sufficiently proved.

Held, further, that even if fraud could be proved this defence could not be raised if there had also been negligence on the part of the defendants in signing the documents.

The first of these actions was one brought by the Standard Bank against the two defendants. Simon Johannes du Plooy and Floris Petrus J. du Plooy, farmers living in the district of Albert, to recover the sum of £1,500 upon an agreement of guarantee. This guarantee—which was on the ordinary form of the bank kept for that purpose—was signed on August 2, 1897, and set forth that in consideration of certain banking facilities being granted to one J. C. van den Heever, the defendants renounced all benefits, and guaranteed themselves assueries and co-principal debtors for the repayment of all sums of money which Van den Heever might at that time or from time to time thereafter owe to the plaintiff up to £1,500. These banking facilities were given Van den Heever, and he was now indebted to the bank up to the amount of £1,500, with interest at the rate of 6 per cent. from September 28, 1898. The defendants' plea admitted the signing of the agreement, but denied all the other allegations in the declaration. It went on to say that in August, 1897, Van den Heever, who is an attorney of the Court, was employed by S. J. du Plooy, one of the defendants, who was executor in his father's estate, to administer and wind up the affairs of the estate. On August 2, Van den Heever placed before the defendants a document, written in English, which they

could not read or understand. It was alleged that he fraudulently represented to them that it was a document they had to sign in order to pass transfer of certain land in the estate, and they signed it *bona fide*, believing it was such a document, and not knowing that it was a contract of guarantee. By reason of these facts they contended that the guarantee was null and void.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiffs.

Sir Henry Juta, Q.C. (with whom was Mr. Close), appeared for the defendants.

Johannes C. van den Heever, an attorney of the Court, said that he had had considerable dealings with the defendants. Their father died in February, 1897, and before he died he had signed a guarantee for witness's indebtedness to the bank. Du Plooy, sen., used to consult the defendant Simon J. du Plooy on such matters, and he was perfectly aware of that guarantee. S. J. du Plooy was the executor in his father's estate, in which there was a farm, Caledonfontein, which had been bequeathed in equal shares to Simon and his brothers. In July, 1897, witness, at the invitation of the Du Plooy's, went to the farm to shoot, and while there they had a discussion about the signing of certain transfers. The defendants accompanied witness to Venterstad for that purpose. The next day witness proceeded to Burgheersdorp, and in consequence of what the manager of the bank, Mr. McKay, who had since died in England, said to him, he went to see Simon du Plooy and informed him that the manager of the bank was getting uneasy about the guarantee of his late father, which was for £1,200, and desired the matter to be settled either by a fresh guarantee or by cash. Witness said he was not in a position to settle the guarantee, and he asked the defendant whether he or his brother would come forward and release the old guarantee. Witness had then a heavy overdraft at the bank. Afterwards the defendant came to his office and signed a fresh guarantee for £1,500 the bank having increased the amount of the security. They went to the office of Mr. Richards, the distributor of stamps, and the stamp was affixed there. Witness told Mr. Richards that the document was a guarantee from the bank. Judgment was obtained on September 12 on the promissory note for £538 10s. The defendants consented to settle the note on witness agreeing to give them,

on behalf of his firm, £100, a cart and horses worth £100, and a promissory note for £450. They went to the manager of the bank and made certain proposals. During the conversation, which was all in Dutch, the manager said, "Mind, this has got nothing to do with the guarantee that the bank still holds."

Cross-examined: Before 1893 witness took up discounting business as well as practised as an attorney. From 1893 to 1896 he lost heavily, having lost £1,500 in 1894. His estate was sequestered at the end of 1898. His liabilities were about £13,000, but there was landed property in the estate to the value of £3,500. In May, 1897, he gave the bank a statement of his affairs, which he believed to be approximately correct, showing that he was £2,400 to the good. There were a number of bad debts which were not written off. He did not know that they were bad debts then. He had tried to collect those accounts, but he did not take very much trouble to do so in 1897. He might afterwards have said to Mr. McKay, the manager of the bank, that the statement could not be absolutely relied upon, as there were a number of debts which should have been written off. Witness had given statements to the bank of the position of certain of his brothers and other people who had signed guarantees or had signed accommodation bills for him. The statements were incorrect, although he believed them at the time to be correct, they having been made from information given to him. He had given the bank a guarantee signed by two Coetzees, and another signed by an aunt of his. He believed these guarantees were now disputed, the parties alleging that he had got them to sign the documents, which were in English, by purporting that they were of a different nature. In doing so they were following the example of others in the Albert district. Thirteen farmers there had said the same thing about other attorneys. Witness admitted that he was the Van den Heever appearing as a joint defendant in a case in the Eastern Districts Court, where the Judge-President was reported to have said that the transaction in question could be called by no other name than fraud. He did not remember those words being used. That was a case of undue preference, and he and other creditors had fairly distributed certain assets among them, believing there were no other creditors, but the plaintiff in the case afterwards turned up as a creditor. Witness admitted having told the defendants that his dog had been locked up

all night in his office, and had nearly spoilt all the papers they had signed, but he had never told them they must sign fresh papers.

John M. Richards stated that he was in the Civil Service, and was now at Kimberley. In August, 1897, he was Assistant Resident Magistrate at Burgersdorp. He knew the defendants and Mr. Van den Heever. In the month mentioned they came to witness's office. He could not say whether they signed the document produced there, or whether they only acknowledged their signatures. Witness cancelled the stamp. He was under the impression that he said to defendants: "Do you understand the nature of the document?" He could not recollect whether or not they answered him. Witness spoke to the defendants in Dutch.

Cross-examined: Witness did not recollect anything being said to the defendants about the nature of the document.

By the Court: Van den Heever might have said something about the document, but witness could not recollect.

Johannes G. B. Watney stated that in May, 1898, he was the manager of the Standard Bank branch at Burgersdorp. He remembered Piet du Plooy and defendants coming with Van den Heever to him on September 9, 1898, and proposing to pass a bond as security for the promissory note for £538. Witness said he would submit the matter to headquarters, and they were to come back in the evening. Witness got an unfavourable reply from Cape Town, and informed Van den Heever. In the evening witness saw the defendants and Van den Heever, and the latter, addressing witness, said that he had informed defendants of the unfavourable answer, and had also specially mentioned the guarantee. That was said while they were standing in the Market-square, and the defendants did not say anything. After discussing certain proposals as to the promissory note, witness said of course that would have nothing to do with the guarantee. The defendants made no reply to that. On September 23 the defendants came down to witness, and the latter said there was the guarantee to which reference had been made previously. They said they thought on the previous occasion he was referring to the bill. They did not dispute their signatures, but said they had been fraudulently obtained. The previous guarantee had been given up about a month after the signing of the fresh one.

Cross-examined: Witness had never spoken to the defendants about the guarantee before September 9, 1898. He had never

written to them about it. He had never had any doubt as to the correctness of the guarantee. He could not remember referring to anyone, either by letter or word, as to the genuineness of the document. Witness always regarded the defendants as the people principally responsible for the indebtedness. He had received a letter from the general manager, dated September 1, in which it was stated that Van den Heever admitted that there was a dispute about the guarantee. He spoke to Van den Heever about the letter a week or so afterwards, and the letter said there must have been a misunderstanding.

De Villiers, C.J.: Have you any doubt at present as to the genuineness of the document?—I really do not know. I have no particular doubt beyond the fact that the Du Plooy dispute it.

Beyond that have you any doubt?—I don't think so.

Alfred Benjamin Lawton said that he was an attorney of the Court, and was employed by Messrs. Fairbridge, Arderne & Lawton. He remembered the proceedings with regard to the promissory note for £338 10s. Before that case came on he had a conversation with one of the defendants' attorneys, Mr. Peters, who had come and asked to see the signature on the note, saying that the defence to be set up was that the note was a forgery. That defence was not set up.

Cross-examined: Witness was quite sure that it was not about the guarantee that Mr. Peters was speaking.

C. A. Schweitzer, an attorney, practising at Burgersdorp, said that on September 24, 1898, the defendants and their uncle came to him. One of the defendants then said they had come in to settle the promissory note, but that they had been informed since they came into town that there was a further obligation of £1,100 against them. Witness said he knew about that, and asked if the bank had not informed them of the guarantee. They answered in the negative, and Simon said that must be a forgery.

Cross-examined: There was a case of a guarantee in which witness was interested, and which has been disputed, on the ground that the signature had been fraudulently obtained, but the defence was immediately withdrawn upon witness taking action.

Simon Johannes du Plooy, one of the defendants, said he had known Mr. Van den Heever for many years. Witness's father had also known Mr. Van den Heever well. In 1896 witness signed a promissory note for

£538 10s. for his father. After detailing the transaction in connection with his father's estate, the witness said that in August Van den Heever came to their place. Afterwards the defendants accompanied him to Venterstad, and signed some powers of attorney. Then on Monday morning witness and his brother met Van den Heever at Burgersdorp, and the latter said that the dog had been locked in his office all night, and had smeared all the papers, and they must wait until the office opened and sign again. They were powers of attorney to pass transfer that they had to sign again. When they went to the Magistrate they did not understand Van den Heever to say a word about a guarantee. At the Magistrate's office they saw Mr. Richards. Van den Heever told witness and his brother Floris to sign, and they did so. He would not have done so had Van den Heever not told them it was a power of attorney to pass transfer. At that time witness had about 150 sheep, two cows, and 100 morgen of land, worth about £1 per morgen. His brother Floris was worse off than witness, and they could not have paid £1,500. If he had known the document was a guarantee for £1,500 he would not have signed. Afterwards Van den Heever told him there was an old promissory note of his father, but he could go home easy, for he would never hear of it again. Witness denied that any mention of the guarantee was made to him before September 23. On that day they came into Burgersdorp to settle the promissory note in question, and then from what he heard he went to Mr. Schweitzer. From what he heard there he went to the bank. That was the first he ever heard about the guarantee.

Simon J. du Plooy, the first defendant, was further cross-examined by Mr. Innes. He said the signature on the bill for £2,800 was his signature. His brother Floris du Plooy and Van den Heever stood sureties. The bill was signed on the same day as the guarantee. He did not know that it was a guarantee until he was told so by the bank manager, but he thought it was a promissory note. He did not think he would know a cheque if he saw one.

Re-examined: He bought some property from his father before his father died. Van den Heever drew up the documents, and he signed them to get transfer.

Nicolaas Everardus Smuts said he was an attorney at Aliwal North. On September 9 the defendants consulted him about a settlement, and he wrote to Schweitzer about

it. Efforts were made to carry out the settlement. He had not heard a word about the guarantee until September 23. He was quite prepared to settle the promissory note on behalf of the defendants.

Petrus Johannes du Plooy, uncle of the defendants, said Vanden Heever told him he (witness) must not press him, as people wanted to bring a criminal action against him. They then came to a settlement by which Van den Heever was to give them a cart and two horses, valued at £100, £100 in cash, and a promissory note for £450. The Du Plooy's were not in a position to pay £1,500, as well as £500. On September 25, Schweitzer told witness about the guarantee, and witness replied that he was surprised that the bank manager had not told them anything about it. The manager did not tell him why he had not told witness of the guarantee before. Witness had no pecuniary interest in the matter.

Cross-examined: He could not tell the difference between a promissory note and a guarantee. On one occasion he stood as a candidate for the Free State Volksraad. He did not know English very well.

Floris Petrus Johannes du Plooy having given evidence, bearing out the statements made by the first defendant, the evidence closed.

Argument and judgment were postponed pending the hearing of a similar case to be brought by the plaintiff against another defendant.

The second action was for the sum of £2,400 due to the plaintiffs upon a contract and guarantee by which the defendants Francois Philippus Coetzee and John Adriaan Coetzee became liable for the payment of the debts of Johannes Cornelius van den Heever to the bank to that extent. The guarantee was in the ordinary bank form, similar to that sued upon in the previous case of *Standard Bank v. Du Plooy*, and was signed by the defendants.

The defence was that the document was obtained by the fraud of Van den Heever.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiffs, and Sir Henry Juta, Q.C. (with whom was Mr. Close), appeared for the defendants.

Johannes Cornelius van den Heever, an attorney, said he knew the defendants. They engaged witness to get transfer of their father's estate. The mother of the defendants was the executrix. The power of attorney was dated September 13, 1897, and

was signed at Venterstad. A transfer was passed to the defendants in January, 1898. Between September, 1897, and January, 1898, the mother wanted to give transfer to the defendants without reservation, but subsequently witness was instructed to prepare a notarial deed specifying the conditions of the transfer, which was signed by her and the two defendants in October, 1897. This document was drawn up at Burghersdorp and executed at Venterstad. He knew the defendants very well. Francois Coetzee understood English. Witness and Francois Coetzee were at school together for two years. The guarantee was signed on the afternoon of the day on which the notarial deed was signed. Witness then told the defendants that he wanted assistance to the amount of £2,400. Francois Coetzee said his name was not good enough for the amount, so it was of no use for him to say he would assist witness. His mother really had control of the farm, which did not therefore belong to him. He then said he would not sign unless Adriaan signed, and Adriaan consented to sign a guarantee to the effect that he would support the witness for the amount specified. A guarantee was then signed, the defendants asking witness not to let their mother know anything about it. The defendants signed the guarantee in witness's office. The document was subsequently witnessed in the Magistrate's office. The defendant raised a loan to pay the guarantee.

Cross-examined: He had lent money to the defendants before the guarantee was alleged to have been signed. Schweitzer might have told witness that criminal proceedings would be taken against him. The notarial deed was attested by Kuys & Moodie in witness's office, and the guarantee was attested by Kuys & Moodie in the Magistrate's office. He supposed that the defendants guaranteed £2,400 to witness because they were old and intimate friends of his. At that time witness knew that Francois Coetzee was a well-to-do farmer, and thought that he was "good enough" for £2,400. The defendants were very desirous that their mother and their wives should not know that they had signed the guarantee, and that was the reason he supposed why they now denied that they knew the nature of the document which they were signing. He did not remember the bank manager discussing with witness the defendants' repudiation of the signatures to the document. Civil proceedings, which were subsequently withdrawn,



were taken by the defendants against witness in the Eastern Districts Court, demanding that the document of guarantee should be handed over to defendants.

Re-examined: Witness had never previously seen the document now produced, in which the defendants alleged that witness obtained their signatures to the guarantee by means of fraudulent representations. On and off Mrs. Coetzee had been one of witness's clients for eight or nine years. Witness's father advised old Mrs. Coetzee in all her business matters.

John W. Kuys identified the signature on the notarial deed and the guarantee form produced as his signature. He had no recollection of the circumstances under which he attached his signature to the documents. He had signed very many documents.

By the Court: He had no recollection of witnessing documents in the presence of Mrs. Coetzee, sen.

Cross-examined: Witness simply attested his signature to documents without reading them, except in the case of declarations.

Re-examined: At the time referred to he was very busy with rinderpest work.

Johannes J. Watney, the manager of the branch of the Standard Bank at Burghersdorp, said that in response to a request from Schweitzer's partner, one Kannemeyer, witness acquainted him with the circumstances of the guarantee. Subsequently the Coetzees saw witness on the matter, and admitted their signatures to the guarantee, but said that they had been obtained fraudulently.

By the Court: Usually the sureties signed the guarantee in the presence of one of the officers of the bank, but frequently a guarantee was signed by the principal debtor. Recently more definite instructions had been issued to bank managers.

This closed the case for the plaintiff.

For the defence,

Francois Philippus Coetzee, one of the defendants, was called. He said that in September he had a conversation with Kannemeyer, Schweitzer's partner, and subsequently proceeded to the bank, where a document was shown to him. He was informed that the document was a guarantee. He knew nothing of the document before, but identified his signature, and told the bank manager that it had been obtained by fraud. In October, 1897, he signed certain documents, and previous to that date he had had no business transactions with Van den Heever. He first knew Van den Heever

when he (witness) was eight years of age, when he spent a year at school with him. If Van den Heever said they were intimate friends he lied. Witness could not read English, and he certainly had received no school prizes for proficiency in English. Witness's mother employed Van den Heever as an attorney because she knew Van den Heever's father. Witness did not know where Van den Heever's house was. On one occasion, in witness's mother's house, Van den Heever explained to witness the nature of a document giving witness's mother the right to the farm. Van den Heever then said to witness: "It is necessary for you and your brother to come to my office and sign a document in connection with the transfer." Witness and his brother then signed two documents—the one giving his mother the right to the farm, and the second the document which Van den Heever said must be signed if witness's mother was to get the farm. Both documents were attested by the Magistrate and Mr. Moodie. Neither document was read over to witness before he signed. Witness certainly did not sign either document as security for Van den Heever. Witness never heard anything about the guarantee until Kannemeyer (Schweitzer's partner) told him about it.

Cross-examined: When he left school he could understand English a little.

John Adriaan Coetzee corroborated, and said he could not read English, but could read Dutch.

Constantine Schweitzer, an attorney, practising at Venterstad and Burghersdorp, said that when the guarantee was produced the defendants said their signatures were obtained by fraudulent representations. Witness was authorised by defendants to institute civil proceedings against Van den Heever, who subsequently asked witness to allow the matter to stand over until he (Van den Heever) could see his father in Cape Town. Civil proceedings were withdrawn when it was seen that the estate of Van den Heever would become insolvent. Criminal proceedings were not instituted, because witness thought it would be best to get the guarantee back from Van den Heever. The Coetzees were able to pay the bank, but they had not tendered payment. After Van den Heever had become insolvent, the present proceedings were instituted.

Cross-examined: At first the defendants desired to have Van den Heever arrested. When witness saw Van den Heever, the

latter denied very strongly that the transactions were of a fraudulent nature.

This closed the case for the defendants.

De Villiers, C.J., expressed a desire to hear evidence from Mr. L. L. Michell, general manager of the Standard Bank, on the customary method of business pursued in respect of guarantee transactions.

Mr. Michell was then called. He said that guarantee forms were sent to different branches of the bank, ready printed. These forms were in the custody of the managers. The managers were not forbidden to let these documents leave the bank. In 1897, at all events, managers would not have been prevented from handing over a guarantee form and allowing it to be taken away for the purpose of signature. There were no instructions at that time that managers should have the signatures affixed in the presence of a bank official. Such a precaution was now taken, however. In 1897 it was not customary to give notice to the sureties where a contract had not been signed before a bank official. It was done sometimes, but not as a rule. If there was any doubt in the matter the manager would give notice. Generally the signatures of the sureties would be made in the presence of a bank official. It was not customary to send an acknowledgment on receipt of the contract. The advance to Van den Heever was sanctioned from headquarters. Witnesses did not know at the time that one of Van den Heever's securities was worthless.

The arguments on the two cases were taken together.

Mr. Innes, after referring to the facts: The rule is, that where one of two innocent persons must suffer through the fraud of a third, the one who has to suffer is that one whose negligence caused the loss. *Young v. Grote* (4 Bing, p. 253); *Bernhardt v. Du Toit* (2 Juta, p. 359). The principles are laid down in *Carr v. L. and N.W. Railway Co.* (10 C.P., p. 307, at pp. 317, 318); *Coventry v. G.E. Railway Co.* (11 Q.B.D., p. 776); *Hunter v. Walters* (7 Ch. App., p. 75, at p. 87). It is true that where a person was fraudulently induced to sign what he thought was a different document, he was held not liable. *Lewis v. Clay* (14 T.L.R., p. 149), but there was no negligence. So also in *Foster v. Mackinnon* (4 C.P., p. 709); *Griffiths v. Kellogg* (20 A.M.R., p. 48); *Walker v. Egbert* (9 A.M.R., p. 548); *Taylor v. Atchison* (5 A.M.R., p. 118); but in *Garrard v. Hoddan* (5 A.M.R., p. 412), and *Rosch v. Kari* (26

A.M.R., p. 788), there was negligence. In the present case there was negligence on the part of the defendants. The story about the dog is too weak. Why should they have signed only one fresh document and not more? Why should different people have signed the documents?

Sir H. Juta: Some of the authorities quoted refer to the case where the person has signed a document unintentionally, but has done this so negligently and carelessly that another person is able thereafter to perpetrate a fraud. But that is not this case.

The other authorities refer to the case of a document being signed without the intention of signing it. *Vort* (4, 3, 8) is to the effect that where fraud is the *causa* of the contract and there is no *animus contrahendi* the contract is void.

*Neotadina* (December 5).

[De Villiers, C.J.: Has not the doctrine of negligence been grafted on our law by decisions of this Court? As said by Watermeyer, J., in *Preuss and Seligmann v. Prins* (1 R., p. 198), the question is, has not defendants' negligence allowed the commission of fraud?]

Watermeyer, J., was treating there of a document which it was intended to sign.

[De Villiers, C.J., referred to *Vort* (44, 1) as to the defence of fraud.]

*Thoroughgood's Case* (2 Co. Rep. 9b). If there was no contracting mind, owing to the fraud of someone, then there was no contract at all.

This is a case of a contract between the plaintiff, the bank, and the defendants, and not the case of a third person taking a contract indirectly and suffering through fraud. *Foster v. Mackinnon* (4 C.P., p. 709) dealt with the case of a promissory note, but a distinction is drawn in the case of negotiable instruments because of trade requirements; instances of this are the rules of law regarding accommodation notes and *bona fide* holders for value. Van den Heever was the agent of the bank to get the guarantee; he was not the defendants' agent. *Thoroughgood's Case*; *Varley v. Cooke* (1 Giff., p. 23); *Preuss and Seligmann v. Prins* (1 Roscoe, p. 193). In *Lewis v. Clay* (14 Times L.R., p. 149), even in the case of a negotiable instrument, it was held that no contract was intended, and therefore no contract was made. The mere fact of signing a document without reading it is not *ipso facto* negligence.

[De Villiers, C.J.: In *Foster v. Mackinnon* there was a new trial, so the Court held that

the verdict was against the weight of evidence.]

It is no negligence for a person to believe and have confidence in his attorney when he tells him that a document is of a certain nature. An attorney is an officer of the Court, and everyone looks with confidence upon him for that reason, and expects proper dealing from him. On the other hand the bank was put upon inquiry and could through its manager have prevented the fraud: it has shown more negligence than the defendants. Further, the consideration for the document failed because no increased facilities were given by the bank. Banking facilities mean further loans of money; the guarantee was really given for a past debt.

[De Villiers, C.J.: Is it not a consideration to allow an overdraft to continue instead of stopping it?]

In this case giving time was no consideration. It is doubtful whether the defendants would have understood this document even if it had been read to them. *Pollock's Principles of Contract* (p. 444); *Hunter v. Walters* (L.R., 7 Ch., App., p. 75, at p. 87).

Mr. Janes: The mere fact that a person signs a document without reading it, is not sufficient to show negligence but it is an element. The explanation given by the defendants as to the circumstances of the signing is too weak.

[De Villiers, C.J.: Supposing that Van den Heever had fraudulently executed a mortgage bond, and had ceded it to the bank, could you say that defendants would be liable?]

The bank in that case could only stand in the shoes of Van den Heever, and could not recover.

[De Villiers, C.J.: How do you distinguish this case?]

Here there is negligence. *Lewis v. Clay*.

[De Villiers, C.J.: Does not the doctrine of negligence appertain to negotiable instruments only?]

No. *Cowdry v. Great Eastern Railway Co.* (11 Q.B.D., p. 776).

The bank stands in a position analogous to that to which *Voet* refers (4, 3, 5). The fraud here is the result of the negligence of the defendants, and the contract cannot be set aside although the defrauder may be liable.

The Court gave judgment in both cases for the plaintiffs with costs, with the exception of the costs of the provisional sequestration of the defendant's estate (*Shiel* 8, p. 399), which are to be borne by the plaintiffs.

De Villiers, J.J., said: The two cases are founded upon documents worded in exactly the same terms, and it may be convenient to consider them together. The defence in both cases is practically the same, that the documents were signed by the defendants through the fraud of Van den Heever, that the defendants were not aware of the contents, that they did not understand the English language, and that they signed the documents because they were informed by Van den Heever that the documents were required for the purpose of effecting certain transfers. Now it is impossible, after hearing all this evidence, not to express in a strong sense one's feeling in regard to the conduct of Van den Heever in the present case. According to his own admission, he led these unfortunate people to believe that they would really incur no liability, that it was really a mere matter of form, that he would see that the whole thing would be all right at the bank, although at that time he must have known that he was hopelessly involved, and that there would be very little chance of his being able to pay the heavy indebtedness which he then already had incurred in the matter. He took advantage of these people, of their good nature, of their not knowing what the ultimate effects of their action would be, in order to enable himself to carry on his banking account for some little time longer. But the question which we have to consider is whether the fraud has been clearly and distinctly proved. There is no principle more clearly established in the administration of justice than that fraud must not only be alleged, but that it must be clearly and distinctly proved. In the present case I must say that to my mind the evidence is very evenly balanced. It is not necessary for me to go into the whole of the evidence—that has been fully discussed on both sides. Taking first the case of Du Plooy, there seem to be certain inherent probabilities in the evidence given by the defendants, which I must say, to my mind, cast some doubt upon the evidence. That statement about the dog having soiled the papers, and that in consequence of the papers being so soiled it became necessary to sign a further document—that story, taken in connection with the whole circumstances of the case, seems to be somewhat improbable. It appears that at Venterstad Simon du Plooy had to sign ten powers of attorney, for the purpose of making transfers to his brothers. It seems also that it was these ten powers of

attorney which had been soiled by the dog, and that then Van den Heever met Simon and his brother at Burghersdorp. But why, if these ten powers of attorney had been soiled, should it become necessary for the defendants to sign fresh documents? There was only one further document executed, and that further document was executed by Floris du Plooy, so why should the name of another brother be signed when he was no party whatever to the previous document? This cannot be lost sight of in considering the probabilities of the case. Then again, there is the fact that a guarantee was already in existence. The father of both the defendants, Floris and Simon, had given a guarantee for £1,200, and it seems hardly credible that neither Simon, who is the executor of his father's estate, nor his brother Floris should have been aware of this previously executed guarantee. If they did know of this previously existing guarantee there seems every probability that they would afterwards, in order to prevent any question arising with regard to the estate in which they themselves were interested, have executed this further guarantee of £1,500. Then, in regard to the Coetzee's guarantee in the second case, there again the evidence seems to me to be very evenly balanced. But I cannot help thinking that Francois Coetzee has somewhat exaggerated his own ignorance. He admits that he was at school for eighteen months, and that during that time he learnt the English language, and that attempts were made by his master to make him speak English, but he suggests that this took place so long ago that he has really forgotten all the English he had ever learned. But we know that the impressions made upon a young mind, even the mind of one so young as eleven or twelve years, are not so entirely lost after eighteen or twenty years that there would be no recollection of what was learned. I am not at all satisfied that Francois Coetzee, at all events, would not, if he had taken the trouble with regard to this document, have been able to comprehend its meaning. Then as to his brother, no doubt he has not received quite so much education, but in the course of his evidence he let slip an expression which I must say had great weight with me. He had said that Van den Heever was an entire stranger to him, that he knew nothing about him, and yet incidentally when he spoke about going to his office, he said, "We went to Jan's office," an

expression which one would expect from a person who had some familiarity with the person of whom he spoke so familiarly. As to the conduct of Van den Heever, it does look suspicious. His conduct on the 9th, when he met Du Plooy, taken in connection with what had taken place with the Coetzees, does lead one to think that on that day the discovery by the Coetzees of this guarantee had to some extent upset him. The Court has now to decide, however, upon which side of the evidence its finding will be based. I think that if Van den Heever had been tried for fraud before a Scotch jury, it is a case in which the verdict would have been not proven—it is not clearly proved to the satisfaction of the Court that there was this fraud—that Van den Heever induced these people to sign the document without their knowing what they signed, and as fraud has not been proved, the defence falls to the ground. But, one word about the law. Presuming that fraud had been committed, the question would still have remained whether the defendants would have been entitled to plead this under all the circumstances of this case. No doubt by the Dutch law, as well as by the English law, where a person who executes an instrument is induced by the fraud of another to execute it without knowing what the contents are, he cannot be said to have entered into that contract which the instrument purports that he does enter into, but the question still remains whether notwithstanding that the contract may be taken as being legally non-existent, yet if the person who executed it is sued by a third person who has given value for it, and who is perfectly innocent of any share in the fraud, whether such a third person cannot recover. Where there has been a cession that is undoubtedly true. But the present case is not one of a cessional document at all. The document on the face of it purports to be a contract entered into between the defendants and the bank. This contract is placed in the hands of Van den Heever if we take the document itself, for the purpose of being given to the Standard Bank and to enable Van den Heever to get banking facilities from the bank. If the defendants had sent such a document to the bank by post there could be no doubt that upon the receipt of that document by the bank, and that upon the bank granting the facilities stipulated for, the contract would immediately arise between the person who signed the document and the bank by reason of the persons so signing,

In my opinion it makes no difference that this document was handed over by the defendants to Van den Heever. But then it is said that they did not know what was in the document. It is upon this point that the question of negligence comes in. Was it not the duty of the defendants first of all to have inquired what the contents of the document were? It is said that there was no such duty upon them because Van den Heever was their attorney. That is true with regard to the Du Plooy's, but not with regard to the Coetzee's. Van den Heever acted on behalf of the Coetzee's mother, but not on behalf of the Coetzee's themselves. But in regard to the Du Plooy's, there were surely some inquiries necessary on their part, if their account is true, why Van den Heever should ask them to sign this one further document because ten other documents had been destroyed. This circumstance should at once have led them to inquire, to ascertain the reason for this contract being again executed. In both cases, it seems to me, there was some neglect on the part of the defendants, there was such neglect on their part as would have debarred them from raising this defence of fraud, even in case fraud had been proved. But then it is said that no increased facilities were given by the bank to Van den Heever. But in my opinion there is clear proof that these increased facilities were given. At the time that the guarantees were given Van den Heever's account was heavily overdrawn, and it would have been in the power of the bank there and then to have stopped his further account, and to have demanded from him payment of the overdraft but the bank continued to let him draw cheques upon them for some months longer. There is sufficient to show that there was consideration given to Van den Heever by the bank, that banking facilities were given to him by the plaintiffs, and that the bank was to all intents and purposes the bona fide holder of this document for Van der Heever. On the face of it, and I lay stress upon the fact, this contract purports to be a contract with the Standard Bank. If the defendants (the Coetzee's) had taken the trouble to read the very first line of the document they would have seen the words Standard Bank of South Africa (Limited), and that the bank were allowing certain facilities. Even if the defendants did not understand English, the words "Standard Bank" are exactly the same in Dutch as in English. Even if they

had only looked at the first line they would have seen the words "Standard Bank" there, and that at all events would have put them on their guard, and would have made them ask this question: "What can the Standard Bank have to do with the question of transfer?" There was great neglect on the part of the defendants in not using such intelligence as they possessed, such a degree of education as they possessed, for the purpose of ascertaining the nature of this document. They used no precautions whatever, and by their extreme neglect they put it in the power of Van den Heever to obtain money from the bank, and in that way they made themselves liable to the bank, and cannot rely upon the plea of fraud as against the bank. I thought it necessary to make these remarks upon the question of law lest it should be thought that the Court was of opinion that this defence of fraud could not be available, but, as I said before, on the question of fact the Court has come to the conclusion that the charge of fraud has not been clearly established. The judgment of the Court, therefore, will be for the plaintiffs in both cases, with costs, with the exception of the costs of the sequestration, which will have to be paid by the plaintiff.

Buchanan, J.: Both these actions are brought on contracts contained in documents in exactly similar terms, but were entered into under a different set of circumstances. The documents in both cases are admittedly genuine in so far as that they were signed by the several defendants, and it is common cause that there is no imputation of fraud or misconduct attributable to the bank. But it is alleged that the signatures to the documents were obtained by the fraud of a third person, viz., Van den Heever. Under these circumstances the onus was on the defendants to prove their defence of fraud. As a question of fact, I am distinctly of opinion that the defendants in Du Plooy's have not discharged the onus of proving their defence. The facts that weigh with me in coming to this conclusion are mainly, that the guarantee in question was substituted for one of £1,200 given by defendants' father, he having died and defendants being heirs in his estate, that the parties were on terms of intimacy and friendship with Van den Heever, that they had previously given him accommodation bills, and that there were cross guarantees given, viz., the one by Van den Heever, and the second defendant for the first defendant, on his

appointment as executor. It would be unnecessary and purposeless to commit any fraud, as I have no doubt if asked the defendants would have given Van den Heever the guarantee he wanted, especially as he would represent that he would undertake all liability thereunder. The second case I admit presents a different aspect. I have grave doubts whether or not a fraud was perpetrated by Van den Heever. But taking the account given by the defendants Coetzee themselves, and their allegation that they did not know Van den Heever, and that the elder defendant is a man of intelligence, and of better education than any of the others, and that he has some knowledge of English, I am not prepared to hold that it is proved to my satisfaction as a juror that a fraud has been committed. It was open to the defendants to have set the criminal law in motion, and they have not so. A conviction of fraud would have materially helped them, but even had criminal proceedings failed, it would not have prevented the defendants from alleging and proving fraud in the civil suit. As I said, the onus of proving fraud is on the defendants, and having failed in their proof, their defence has failed. But I may say a word on the law. In my opinion the doctrine of negligence laid down in the English and American cases has been imported into our law. This was recognised by a decision of this Court as far back as 1864, a decision arrived at by two able judges who were especially well versed in the principles of Roman-Dutch law. To hold otherwise would I think be most dangerous, and introduce great uncertainty into business transactions. It would also encourage the setting up of defences of fraud even in cases where it did not exist. I concur in giving judgment for the plaintiff in both cases, with costs. These cases mainly depend upon the question whether the defendants were induced by Van den Heever by means of fraud to enter into contracts which they had no intention of contracting. For the determination of this question I find very little assistance from a minute analysis of the evidence, which is very conflicting. The result of the evidence as a whole is that grave suspicion attaches to the conduct of Van den Heever. But having regard to some of the broader features of the case, I cannot come to the conclusion that fraud has been proved. I shall refer to so much of the evidence as prevents me from coming to that conclusion, being in its character favourable to Van den Heever, without at the same time removing

all suspicion. It seems to me there is no evidence of concealment of the contents of the documents by Van den Heever from the defendants, and although it is stated that they cannot read English, the mention of the Standard Bank in the first line of the documents, in large letters, could have been seen by them, and would have revealed at once that the contract was not such as they alleged it was represented by Van den Heever to be. Then they were taken by Van den Heever to the Magistrate's office to have the contracts stamped and attested by the Assistant Magistrate and his clerk, the former of whom was in duty bound to inquire into its nature for the purposes of the stamps, and under these circumstances there was every probability that a fraud if it was intended would be detected. And then we find that one of the documents referred to in Coetzee's case is signed by Mrs. Coetzee and her two sons, and the three signatures are witnessed by Mr. Kuyt, the Assistant Magistrate. This circumstance is in direct contradiction of the evidence of the defendants Coetzee, and in corroboration of Van den Heever's evidence, and seriously affects their version of the whole transaction. In the face of this evidence, which however does not remove all suspicion, I cannot come to the conclusion that fraud has been proved. This finding would decide the case, but the law questions having been raised, I may say I concur with the rest of the Court in this view of the law. I am of opinion that if the defendants were induced by fraud to enter into a contract they never intended to enter into, in the absence of a contracting mind on their part, the contract would be wholly void and not only voidable; but the defence of fraud could not be set up by them against the bank, an innocent party, if they were guilty of negligence in signing the contracts. In that case, however, I should have held that the defendants were not guilty of negligence. I think that if they were unable to read English they were justified in relying upon the word of Van den Heever as to the contents of the documents, or at least that they were not guilty of negligence under the circumstances in placing confidence in an attorney of this Court who holds his office under the sanction of this Court.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

*Ex parte* JOHNSON AND SMITH. { 1899  
Feb. 2 th.  
Partnership—Departure of managing partner—Receiver.

This was an application for the appointment of Samuel Edmonds Smith, the second-named applicant, as receiver of a partnership business hitherto carried on under the style of John Collins & Co., with power to liquidate the same upon dissolution of the partnership.

The applicants stated that the contract of partnership had been entered into by themselves and one John Collins, and in terms of the agreement, the business had been carried on at Cape Town under the sole control and administration of the said Collins, they themselves taking no part in the management thereof.

That Collins had left Cape Town on the 1st day of the present month for the ostensible purpose of collecting debts due to the firm by customers in various country towns.

They set forth other circumstances which led them to be apprehensive that Collins had left the Colony, and stated that they desired therefore to dissolve the partnership and have a receiver appointed.

Mr. Benjamin appeared for the petitioners.

De Villiers, C.J., said: There is no need for an order for dissolution at this stage, but it is clear that somebody ought to be appointed to liquidate the partnership. The Court will appoint Samuel Edmonds Smith as receiver for that purpose.

Buchanan and Maasdorp, J.J., concurred.

[Applicants' Attorneys, Messrs. W. E. Moore & Son.]

METCALF V. METCALF. { 1899,  
Feb. 20th.

This was an action for the restitution of conjugal rights, failing which for a decree of divorce.

Mr. Benjamin appeared for the plaintiff; the defendant was in default.

The plaintiff, Mrs. Kate Emily Metcalf, said she was married to the defendant, Joseph Henry Metcalf, on December

5, 1891, at West Ham, England. She identified the copy of the marriage certificate produced. From 1891 to 1896 witness lived with defendant in England. Defendant was then a master mariner, and was consequently away from home from time to time. In 1896 plaintiff and defendant came out to the Cape, defendant having accepted an engagement at Victoria, Marshonaland. When they had proceeded as far as Mafeking the Matabele war had broken out, and they had to remain in Mafeking for some time. Subsequently the engagement of the defendant at Victoria was cancelled, and defendant accepted an engagement at Mafeking. After having been employed there for rather more than two months, defendant deserted plaintiff and proceeded to Bulawayo, and did not offer to take plaintiff with him. He had not the means to do so. While at Bulawayo he did not send plaintiff the means to proceed to Bulawayo. While plaintiff was at Mafeking her health broke down, and she was ordered to return to Cape Town. She returned to Cape Town, and at first provided herself with means by disposing of some of her goods, and subsequently she accepted an engagement. In December, 1896, defendant came to Cape Town and constantly importuned plaintiff for money, and did not offer to make a home for her. In consequence of defendant's frequent visits to her, plaintiff had to give up a business engagement at Observatory-road. She then accepted a situation at Sea Point, whereupon defendant wrote to her, saying that if she would send him money he would not trouble her again. Plaintiff had never given defendant money. She did not know where defendant was now. She had never heard from him since 1896. There was one child of the marriage, aged five. Plaintiff was in employment at present. She had maintained the child for three years.

By the Court: Defendant had never asked her to live with him; he only asked her for money. Plaintiff was anxious for defendant to maintain her, because at that time she had no friends in this country. If defendant had offered to maintain her, she would have lived with him. When he accepted an engagement at Mafeking he did so with the intention of permanently settling in this colony. Plaintiff knew that defendant had sailed for Australia.

The Court granted a decree of restitution of conjugal rights, with costs, defendant to return to or receive the plaintiff on or before May 15, failing which a rule would

be issued calling upon defendant to show cause, on or before May 31, why a decree of divorce should not be granted, with costs, the plaintiff to have the custody of the child of the marriage.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné]

#### BRANT V. BRANT AND BOK.

Mr. McGregor applied for the removal of the trial of this cause to the Circuit Court of King William's Town.

The order was made accordingly.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

BRINKWORTH V. BRINKWORTH. { 1899.  
Feb. 21st.

This was an action in which the husband, George Gibbie Brinkworth, sought for a decree of divorce from his wife, Mary Brinkworth, by reason of her adultery with one Thorpe.

Mr. Benjamin appeared for the plaintiff—Defendant came forward, and in reply to the Court said she did not defend the case, but had been called as a witness.

The plaintiff said the parties were married at Reading, England, on October 17, 1895. Plaintiff resided in England with his wife until 1897, and then, owing to financial difficulties, he came out to the Cape, and took up his residence here. The defendant did not come out at the same time, but remained at home with plaintiff's parents for some time, but subsequently about five or six months later; he believed it was in March, 1898—defendant joined him. When plaintiff first came out to this country he rented a house—66, Bree-street—as a boarding-house, and also obtained employment in Cape Town. He was at present employed by Messrs. E. K. Green & Co., and was not living with his wife. In November, 1898, certain information reached plaintiff, and his suspicions were aroused with regard to his wife. He then taxed her with infidelity, but at first she denied the charge. Plaintiff continued to reside with her for some time longer, and during all this time

she was very familiar with a man named Thorpe, and plaintiff again spoke to her on the subject, but she absolutely refused to "break it off." Shortly afterwards plaintiff went away from town in his capacity as traveller, and while he was away certain information and certain letters reached him. In December, 1898, he returned to town, and again taxed her with familiarity with Thorpe, but she again denied it. Later in the same month, defendant partially admitted infidelity. She said she would write him a letter telling the whole truth. Later on she altered her mind, and said she would not confess infidelity. But she made a verbal admission. She told him point blank that she was in love with Thorpe, and that she meant to have him afterwards. She said: "Come what will, I will have him." At that time he did not know that she had committed adultery, but owing to his suspicions he employed detectives. There was one child of the marriage, aged two and a half years, now in the custody of the mother. Plaintiff asked for the custody of the child.

Defendant had no questions.

Bernard Smith was next called. He said he was a private detective in the employ of one Hill. Witness received instructions to watch the defendant, who kept a boarding-house at 66, Bree-street. On January 26 witness engaged a room at defendant's boarding house, where a boarder named Thorpe resided. During the time witness resided at the house he had frequently seen Thorpe in defendant's bedroom, at night and during the day. On Friday, January 27, at about one a.m., witness went downstairs and saw Thorpe in defendant's bedroom. He heard them talking, but he did not know what they said. The door was open, and there was no light in the room. Witness saw them by means of the light which entered the room through the shutters, which were open at the top. On January 30 witness again saw them together in the bedroom. On February 2, in accordance with an arrangement with his employer, Hill, witness passed a note to Hill, who was on the stoep, to enter the defendant's bedroom. Hill entered the house by means of a latch-key, opened the door of defendant's bedroom, and entered the room.

De Villiers, C.J.: Do you consider that your employment as a detective entitles you to open the door of a lady's bedroom at night?

Witness: Not without reasonable grounds of suspicion.



What right had you to open her door?—Because I heard two people's voices in the room.

But what business had you there?—I was doing the business I was engaged for.

Walter John Goodchild said he was employed in Cape Town as a joiner. He was present at the wedding of the plaintiff and defendant. At about half-past twelve on February 2, 1898, the defendant went to him, and said: "Come down at once. There are three men in my room." Witness went down to defendant's bedroom, and saw three men there, including Thorpe and Hill.

William Hill said he was a private detective. The witness Smith was employed by him to make inquiries in the present case from January 26, 1898, to February 2, 1898. On February 2 witness gained admission to the house by a latchkey, and entering defendant's bedroom, saw defendant and Thorpe there. Two boarders were also present, and when they saw witness they said, "Oh, this is the game, is it?"

De Villiers, C.J.: What made you go into the bedroom?

Witness: They were my instructions from the husband.

But he could not give you such instructions?—He gave me the latchkey, anyway.

But you had no authority from a Magistrate or a Justice of the Peace?—No.

This closed the case for the plaintiff.

In reply to the Court, defendant said she had no witnesses, and she did not desire to give evidence. She admitted the marriage. It would be a pity if the child were taken away from her, as she could look after it much better than the father.

Mr. Benjamin intimated that the plaintiff would not press for the custody of the child, provided that he could have reasonable access to it, and that he could at any time again ask for the custody of it.

In reply to the Court, defendant said she had paid the rent of the house at which she resided since January 1.

De Villiers, C.J.: There is no doubt as to the adultery. But I would give a word of warning to private detectives. They are not to suppose that because they call themselves detectives they are entitled to go into private bedrooms at night for the purpose of ascertaining whether adultery is being committed or not. They must prosecute their inquiries without trespassing or without infringing upon the rights of others. It may be very important that there should be the discovery as to whether adultery has been

committed or not, but it is still more important that the privacy of people's bedrooms should not be violated in this manner. In this case the plaintiff will take his decree, the defendant to have the custody of the child, with access at all times and reasonable places to the plaintiff, with liberty to the plaintiff to apply again for the custody of the child.

Buchanan, J.: I must express my strong disapproval of the action of the detective in this case. His conduct might have led to a very serious assault, and if such a thing had occurred he would have been altogether to blame.

[Plaintiff's Attorneys, Messrs. Innes & Hutton.]

#### BERNSTEIN V. BERNSTEIN.

This was an action in which the plaintiff, Mark Bernstein, sought for a decree of divorce from his wife, Rebecca Bernstein, by reason of her adultery with divers persons.

Mr. Buchanan appeared for the plaintiff. The defendant was in default, but was present in court.

The plaintiff, Mark Bernstein, said the parties were married on September 2, 1894. He identified the marriage certificate produced, which was drawn up in Hebrew. They lived together in London until the 23rd of April, 1898, when plaintiff left London for Glasgow. When he returned to London defendant was missing. Acting upon information plaintiff followed defendant to the Cape, where he was now employed as a barman, at the Dolphin Arms, Cape Town. On January 13 of this year plaintiff found out that defendant was residing in Canterbury-street, Cape Town, and he visited her there. Plaintiff asked her what she was doing, and she said she was a prostitute. Plaintiff informed her that he did not intend to reside with her any longer, and she replied that she was satisfied. On a subsequent occasion, plaintiff saw the defendant in the room with a man.

By the Court: Defendant was living in a b'othel.

Solomon Salomon, a tailor, residing in Dorp-street, Cape Town, admitted adultery with the defendant on more than one occasion. Defendant was a prostitute.

The Court granted a decree of divorce.

[Plaintiff's Attorneys, Messrs. Innes & Hutton.]

## SUPREME COURT

[Before the Right Hon. Sir HENRY DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

COENRADIE'S EXECUTRIX V. COENRADIE'S EXECUTOR DATIVE. { 1899.  
Feb. 22nd.

Mutual will—Construction—Survivor—Usufruct.

This was an action brought by the executrix of the estate of the late P. J. Coenradie, P.J.son, against the executor dative of the estate of the late P. J. Coenradie, sen.

The plaintiff was formerly the wife of P. J. Coenradie, P.J.son, and she sued for payment of £530 1s. 3d., being the amount of the inheritance due to the estate of her first husband under the will of P. J. Coenradie, sen., and his wife, dated November 23, 1853. Under this will she alleged that the survivor together with the children of the marriage were appointed heirs to the first dying, the survivor to remain in possession of the whole joint estate, but in case of remarriage the portions of the said children to be ascertained and secured as in the will directed. The testator died on the 25th November, 1879, leaving one daughter and one son, the latter being plaintiff's husband, married to her in community. The testatrix remained in possession, and framed an account showing £530 1s. 3d. as the paternal inheritance of the said son. In June, 1888, the said son died, leaving a will by which he appointed the plaintiff his executrix. The testatrix died in July, 1894, having appointed defendant her executor testamentary, and in August, 1895, defendant received letters as executor dative of the testator.

The defendant in his plea denied that he was the executor testamentary of the testatrix, and said that according to the true intent and meaning of the will P. J. Coenradie, P.J.son, who predeceased the testatrix, was not entitled to any sum of money from the estate of his parents. And for a further plea, in case the Court should be of opinion that the said son was entitled to a share in the testator's estate, he said that the amounts brought up in the account referred to in the declaration were incorrect; the true amount in the joint estate being

£2,379 12s. 7d., of which the plaintiff would be entitled to £396 12s. 2d., being one-sixth of the sum—this he was willing to pay over to plaintiff should the first plea be overruled. He said that the account referred to in the declaration was signed by the testatrix very shortly before her death, and at a time when she was unable to understand the contents thereof, and was entirely erroneous.

The clauses in the will of P. J. Coenradie, sen., and his wife as to the interpretation of which the parties differed, were when translated as follows: "Before proceeding to the election of heirs, we declare to appoint each other reciprocally, that is the first dying the survivor, together with the children born of this our marriage, to be our heirs, and such of all property both movable and immovable, relinquished and left by the first-dying on demise to be assumed and possessed by the heirs as free and personal property, without the contradiction of anyone whomsoever. The survivor of us to assume and possess the same as free, unencumbered, and personal property, no one whosoever contradicting, and do and deal with it at will, provided always that the survivor shall be held and bound to educate the children born of this marriage in an honourable and Christian way, and maintain them until their majority, earlier marriage, or other approved state. "But if the survivor wishes to proceed with a second marriage, he or she, previous to contracting the same, shall be obliged to have the maternal or paternal portions of the children determined by two good and well-reputed men as guardians, who shall do so after inventorying and appraising the entire estate, without it becoming necessary, however, to pay out the said portions earlier than aforesaid."

Mr. Innes, Q.C. (with whom was Mr. P. Jones), appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

Alexander Innes, an auctioneer and general agent, residing at Murraysburg, said he was acting for the plaintiff. He remembered the death of old Mr. Coenradie and a sale of his property. The farm Poortjie realised £2,000, which had been paid to the present executor dative. The purchasers got credit for five years, and paid it after the death of the testatrix to the present defendant. £491 was paid to the old lady as well. £115, the price of an erf, was also paid to the testatrix. The amount of £250 was due on a promissory note by P. J. Coenradie, jun., to his mother.

Cross-examined: Several amounts which originally appeared in one of the accounts had been withdrawn.

Pieter Jacobus Coenradie, the defendant, and the executor dative in old Mr. Coenradie's estate, said that he and the testator married sisters. Witness was also appointed executor dative in old Mrs. Coenradie's estate. The £2,000 for Poortje was paid to him through the last witness by the purchasers. Witness went into the affairs of both estates, and followed the instructions of the will as far as he could understand it. He took up the position that Mrs. Coenradie was not entitled to anything under the will. He did not get the £115 or the £190. Witness had dealt with all the assets of the joint estate as far as lay in his power.

Mr. Innes: There is some discrepancy between the first and second of the clauses in dispute. The only way of reconciling them is by taking the view that the intention of the testators was to give the survivor a life usufruct.

Mr. Searle: The will is ambiguous. The words in the original, "de langstlevende van ons beide als vrij onbezwaard, en eigen goed te worden aanvaard en bezeten zonder iemands tegenspraak ter wereld," are stronger than the translation put in, and mean that the survivor shall take the property as his or her "own" to do with as he or she likes.

[De Villiers, C.J.: *Oosthuizen v. Mookes* (K. 1, p. 330) is the leading case on this point.]

That case is not quite the same, because here it might be said that there could not be a vested interest until the survivor died except in case of a second marriage. In *Brown v. Pickard* (2 Juta, p. 514), the interest given was the nearest, amongst the reported cases, to the interest given in this will, and there it was held that there was no vesting. I admit that the £115 must be brought up against the estate.

De Villiers, C.J. (after reading the first clause), said: Now this clause goes very far, but the Court should always read a will as a consistent whole. Well, if we proceed we see that the next paragraph says, "If the survivor wishes to proceed with a second marriage, he or she, previous to contracting the same, shall be obliged to have the maternal or paternal portions of the children determined by two good and well-reputed men, &c." Now it has been decided in previous cases where clauses very like these occur that the intention of the testators must be

taken to be that the survivor should take half and a child's portion; that the children should be treated as the heirs, and where the survivor has a life interest, such life interest should be held to be a usufruct rather than a *fidei-commissum*. The plaintiff is the executrix of one of the children, and she claims that the portion which is due to her husband, payable on the death of the mother, shall now be paid to her in her capacity as executrix. In my opinion this contention is a correct one, and the Court gives judgment accordingly. Coming next to the amount payable, there are three items, first the executor's commission on the debit side. There was £2,000 for the landed property which was sold, but the amount was not payable until five years after the sale. The consequence was that the money was not really received by the testatrix as executrix but it was only received by the executor dative. If he received the money he is entitled to his commission upon it, that is 2½ per cent., £50. It would appear that 1 per cent. was again charged in the estate of the testatrix. Of course we have nothing to do with that now, but I think that as he has received that money he cannot charge it again. So far as the present estate is concerned, the commission must be reduced from £74 to £50. On the credit side there is £115. That must be allowed because that £115 formed part of the estate of the testator. In regard to the £250, this item must be allowed. Judgment for the plaintiff for the amount, with costs against the estate of the testator.

Buchanan, J., said: The decisions in the cases of *Strydom v. Strydom* (11 Juta, 424) and *Nel v. Nel's Executrix* (12 Juta, 444) specially bear on this case. All the decisions of this Court in previous cases show that there was a vesting of the bequest on the death of the testator, notwithstanding that the legatee died before the survivor, who had a life interest in the estate. As to the executor's commission, I am of opinion that he is not entitled to charge twice over on the same assets, nor is he entitled to charge on assets which never passed through his hands.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton: Defendant's Attorneys Messrs. Van Zyl & Buissinné.]

MORGENROOD V. THE COLONIAL GOVERNMENT. { 1899.  
{ Feb. 22nd.

Contract of service—Government Department—Powers of subordinate offices.

*The plaintiff, who was engaged to perform the duties of assistant analyst in the Government service, whilst performing such duties, entered, as he alleged, into a contract with the head of the Laboratory Branch of the Department of Agriculture, under which he was to perform the duties of another officer in lieu of his own for twelve months, and to receive for that period an addition of £100 to his salary.*

*Held, that such contract, if made, was not binding upon the Government.*

This was an action for £149 13s. 4d., balance of salary alleged to be due, and £1,000, damages, instituted by Samuel Brichel Morgenrood, an analyst, of Cape Town, against the Secretary for Agriculture, as representing the Colonial Government.

The material allegations in the declaration were as follows:

2. On or about the 1st July, 1895, the Secretary for Agriculture for the time being engaged the services of the plaintiff as an assistant analyst, at a salary of £200 per annum, in the Department of Agriculture.

3. The work attached to the office to which plaintiff was appointed consisted specifically of the examination and assay of minerals and soils, and of such minor miscellaneous work as might from time to time require to be done in connection with the said department.

4. On or about the 22nd September, 1896, special leave of absence for one year without pay was granted, commencing from the 1st day of October, 1896, to Mr. J. C. Watermeyer, an officer senior to the plaintiff in the department and drawing a salary of £350 per annum.

5. The plaintiff, on the 2nd September, 1896, consented and agreed with Mr. Charles Faure Juritz, the senior Government analyst, to perform the said Watermeyer's duties in lieu of his own for a period of one year from the 1st October, 1896, the said Juritz offering, and the said plaintiff accepting, a salary of £300 for the said period.

6. The said Juritz was the officer in charge of the laboratory branch of the Department of Agriculture, and as such was the proper person to make such contract on behalf of the Secretary for Agriculture for the time being.

7. Thereafter, in terms of the agreement in the preceding paragraph mentioned, the plaintiff proceeded duly to carry out his part of the said agreement, and properly perform all work assigned to him thereunder by the said Juritz.

8. On the 20th day of October, 1896, the plaintiff was, in pursuance of the said agreement, officially gazetted as an analyst under the Sale of Food and Drugs and Seeds Act, 1890, to act during the absence of the said Watermeyer on leave, the said official notice being signed by Mr. Charles Currey, the permanent head of the Department of Agriculture.

9. Thereafter the plaintiff received no increased salary, though he claimed at the end of each month the amounts due to him in terms of the said agreement, until the plaintiff, after considerable difficulty, finally ascertained that the Secretary for Agriculture for the time being declined to recognise and carry out the said agreement.

10. In consequence of the breach of contract of the said Secretary for Agriculture by such repudiation as aforesaid, the plaintiff, though ready and willing to carry out the contract, was compelled to resign his appointment in the Department of Agriculture on the 18th day of January, 1897, the plaintiff returning to the department, however, on the 1st day of February, 1897, under protest, and performing work assigned to him until the 13th day of March, 1897.

11. The plaintiff received from the Secretary for Agriculture for the time being for his services from the 1st day of October, 1896, to the 13th day of March, 1897, the sum of £208 6s. 8d., and after the said 13th day of March, 1897, to the expiry of the contract period on the 30th day of September, 1897, the plaintiff earned in the other employment the sum of £42 sterling.

12. There is still owing to the plaintiff the sum of £149 13s. 4d., as balance of salary, to wit, £300, due for the said contract period.

13. The plaintiff, relying on the due payment of the increased salary to which he was entitled for the said contract period in terms of the agreement aforesaid, signed promissory notes in favour of certain of his creditors, which notes he was unable to meet

at maturity in consequence of the breach of contract of the said Secretary for Agriculture, by reason whereof the plaintiff has sustained serious damage to his credit.

14. The plaintiff suffered substantial difficulty and inconvenience in obtaining other employment subsequent to the expiry of the contract period in consequence of the manner in which the Secretary for Agriculture aforesaid caused the contract with plaintiff to be terminated, and by reason of the said Secretary for Agriculture representing to other intending employers, or not denying on inquiries being made by them in regard thereto, that the plaintiff had been, or would have been, dismissed from the department on account of misconduct.

15. The plaintiff has suffered damages in the sum of £1,000 by reason of the premises.

Wherefore the plaintiff claims: (a) Judgment for the sum of £149 13s. 4d., balance of salary as aforesaid; (b) judgment for the sum of £1,000 damages as aforesaid; (c) alternative relief; (d) costs of suit.

As an alternative to the claim for the balance of salary aforementioned, should this Honourable Court find that the contract was not completed in the manner set forth in the foregoing paragraphs, the plaintiff says:

1. He craves leave to refer to the facts already set forth as above.

2. The plaintiff, from and after the 1st day of October, 1896, at the desire and with the knowledge and consent of the Secretary for Agriculture for the time being, and on his behalf, performed the analyses of certain samples of water, food, and otherwise, as set forth in the schedule hereto annexed.

3. The plaintiff says that he is entitled to the sum of £123 9s. 4d., as a reasonable remuneration, being calculated at the rates fixed by Government tariff, less the amount already paid to plaintiff.

Wherefore the plaintiff claims: (a) Judgment in the sum of £123 9s. 4d., for work performed and services rendered at the special instance and request of the said Secretary for Agriculture; (b) alternative relief; (c) costs of suit.

The defendant, after admitting the allegations in paragraphs 1, 2, and 3 of the declaration, pleaded as follows:

3. As to paragraphs 6, 7, and 9 of the declaration, the defendant denies that any such agreement as is alleged and referred to in the said paragraphs was entered into between Mr. Chas. Faure Juritz, as representing the defendant or the Colonial Govern-

ment, and the plaintiff on the 2nd September, 1896, or on any date, and the defendant further says that the said Juritz had no power or authority to enter into any such agreement. With special reference to the said paragraphs, the defendant says that during the months of October, November, and December, 1896, Mr. Muller, an officer of the department, was absent on leave, and during his absence the Secretary for Agriculture authorised the payment to plaintiff of a bonus of £8 6s. 8d. per month in addition to his ordinary salary of £200 per annum, but this special remuneration was to cease, as the plaintiff well knew, and did cease, on Mr. Muller's return to duty on the 1st January, 1897.

4. As to paragraph 8 of the declaration the defendant admits that the plaintiff was on or about the 20th day of October, 1896, gazetted as an analyst under the Act 5 of 1890. The notice of the plaintiff's appointment as an analyst was inserted in the "Gazette" of that date, not under any agreement with the plaintiff as alleged in paragraph 8 of the declaration, but in terms of section 11 of the said Act.

5. As to paragraph 10 of the declaration the defendant admits that the plaintiff resigned his appointment on the 18th January, 1897, and that he returned to duty on the 1st February, 1897, and continued his duties in the department until the 18th March, 1897, on which date he finally resigned his appointment.

6. As to paragraph 11 of the declaration the defendant admits that between the 1st day of October, 1896, and the 13th day of March, 1897, the plaintiff's salary with bonus of £25 as aforesaid, amounting in all to the sum of £108 6s. 8d., was duly paid to him. The defendant has no knowledge of the amount of the plaintiff's professional or other income subsequent to his resignation.

7. As to paragraph 12 of the declaration the defendant denies that the sum of £149 13s. 4d., or any sum is due to the plaintiff by the Colonial Government.

8. The defendant has no knowledge of the allegations contained in paragraphs 13 and 14 of the declaration. With regard to the latter paragraph he specially denies that he ever represented to intending employers of the plaintiff, or to any persons that the plaintiff had been or would be dismissed from the public service on account of misconduct. The defendant further denies that any inquiries were made of him on the said subject.

9. As to paragraph 15 of the declaration the defendant denies that the plaintiff has sustained damages in the sum of £1,000, or in any amount by any act or omission on his part, or on the part of any officer of the Agricultural Department of the Colonial Government. Wherefore he prays that the plaintiff's claim may be dismissed with costs.

For a plea to the alternative claim of the plaintiff the defendant says :

1. He craves leave to refer to the matters set forth in his plea.

2. As to paragraphs 2 and 3 of the said alternative claim the defendant says that the analyses therein referred to were analyses which were assigned to the plaintiff to be performed by him in his capacity as an analyst in the public service of the Colony by the head of his department. It was the plaintiff's duty to perform the said analyses or any other work which might be assigned to him by the senior analyst of his department in consideration of his salary of £200 per annum as fixed by Parliament. The defendant further says that in respect of the said analyses the plaintiff is not entitled to the sum of £133 9s. 4d., or to any other amount as special remuneration over and above his salary as fixed by Parliament as aforesaid.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The replication was general, and upon these pleadings issue was joined.

Mr. Close (with whom was Mr. Currey) appeared for the plaintiff.

Mr. Sheil, Q.C. (with whom was Mr. Molteno), appeared for the defendant.

Samuel B. Morgenrood, the plaintiff, said he was an analyst by profession, and was a B.A. of the Cape University. At present he was a lecturer at the Bloemfontein University at a salary of £400 a year. In 1895 Mr. Juritz approached him with regard to an appointment in the laboratory of the Agricultural Department, and finally Mr. Juritz, the head of the laboratory department, appointed witness as analyst at a salary of £200 a year. The nature of his duties were specified to him. On September 2, 1896, there was some talk of Mr. Watermeyer going away on leave for a year in Damaraland. On that occasion the matter was mentioned to witness by Mr. Juritz, who asked witness to do Mr. Watermeyer's work with an addition of £100 a year as salary. Witness accepted the offer, and

went away on a business trip. In October witness returned to town, when he was informed by Mr. Juritz that he was to take up Mr. Watermeyer's work, although definite arrangements had not been made. Witness proceeded with that work, and it was arranged that Mr. Rose should take the work originally performed by witness. Another analyst, Mr. Muller, was absent at the time, and Mr. Muller's work was divided amongst the other three analysts. Witness was gazetted as the successor to Mr. Watermeyer, assistant analyst, during the absence of Mr. Watermeyer on leave. Witness performed all Mr. Watermeyer's duties until his return. At the end of October witness did not receive the promised increase, and saw Mr. Juritz about it. Mr. Juritz told him he would see about it. In November witness again saw him on the matter, but nothing was done. In December, 1896, a memorandum signed by Sir Pieter Faure, the then Ministerial head of the department, was read to witness, which stated that during the absence of Mr. Watermeyer his work would have to be done by the staff, with the addition of Mr. Rose, and that during the absence of Mr. Muller extra remuneration would be given to witness, but that on Muller's return witness was to receive no extra remuneration. Subsequently Mr. Juritz altered the wording of the memorandum, which mentioned an extra £100 a year for witness, to "at the rate of £100 a year" until Mr. Muller returned. At the end of December witness was paid £25 for doing Mr. Watermeyer's work for three months. In January, 1897, witness resigned, as he saw that he would not get the additional £100 a year which had been promised to him. Subsequently Mr. Juritz wrote to the head of the department, stating that plaintiff's additional duties were worth £100 a year in addition to his own salary, and pointing out that his (Mr. Juritz's) recommendation had been rejected. Witness did not press the claim for damages, £1,000, but claimed for £149 13s. 4d., the value of the work done by him while Mr. Watermeyer was away on leave.

Cross-examined: His original appointment was made by Mr. Currey. He was not on the fixed establishment, but was employed under a special section of the Act of 1888, by which persons possessing special qualifications for particular work need not pass the Service examination. Witness was engaged by Mr. Juritz, and not by Mr. Currey or Sir Pieter Faure. When Mr. Muller returned, the

extra pay which witness was to receive for doing Mr. Muller and Mr. Watermeyer's work ceased. Witness received no notification of Mr. Juritz's recommendation for the payment to witness of an additional £100 for doing Mr. Watermeyer's work.

Re-examined: He received no notification of the arrangement by which he was paid an additional salary for doing Mr. Muller's work while Mr. Muller was away. He accepted the £25 for the purpose of keeping the matter open.

James Chas. Watermeyer, an analyst in the employ of the Government, said he received extra pay for doing part of Mr. Muller's work while Mr. Muller was away, but received no notification of this from anybody but Mr. Juritz. Shortly before witness left upon twelve months' leave witness heard Mr. Juritz offer plaintiff £100 per annum in addition to his salary for doing part of witness's work for twelve months. Plaintiff accepted the offer. Mr. Juritz had no authority to make increases without the authority of the head of the department. In the case of the plaintiff witness understood that the increase would be granted.

John Muller said he was appointed assistant analyst by Mr. Juritz at £180 a year. He received a letter of appointment from Mr. Currey at a later stage. Witness did a portion of Mr. Watermeyer's work while Mr. Watermeyer was away on leave at the rate of £300 a year.

Victor Edmund Flack, a clerk in the Agricultural Department, said he was engaged as a junior clerk by Mr. Juritz. He received no letter of appointment from Mr. Currey.

Cross-examined: He did ordinary "clerking" work. He wrote reports and addressed envelopes.

John George Rose said he was engaged by Mr. Juritz.

Cross-examined: Subsequently he received a notification of his appointment from Mr. Currey.

Arnold Simons said he was engaged by Mr. Juritz, and was subsequently told by him that the appointment had been confirmed.

This closed the case for the plaintiff.

For the defence,

Chas. Frederick Juritz said, regarding the alleged arrangement with the plaintiff, that he recommended that the increase be made; that he would endeavour to make arrangements with the head of the department for

the increase to be granted. Witness had no authority to enter into contracts of this kind.

By the Court: He got the extra work done under the impression that Sir Pieter Faure would eventually agree to witness's recommendation. Flack was not on the fixed establishment.

Cross-examined: The amounts charged on plaintiff's schedule for work done were reasonable. Outside analysts would have charged more. All the time that plaintiff was doing the extra work witness hoped that the increase would be allowed, and plaintiff was evidently under the impression that it would be allowed. Witness's present staff went to him regarding engagements.

Re-examined: He had never made an appointment without the sanction of the head of the department.

Chas. Currey, Under Secretary for Agriculture, said that in 1895 the analytical laboratory was attached to the Agricultural Department. All actual appointments in a department were made by the Ministerial head through the permanent head. Preliminaries were arranged by heads of branches, who made recommendations which it was for the head of the department to approve or disapprove as he deemed fit. In the present case, witness only authorised a payment of £25 to the plaintiff for doing Mr. Watermeyer's work while Mr. Watermeyer and Mr. Muller were away. In the cases where extra payments were made to those members of the staff who did Mr. Muller's work during his absence, witness's authority was given.

Sir Pieter H. Faure gave corroborative evidence.

Mr. Close: The plaintiff was justified in believing that Juritz was entitled to contract with him. The contract was within the scope of Juritz's apparent authority, therefore his principal is bound. In other cases of employment the authority of the head of the department had not been obtained as far as the plaintiff knew. In any case, where the head of the department knows of such negotiations he should expressly repudiate them if they are unauthorised. The Government is estopped from repudiating the liability after holding out an official in an apparently responsible position like that of Juritz.

Mr. Shell was not called upon.

De Villiers, C.J., said: The plaintiff's case is briefly this, that he has entered into a contract with the Government by which

the Government bound itself to employ him for a period of twelve months, during Mr. Watermeyer's absence, at an additional salary of £100, additional to the salary which the plaintiff was entitled to receive for the performance of his ordinary duties. But he was previously appointed to perform duties as assistant analyst at the rate of £200 per annum, and his case is that this subsequent contract was entered into with him by Mr. Juritz. The first question is, had Mr. Juritz any power to enter into such a contract on behalf of the Government? I am quite satisfied that Mr. Juritz had no such power at all. No doubt he was the head of his branch of the department, but as such head he had no such independent position as to enable him to contract on behalf of the Government. So far as any responsible official of the Government was concerned, there never was any consent to such an arrangement. When the proposal was made, Sir Pieter Faure, who was then the responsible head of the department, consented to the payment of an additional sum only during the absence of Mr. Muller; but beyond that he never went, and even the plaintiff himself does not state that Mr. Juritz at any time informed the plaintiff that he had received the consent of the responsible head of the department to this additional £100. All the plaintiff can say is that Mr. Juritz assented to it, and that he (the plaintiff) assumed that the Government also assented to it. Then I am by no means satisfied that Mr. Juritz at any time clearly made, or purported to enter into a contract with the plaintiff. What he seems to have done was to hold out hopes that it would be done. The plaintiff must have known that as he received no intimation the Government had not assented to the arrangement. Then the plaintiff proceeded to do certain work, and if the question had been whether the plaintiff was to receive a sum for the additional work which he performed up to the time when he discovered that the Government had not consented to the arrangement, there would have been considerable force in the argument of Mr. Close. But the Government has paid the plaintiff, for the additional work performed during the months of October, November, and December, £25. Now the question arises whether the plaintiff can claim that there is a binding contract for the whole period of Mr. Watermeyer's absence. There can be no such claim. Mr. Juritz could not bind the Government that during the full

period of the absence of Mr. Watermeyer the plaintiff would be necessarily employed to do another officer's work. We think, therefore, that upon this ground the plaintiff's case falls to the ground. Even if Mr. Juritz had purported to make a binding contract, he had no authority from the Government to enter into such a contract. Then the plaintiff says that at all events he is entitled to his *quantum meruit*. He says he is entitled to his additional work done since January 1, 1897. I am of opinion, however, that he is not. He might have been working up to the 1st of January, and he then could have said, "I will revert to my original agreement, to do the work for which I was engaged at the rate of £200 a year, and that if you refuse to allow me to do that, I shall claim for any additional work which I do." But that is not the position. In January he took up the position that the Government was bound to employ him at this additional rate for the whole period during which Mr. Watermeyer was absent. Upon this legal point the plaintiff, in my opinion, has entirely failed, and the judgment of the Court must be for the defendant with costs.

Buchanan, J., said: I think the plaintiff had good grounds for believing that the contract was completed, but Mr. Juritz had no power to make such a contract. All he could do was to recommend the arrangement to Government. Had the Department of Agriculture done what they ought to have done—given notice to a person of the terms upon which he was appointed—this case would never have come into court.

Maasdorp, J., also concurred.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

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## SUPREME COURT

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[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1899.  
{ Feb. 23rd.

Mr. Benjamin applied for the admission of Frank Widdicombe as attorney and notary.

Granted.



Mr. Buchanan applied for the admission of Johannes Gerhardus van Alphen as a translator, with leave to take the oaths at Kimberley.

Granted.

### PROVISIONAL ROLL.

#### FOTGIETER V. ORSMOND.

Mr. Buchanan applied for provisional sentence upon a promissory note for £444 10s. 6d., with interest and costs.

Granted.

#### LAWRENCE AND CO. AND OTHERS V. PERLHEFTER.

Mr. Molteno applied for the final adjudication of the defendant's estate.

Granted.

#### HIDDINGH V. SCHADE.

Sir Henry Juta, Q.C., applied for provisional sentence for £466 13s. 4d., instalments due upon a contract of sale, with interest.

Granted, subject to the contract being stamped.

#### KELLY V. STEPHAN.

Mr. Joubert applied for provisional sentence for £300 upon a mortgage bond, with interest. The bond had been ceded as collateral security to one Arends, but a written consent by the latter was put in.

Granted.

#### STURK AND CO. AND OTHERS V. SYRKIN.

Mr. Maskew applied for a final order of sequestration of the defendant's estate.

Granted.

#### HENRY V. SCOTT.

Mr. Upington applied for provisional sentence upon an unsatisfied judgment of the Court of the Resident Magistrate of Pietermaritzburg, Natal.

Defendant appeared in person, and said he resided in Cape Town, and had resided in Cape Town for ten months. He had never received the summons to appear in the Magistrate's Court.

The record stated that service had been personal, but the Court ordered the case to

be postponed until March 13 for the production of further proof as to the terms of the return of the summons.

*Postea* (March 13th).

Provisional sentence was granted.

#### NIAY V. ZWAIGENHAFT.

Mr. Upington applied for provisional sentence upon a promissory note for £18 10s. and interest.

Granted.

#### COLLIER AND HILL V. BOWAN.

Mr. Gardiner applied for provisional sentence for £29 6s. 7d., less £10 paid on account.

Granted.

### ILLIQUID ROLL.

#### COLLIE V. HARRIES.

Mr. Graham, Q.C., applied for judgment in default of plea for £143.

Granted.

#### HOFMEYER AND SONS V. LUCKE.

Mr. Buchanan applied for judgment under Rule 329 for £51 5s. 4d., the purchase price of certain animals, and for goods sold and delivered.

Granted.

### GENERAL MOTIONS.

#### IN THE ESTATE OF STEYN.

This was an application by the curator of one Steyn, for leave to sell certain property in the estate.

Mr. McGregor for the applicant.

The Court granted the order, provided that the curator obtained the written consent of all the children.

#### IN THE MATTER OF BEYERS.

This was an application for the appointment of a *curator ad litem* to one Adam Beyers, and the appointment of a provisional curator.

Mr. Benjamin appeared for the applicant and said he applied under Act 1 of 1897.

[De Villiers, C.J.: If you act under the Act you should apply to a judge in chambers.]

Then I will merely apply for a *curator ad litem*,

Mr. Buchanan was appointed *curator ad litem*.

EWAN'S TRUSTEES V. PEACOCK { 1899.  
Feb. 23rd.  
Mar. 8th.  
BROTHERS.

Insolvency — Undue preference —  
Attachment *ad fundandam jurisdictionem*.

*The defendants, who were creditors of E., attached certain of his goods ad fundandam jurisdictionem in a suit to recover the amount of the debt, but agreed to stay proceedings and release the goods from attachment upon E. giving them a promissory note for the amount of the debt, delivering over the goods under attachment as security for payment of the note, and passing a bond upon his landed property.*

*The defendants thereupon took possession of the goods. E.'s liabilities at the time exceeded his assets, and six weeks later his estate was sequestered. He failed to pay the note or pass the bond. Held, that the delivery of the goods to the defendants was an undue preference.*

This was an action for the re-delivery of certain goods or their value upon the ground of an undue preference.

The declaration alleged that the estate of the insolvent, Ewan, was compulsorily sequestered on the 16th June, 1898.

That in or about April, 1898, the insolvent, who was then largely indebted to the defendants, alienated and delivered to them certain goods and merchandise of the value of £605 in payment or part payment of his indebtedness.

That at the time the insolvent contemplated the sequestration of his estate, and that the said alienation was an undue preference, and null and void.

The plaintiffs on these grounds claimed an order for the delivery of the said goods to them or payment of £605.

The defendants, in their plea, denied the allegations of contemplation of surrender and undue preference.

They said that prior to March, 1893, the insolvent was indebted to them in the sum of £641 8s. 2d. for goods sold and delivered.

That the insolvent carried on business in Rhodesia as well as in this colony, and on or about March 21, 1898, the defendants attached the goods now claimed by plaintiffs under an order of the Eastern Districts Court, in a suit against the insolvent, then being in Rhodesia, to recover the same.

Thereafter the defendants agreed with the insolvent, that the said proceedings should be stayed and the goods released from attachment upon the insolvent giving to the defendants a promissory note for the amount of debt and costs, and delivering over to the defendants the goods under attachment as security for payment of the said note, and passing a second bond in defendants' favour upon certain landed property belonging to the insolvent.

In pursuance of the above agreement, the goods were taken possession of by the defendants.

The insolvent failed to pass the said bonds, and the promissory note has not been paid, and the defendants are entitled to retain the said goods.

Wherefore they prayed that the claim might be dismissed, &c.

The replication was general.

Mr. Innes, Q.C., and Mr. Benjamin appeared for the plaintiffs.

Mr. Searle, Q.C., and Mr. Currey for the defendants.

Robert Henry Hopper Stockdale, residing at Port Elizabeth, one of the plaintiffs, said he was one of the trustees in the Colony of the insolvent estate of Ewan. Insolvent had been carrying on business at Sterkstroom, in this colony. His other businesses were in Rhodesia. When witness visited insolvent's business at Sterkstroom in August he took stock. Acting upon insolvent's information as to the price paid for stock, witness assessed the assets at £2,910 and the liabilities at £3,736. The deficiency existing in August substantially existed in April, or earlier. Witness realised the assets to the best of his ability, and they had realised about £2,500 for distribution eventually. Proofs of debt had been made in respect of Rhodesia as well as Colonial creditors. The total proofs against the whole estate in the Colony and Rhodesia was £9,999. The Rhodesian assets were estimated to realise £1,200. The total dividend payable to all creditors would be about 5s. in the £.

**Cross-examined:** There were no books to show the value of the stock at Sterkstroom. Witness estimated the value of the insolvent's stock at Sterkstroom in April from information supplied by the insolvent. The insolvent's books were very improperly kept. Most of the stock was new. In realising, some of the stock was sold under cost price. When asked to put certain documents in order, insolvent said it was not in his power to do so.

**Re-examined:** A large number of debts to the estate were incurred years ago by workmen employed on the construction of the Indwe railway. These debts were irrecoverable.

Houlton Augustus de Beer, residing at Bulawayo, said he was one of the trustees in the insolvent estate in Rhodesia. The schedules in the Rhodesian estate were filed in June, 1898, and showed liabilities £7,195 7s. 6d. and assets £5,962 2s. 6d. Witness valued insolvent's stock as shown by the schedules. Witness took the outstanding debts from the books, writing off those which he knew were bad. Altogether the valuation of the assets was a fair one, although the realisation was considerably lower than the valuation. The assets were now estimated to realise only £1,200. He believed that insolvent was insolvent in respect of the Bulawayo business at the end of April.

**Cross-examined:** Insolvent had several branch businesses in Rhodesia. The only assets at Mochudi were bad debts Mr. Fuller, one of insolvent's managers, drew up the schedules.

Dugald Malcolm White, manager in South Africa for Stewart & McDonald, of Glasgow, and residing in Port Elizabeth, said his firm had supplied goods to insolvent for about three years. Insolvent owed witness's firm close upon £5,000. Insolvent's accounts first became unsatisfactory towards the end of 1896, and subsequently witness's firm frequently wrote to insolvent asking for settlement of accounts, and complaining that insolvent made payments to Peacock Bros., and paid nothing to Stewart & McDonald.

**By the Court:** Stewart & McDonald got nothing, in spite of the letters.

**Re-examined:** Insolvent promised to pass a bond in favour of Stewart & McDonald, but no bond was ever passed. Insolvent promised to forward goods supplied by them to witness at Port Elizabeth, but he never ful-

filled his promise. Witness first heard of the attachment by Peacock Bros. of the goods at Sterkstroom late in May or June.

**By the Court:** Insolvent informed witness that the goods attached by Peacock Bros. were Stewart & McDonald's goods. Insolvent never informed witness of the attachment until late in May. Witness at once took proceedings to sequester the estate. Insolvent then owed witness's firm about £5,000. Insolvent frequently did not reply to witness's letters. Throughout 1897 insolvent's accounts were most unsatisfactory.

**Cross-examined:** After the sequestration some of the large creditors desired that the insolvent should be given time.

**By the Court:** If before the attachment was made the insolvent had signed a bond in favour of Stewart & McDonald, and had made a substantial payment, witness would have paid out Peacock Bros. or would have backed their bills.

This closed the case for the plaintiff.

For the defence,

Charles Maynard Mullett, manager to Messrs. Peacock Bros., Queen's Town, was called. He said that his firm had dealings with insolvent from 1893 to July, 1897, when witness heard that Stewart & McDonald were supporting him, and discontinued supplying him with goods from that time. Insolvent then gave a promissory note for the balance of his liabilities to witness's firm. Early in 1897 insolvent was doing well at Sterkstroom, having £3,082 to his credit. On November 22, 1897, insolvent paid witness £80 on account of a promissory note for £180, and he had prior to that made small payments. In January, 1898, witness's firm wrote to insolvent pointing out that he owed them £631 6s. 9d., and demanding payment of the same. One Bower then offered to take over the Sterkstroom business, and witness's firm made certain conditions, but Bower then withdrew his offer, owing to his wife having declined to allow him to take over the business. In March, 1898, witness applied to the Eastern Districts Court to attach certain of insolvent's goods at Sterkstroom, and on March 24 the attachment was made. On April 29, witness saw insolvent in Queen's Town, when the latter seemed hopeful, and witness accepted the terms of the letter dated April 29 (produced). Witness arranged to take over certain goods in insolvent's store at Sterkstroom, sending a man named Ahlfeldt to take over the goods. Witness instructed

Ahlfeldt to try and get £1,000 worth of goods as security for the bond of £700, which included the debts and the costs, as £700 worth would be insufficient security in the event of realisation, but Ahlfeldt could only get £600 worth, which were delivered to defendant. The latter thought this was not sufficient security, and asked insolvent to pass a further bond in their favour for £300 on certain property, but this bond was never completed. Before the insolvency, witness was unaware that insolvent contemplated sequestration. Witness always understood that all that insolvent required to get over bad times at Sterkstroom was time.

Cross-examined: Witness could now see that the statement of profits made by insolvent and prepared in 1897 was inconsistent with the amount of business possible in a small place like Sterkstroom.

By the Court: Witness did not know the extent of insolvent's liabilities previous to the sequestration. Witness preferred to attach insolvent's goods to getting judgment for the amount owing to witness's firm by insolvent.

Re-examined: If the estate had not been sequestrated witness would have entered an action for judgment for the amount of the debt.

By the Court: Witness hoped that by pressing the insolvent before sequestration the other creditors would have paid out witness's firm.

Robert Ewan, the insolvent, said he had carried on business at Sterkstroom since 1893. Since 1896 he had frequently resided in Bechuanaland. At first he did very well at Sterkstroom, and opened up stores in Bechuanaland and Rhodesia, as the railway extended. Peacock Bros. supplied him with goods up to 1897, but after that Messrs. Stewart & McDonald were his chief supporters. Until the railway was completed to Bulawayo witness did very well at his stores at out-stations. He then opened a store at Bulawayo, and early in 1898 he had a good stock there. Witness then intended to gradually close his out-stations, and concentrate at Bulawayo. Before he could get properly settled at Bulawayo, Peacock & Co. and Stewart & McDonald and other creditors in the North pressed him for payment of the debts he owed to them. He first heard of the attachment by Peacock Bros. from his Sterkstroom manager in March, 1898. When he made the arrangement with Peacock

Bros. he had not the slightest intention of surrendering his estate, and he intended as soon as had settled small matters to pay Stewart & McDonald what he owed them.

By the Court: He allowed Peacock & Co. to attach goods at Sterkstroom in order to avoid judgment being entered against him. He would not have had the money to meet their claim at the time if judgment had been obtained against him. He did not know that in the event of his not being able to satisfy the judgment Peacock Bros. could have sequestrated his estate. He had lived in this country for ten years, but he was not well acquainted with the law.

Examination resumed: He disposed of his share in the coal concession and put the proceeds into his business.

By the Court: He had not been in business before he came to this country. At Home he worked as a grocer's assistant.

Cross-examined: He was pressed for payment by Stewart & McDonald, Holt & Holt, Smith & Co., the Kaffrarian Milling Company, James Lawrence & Co., and others. Throughout April he was in desperate straits owing to his great expenses. He did not think when he handed over goods to Peacock that his other creditors, if they knew about it, would come down on him at once. He did not tell them, as he hoped to be able to settle matters in a few months' time. Stewart & McDonald were the only people besides Peacock & Co. who could have helped him, but he did not think that the former firm would have objected to his agreeing to grant an attachment to Peacock & Co.

Th's concluded the evidence.

*Postea* (March 8th).

After argument,

Judgment was given for plaintiffs.

De Villiers, C.J., said: Within six weeks of his insolvency, the insolvent delivered to the defendants goods to the value of £605 in settlement of claims which they had against him. It is very important in the consideration of this case to bear in mind the terms of the agreement entered into on April 29, 1898, which is contained in the letter addressed by the insolvent to the defendants. It is as follows: "Messrs. Peacock Bros.—Dear Sirs,—In consideration of your agreeing to accept my promissory notes, payable at three months from date, for the amount of your claim against me, including costs, up to £712, I hereby undertake to deliver and hand over to you at your stores in Queen's Town new goods in original packages to the value of

the amount of your claim, and a margin in addition sufficient in your estimation to cover any depreciation in value or loss on sale, such goods to be held by you as security for the due payment of the above promissory notes, with any interest and charges that may accrue thereon, with power to realise the same either by auction or private sale in case I make default in payment of either of the promissory notes: proceedings to be withdrawn upon this." At the time that letter was written the insolvent was hopelessly insolvent, and he must have known that he was hopelessly insolvent, and if there was contemplation of sequestration the terms of this letter leave no doubt on my mind, but that there was an intention to prefer. The previous correspondence between Stewart and the insolvent shows that if there was one creditor whom the insolvent was entitled to prefer above any other it was Peacock Bros., who had originally given him his start in life. The important question in my opinion to be decided is whether there was any contemplation of sequestration, because, as I said before, if there was the intention to prefer seems to be perfectly clear. But for the eighth section of the Act of 1884, there might have been considerable difficulty in proving that there was contemplation of sequestration on the part of the insolvent, but the eighth section relieves the Court of any difficulty that might have arisen. This section reads: "If at the trial of any action brought for the purpose of setting aside any alleged undue preference under the provisions of the 81th, 85th, 87th, 92nd, or 95th section of the said ordinance, it be proved that the alienation, transfer, cession, delivery, mortgage, pledge, or payment forming the subject of such action was made, granted, or given within six months before the sequestration of the estate of the insolvent, and at a time when his liabilities fairly calculated exceeded his assets fairly valued it shall be presumed that the insolvent at such time contemplated the sequestration of his estate unless proof be made to the contrary by the defendants in such action." Now in this case it was less than six months before his insolvency; in fact, as I said before, it was only six weeks, and at the time there is no doubt that his liabilities fairly calculated exceeded his assets fairly valued. Even if the Court separated the two estates, the one in Rhodesia from the one in the Colony, even

then, as regards the estate in the Colony, he was in my opinion insolvent. Of course if the two estates were not separated but treated as one, it is still more clear that there was an excessive liability over assets. That being so, the presumption is that there was contemplation of sequestration, and the question now is: have the defendants by their evidence rebutted that? It is true that they have called the insolvent, who states that he did not contemplate sequestration, but his mere statement is not sufficient. If all the circumstances of the case show that any reasonable person being situated as he was must have contemplated sequestration of his estate, his present impression would not influence the Court. The Court must be guided by the circumstances existing at the time that the act was done. Those circumstances satisfy me that he must have contemplated sequestration, and a portion of the previous correspondence strengthens that view. At that time his creditors were strongly pressing him from all sides. Then there was the action brought against him by Peacock Bros. The defendants strongly rely upon the fact that there was an attachment upon his goods, but that attachment was only for the purpose of founding jurisdiction, and an ordinary writ would have had to be issued before these goods could be sold, and doubtless if these proceedings had gone on, before the sale—the distribution of the assets under the writ—could have taken place, the other creditors, including Stewart & McDonald, would have come down upon the insolvent, and sequestration would have been forced. It may well be that it was in order to avoid that that this private arrangement was made—a private arrangement by which the fullest security was given to the satisfaction of Peacock Brothers—a security not only for the debt, but leaving a large margin upon the value of the goods, which would, no doubt, give Peacock Brothers complete security. Then if one reads the correspondence between Stewart and the insolvent, one would have thought that the first thing the insolvent would have done after entering into that arrangement would have been to inform Stewart of it. He had dealt largely with Stewart and McDonald, and they had given him large credit, but instead of informing them of the fact of this private arrangement he studiously conceals the fact from them. I cannot imagine why there was this silence as to what had

taken place, unless there was some sinister motive, and the motive could only have been to protect Peacock Brothers in the event of a contemplation of sequestration of the estate. For these reasons I think the plaintiffs must succeed in the present action. Judgment must be given in terms of the declaration with costs.

Buchanan, J., in concurring, said: In this case I would probably have had very little doubt even under the old law that there was contemplation of sequestration. It was nothing like an ordinary business transaction passing between two parties. The fact that since this transaction came to light other creditors immediately took steps showed the natural effect that transaction had on the minds of those other creditors. With regard to contemplation of sequestration, whatever difficulty there might have been under the old law has been clearly removed by the Act of 1884.

Maasdorp, J., also concurred.

[Plaintiffs' Attorney, Gus Trollip: Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon., Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

VAN ZYL V. ENGELBRECHT. { 1899.  
Feb. 24th.  
27th.  
March 14th.

*The defendants at a public sale of land belonging to an insolvent estate bought all the land, but as the trustee had not, owing to mistake, received transfer of the whole, an undivided part only was transferred to the defendants. The trustee having subsequently obtained transfer of the remaining portion being 9-56ths of the whole, offered it for sale by public auction, but the defendants publicly protested*

*against the sale. The plaintiff, who had been present at the first sale, was present also at the second sale and heard the defendants' protest, but notwithstanding such protest he bought the land for the trustee. The 9-56ths portion was then transferred to the plaintiff, but the defendants remained in occupation of the whole.*

*Held, that the plaintiff having purchased with knowledge of the defendants' rights was not entitled to claim a partition of the land, and that the defendants were entitled by claim in reconvention to an order setting aside the transfer to the plaintiff (without prejudice to the rights of bona fide mortgagees) and to a rule calling on the trustee to show cause why he should not transfer the 9-56ths to the defendants.*

This was an action brought by the plaintiff against seven defendants, for a declaration of rights in respect of certain two farms in the Clanwilliam district.

The declaration stated (in paragraphs 1 and 2) that the plaintiff was the registered owner of 9 56 of the farm Palaishuevel, and of 9 56 of the farm Ratelrug, in the division of Clanwilliam; the defendants (seven in number) were the owners of the remaining 47 56 of the said farms; the parties were owners in undivided shares.

3. The plaintiff is desirous of having a partition made of the said farms, in order that his portions thereof may be defined, and that sub-divisional transfers may be passed to him of the portions to which he is entitled, and for that purpose failing an agreement between the parties of having an arbitrator or arbitrators appointed to make the said partition, he is ready and willing, and has tendered to bear his share of the expenses of the said petition, and to sign all necessary documents in that behalf.

4. The defendants deny that the plaintiff is entitled to any portion of the said farms, and deny his right to a partition, and have refused to take any steps to have the said partition made.

5. All things have happened, &c., but the defendants refuse to take any steps for the purpose.

Wherefore he claimed an order that he was entitled to own and occupy 956 in each of the said farms, and the necessary orders to enable him to get partition.

Of the defendants, Pieter Gideon Engelbrecht, Josias Andries Engelbrecht, Catharina Jacoba Aletta Engelbrecht, executrix testamentary of the estate of the late Jacobus Adrian Albertus Engelbrecht, and Carolina Maria Petronella Engelbrecht, executrix testamentary of the estate of the late Johannes Hermanus Engelbrecht filed the following plea:

1. They admit the allegations in paragraphs 1 and 4 of the declaration, and also admit that they refuse to take steps to partition the farm Palai-heuvel and Ratelrug as desired by the plaintiff.

2. They also admit that the plaintiff is registered, but deny that he is legally registered as the owner of 956 shares of the said farms, and they admit that they and their co-defendants are registered as the owners in undivided shares of 4756 shares of the said farms; but say that in law they, the said defendants, are, as will hereinafter appear, entitled to be registered as the owners of the 956 shares of the said farms now registered in the plaintiff's name.

3. Save as aforesaid, they deny the allegations in paragraph 5 of the declaration.

4. They say that heretofore, in the year 1883, the several trustees of the then insolvent estates of (a) Hermanus Engelbrecht (b) Josias Andries Engelbrecht, aforesaid, (c) Gert Cornelis Engelbrecht, (d) David Jacobus Sieberts Engelbrecht, and (e) Adrian Johannes Engelbrecht were together entitled to shares of the said farms, of which each of the said insolvents was a registered owner of 233 shares, amounting to 1036 or 27 shares of the entire farms, and in that year the said trustees united to sell all their right, title, and interest in the said farms by public auction, and did so sell the same, namely, 27 shares of both the said farms, to one Smuts, all the said shares being undivided shares.

5. Thereafter in error transfer was in the said year passed by the said trustees of the aforesaid insolvents to the said Smuts of one-eighth share only of each of the said farms, but the said Smuts by himself or others on his behalf took and had possession of the said farms as being entitled to the 27

shares thereof sold to and bought by him as aforesaid.

6. The said Smuts became insolvent, and the trustees of his insolvent estate thereafter in the year 1889 duly advertised for sale by public auction "all the landed property belonging to the said estate, which, besides another property, included the said Smuts's shares of the farms Palaisheuvel and Ratelrug."

7. At the said sale the defendants Pieter Gideon Engelbrecht, Josias Andries Engelbrecht, and the late Jacobus Adrian Albertus Engelbrecht, and Johannes Hermanus Engelbrecht (each of whose estates is now lawfully represented in this suit by his executrix) purchased all the said Smuts's shares of the said farms so offered for sale as four purchasers in equal shares.

8. The trustees of the estate of the said Smuts passed in error and the said four purchasers received in error transfer of one-eighth share only of the said two farms, being the share theretofore transferred in error to the said Smuts as aforesaid, and no transfer of all the shares of the said farms belonging to the said estate.

9. Thereafter the trustees of the said Smuts discovered the error that had taken place, and obtained transfer from the several trustees of the insolvent estates referred to in paragraph 4 of the 956 shares of each of the said two farms, representing the difference between the 27 shares sold to the said Smuts as aforesaid in 1883, and the one-eighth share, which by error was alone transferred to him as aforesaid.

10. The said trustees, in obtaining as aforesaid the said transfer of the said 956 shares in each of the said farms after the same had been sold by them to the four purchasers aforesaid could lawfully act merely as transferees for the purpose of thereupon and thereafter legally transferring the said shares to the said four purchasers.

11. Not regarding their duty in that behalf, or the rights of the aforesaid four purchasers, the said trustees thereafter purported to offer for sale by public auction the said 956 shares so transferred to them as aforesaid, and the defendant Pieter Gideon Engelbrecht appeared on the day of sale and publicly protested against the said sale, which protest was known to the plaintiff, who, despite such protest, bid for the 956 shares of each of the said farms then offered for sale, and the same were knocked down and declared sold to him.

12. Thereafter the trustees of the estate of Smuts wrongfully and unlawfully passed and the plaintiff wrongfully and unlawfully received, transfer of the said 956 shares in each of the said farms, in violation of the rights as aforesaid of the four purchasers.

13. The said defendants say that two of them are, and two of them representing the said purchasers have been and are in quiet possession of the land and property so purchased by them from the trustees of the insolvent estate of the said Smuts, and the plaintiff is not in possession of any portion of the said two farms.

14. The transfer passed to the plaintiff by the said trustees is by reason of the premises bad in law and null and void, inasmuch as the acts of the trustees in purporting to sell and give transfer of the said 956 shares of each of the said farms, and the acts of the plaintiff in purporting to purchase and take transfer thereof, were *mala fide* acts in fraud of the rights of the said defendants as the true purchasers of the rights of the said trustees in respect of the said shares at a time when the same had not yet been transferred to the said trustees as aforesaid, but formed portion of all the landed property belonging to the estate of the said Smuts, and were purchased and acquired by the said four purchasers.

15. The plaintiff is by reason of the premises not entitled to obtain a decree of partition as by him desired.

Wherefore the said defendants pray that the plaintiff's claim may be dismissed with costs.

II. And for a claim in reconvention the said defendants (now the plaintiffs) say as follows:

1. They crave leave to refer to the several paragraphs of the foregoing plea, which, to avoid prolixity, they pray may be read as though here repeated.

2. They submit that they are entitled to ask that the transfer to the plaintiff shall be declared to be bad in law and null and void, and that the same be set aside accordingly, and that they are entitled in law as against the plaintiff to the ownership of the 956 shares of each of the said two farms now registered in his name.

3. There stand registered in the debt registry of the Colony two mortgage bonds passed by the plaintiff (now defendant), one in favour of one Emile Henry van Noord-n, for the sum of £85 18s. 10d., and the other in favour of Louis G. H. Pocock for the sum of £85, by which bonds the plaintiff (now de-

fendant) wrongfully and unlawfully purported *inter alia* specially to hypothecate the said shares of each of the said two farms as security for the payment of the said sums of £85 18s. 10d. and £85 with interest thereon.

4. The defendants (now plaintiffs) are entitled as against the plaintiff (now defendant) to have the said bonds set aside, in so far as they purport to hypothecate the said shares of the said farms, or to judgment for the amount which they may lawfully be bound to pay by way of capital and interest to the legal holders of the said bond, in order to obtain the release of the said shares of the said farms from the operation of the said bonds, and they are ready and willing to pay into court, or in such manner as this Honourable Court may direct, the amount still due and unpaid by way of capital and interest under the said bond for the benefit of the legal holders thereof.

Wherefore the defendants (now plaintiffs) pray:

(a) For an order declaring that the transfer aforesaid to the plaintiff (now defendant) is bad in law and null and void, and directing that the same be set aside accordingly, and that the plaintiff be compelled forthwith to deliver up the title deeds now held by him.

(b) For a declaration that they are in law entitled as against plaintiff (now defendant) to the ownership of the 956 shares of each of the two farms, Palsheuevel and Ratelrug, now registered in his name.

(c) For an order declaring that they are as against the plaintiff (now defendant) entitled to have the said bonds set aside in so far as they purport to hypothecate the said shares of the said farms.

(d) For judgment for such sum by way of capital and interest as they may legally be bound to pay upon failure of the plaintiff (now defendant) to pay the same in order to obtain the release of the said shares of the said farms from the operation of the said bonds, or that they may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

The plaintiff pleaded, in reconvention, that the land advertised for sale by Smuts's trustees in 1889 and sold to the defendant was only one-eighth share of the farms Palsheuevel and Ratelrug, and that transfer of the said shares was duly passed and taken by them, and that they were not entitled to claim more.



That he (the plaintiff) duly purchased from Smuts's trustee at public auction 956 of the said farms, and was not aware of any protests made on the day of sale by Pieter Gideon Engelbrecht or any other person.

That transfer of the said 956 was therefore duly passed.

He denied that the bonds referred to in paragraph 3 were wrongfully passed, and that the defendants were entitled to have them set aside.

He admitted the other allegations in paragraphs 3 and 4.

Issue was joined on these pleadings.

Mr. Searle, Q.C. (with whom was Mr. Molteno), appeared for the plaintiff.

Sir Henry Juta, Q.C. (with whom was Mr. Jones), appeared for the defendants.

The defendants having accepted the onus of proof, the following evidence was led on their behalf.

Charles Montagu Fryer, residing at Clanwilliam, said he was trustee in the insolvent estate of the five insolvents, the Engelbrechts. He sold the landed property belonging to them by public auction. According to the schedules the insolvents owned one-eighth of the whole farm Bergvallei. Witness had no transfer before him, as at the time the transfers were lost. He therefore sold the whole of their interest in the estate: he thought it was an eighth. Smuts was the purchaser.

By the Court: He did not at present possess the conditions of sale. He sold everything that belonged to the insolvent estate.

Examination continued: Subsequently it was made clear to him that there was an error in the transfer to Smuts, and another transfer was made of the remaining 956.

Cross-examined: He knew nothing about the sale by Smuts's trustees.

Pieter Gideon Engelbrecht, one of the defendants, said he and his brothers inherited certain shares of the farm Bergvallei. He was a cousin of the five insolvents. When the insolvents became insolvent their portions were undivided. Kotze's portion was cut off after the insolvency. Fryer sold only an eighth share of the farm. Witness received the handbill produced from one Emil van Noorden, auctioneer, and trustee in Smuts' estate. This announced the particulars of the sale of property in Smuts's insolvent estate in 1889. He noticed that the ground advertised in the handbill was not the whole extent of the ground in the estate. Witness

publicly told Van Noorden that there was a mistake, and Van Noorden replied that the mistake had been rectified by himself and the other trustee, and that the whole of the ground in the insolvent estate would be sold. Van Noorden then read out the conditions of sale in an indistinct voice, and witness then purchased the land for £650, on behalf of his three brothers and himself. A year later the second sale was held on the farm. Witness protested, on the ground that the land was his. Van Noorden was the auctioneer again, and said he could protest if he liked. He did not see the land knocked down. Van Zyl was present, and must have heard his protest.

Cross-examined. He signed the declaration of purchase without reading it, as it was in English.

Sarel van der Merwe said plaintiff never interfered with the ground in dispute. He corroborated last witness as to what was sold, and as to the protest.

Cross-examined: He had made no arrangements with the defendant that if they won the case he would obtain a share in the ground, or that if they lost the case he would pay the costs. There was an agreement of sale between the widow Engelbrecht, one of the defendants, and himself.

Frederick J. Carstens, a member of the Clanwilliam Divisional Council, corroborated as to Engelbrecht objecting to the second sale by Van Noorden.

Johannes Gideon van Zyl and Jean Louis Lansberg and others corroborated.

For the plaintiff,

Emile H. van Noorden, auctioneer, said he and Zoer were trustees in Smuts's insolvent estate. When Smuts sold the property it was described as one-eighth of the property. When the first sale took place the error in the transfer still existed, and at the first sale only a portion of the property was sold. £650 would not be a fair price for the whole property, but it would be a fair price for the one-eighth. The Engelbrechts perfectly understood what they were buying. At a subsequent date the transfer deed was so amended as to include the whole of the property. At the second sale, the remainder of Smuts's property was disposed of to Van Zyl. Before the second sale actually took place one of the Engelbrechts said to witness, "I protest," and witness asked him what he protested against, and advised him if he had a protest to make to protest in writing. Engelbrecht made no protest in writing, and

witness heard no more of the matter. Van Zyl had to get a preferent dividend in Smuts' estate. That had to go against the purchase price. For costs witness gave him a bond for £85. The dividend was £115.

By the Court: At the first sale he told those present that he was disposing of all the property of which transfer had been obtained, not that he was disposing of all the assets.

Examination continued: He had no personal interest in either of the parties.

Cross-examined: In 1895, in the case of *Smuts' Trustees v. Van Zyl's Executors* (see 5 Sheil, p. 91), he admitted having altered a receipt, adding other figures to the original figures. The bond of £85 referred to in that case was the one witness now had. At the first sale in the present case he knew there was some other land, but he did not know anything about the land. When Engelbrecht protested, witness did not ask him why he objected.

By the Court: When Engelbrecht protested witness had not the faintest idea that the protest referred to the land.

Pieter Marthinus Gysbert van Zyl, the plaintiff, said that at the first sale Van Noorden disposed of the one-eighth share to the Engelbrechts, one of whom said 'That's not all the ground.' Van Noorden replied that the matter had been rectified on the previous evening. At this time Smuts had not obtained transfer of all the land, and witness knew that at the sale all the land was not disposed of. At the second sale Van Noorden disposed of the remaining property to witness for £200. During the second sale Gideon Engelbrecht protested, and Van Noorden told him to protest in writing. The land was not knocked down to witness at once, but half an hour later, and privately. Subsequently the defendants declined to give up the ground which plaintiff bought at the second sale, on the ground that it was their ground. Defendants had never threatened witness with a lawsuit. On one occasion the deceased husband of one of the defendants offered witness £30 for the ground, but witness declined the offer. Defendants knew that witness had purchased the land in dispute two days after the sale.

Witness passed a bond to Van Noorden in 1891, and one to Pocock in 1895. Pocock was at the sale. The purchase price was settled by witness paying the expenses. The balance had to go to the estate.

By the Court: Witness was executor of Gideon van Zyl's estate. That was how he

took the property over. He never paid the purchase price. The bond was not due. The expenses were about £30. Van Noorden was acting as his agent in G. van Zyl's estate, and induced witness to purchase the property in order to arrange his accounts. Witness did not want to buy the ground, he knew there was a dispute about it. He knew that the Engelbrechts claimed the ground. He knew what they meant by the protest. Van Noorden knew it.

Cross-examined: There was no money owing to Pocock from the estate. Witness owed the money, it was interest on his farm Langvallei, he gave Pocock a bond on this property for the interest.

Re-examined: He had signed a promissory note in favour of Pocock and passed the bond to secure the note.

Henry Ralph Arderne, an attorney, and a member of the firm of Fairbridge, Arderne & Lawton, said he had had the matter of the rectification of Smuts' transfer in his hands for several years; there were several difficulties in settling the estate, but eventually the Government allowed the transfer to be amended.

Johannes Hermanus Kotze and Matthys Jacobus van Zyl gave corroborative evidence as to the Engelbrechts refusing to give up the ground in dispute.

After hearing Mr. Searle.

Judgment was given for the defendants.

De Villiers, C.J.: The present proceedings arise out of a mistake, originally made by the trustees of the insolvent estate of one Engelbrecht, in transferring to Smuts the land which he had bought from the estate. He had bought all the land, but the undivided portion of which he received transfer was less by 9-56ths than he had bought. The trustees honestly decided to transfer the 9-56ths to Smuts, but before this could be done, Smuts became insolvent. The trustees of Smuts' insolvent estate then advertised that the whole of the land was to be sold, but the extent was given as it would be less the 9-56ths. The defendants attended the sale and pointed this mistake out to Van Noorden, one of the trustees. The Court is satisfied, notwithstanding Van Noorden's denial, that he led the defendants to believe that he was putting up to auction all the land belonging to Smuts. The plaintiff was present at the sale and knew what passed. The defendants purchased the land, and obtained possession of the whole, but only the land transferred to Smuts was transferred to them. The trustees of Smuts' insol-

vest estate subsequently obtained transfer of the remaining undivided 9-56ths portion, but instead of transferring it, on their part to the defendants they offered it for sale by public auction. The defendants attended the sale, and protested against it on the ground that they had bought the whole of the land at the first sale, and remained in possession ever since, but their protest was disregarded. Van Noorden wishes the Court to believe that he did not know what the protest was. That is utterly incredible; it is utterly impossible to believe his statement. He himself was connected with the whole of the previous transaction, and he had been instrumental in getting this property, this 9-56ths of Smuts' estate transferred. He must have known that the Engelbrechts at the first sale believed that they had purchased the whole of the landed property, and now he wishes the Court to believe that he did not know what the defendants protested about at the second sale. The plaintiff himself has been much more honest in the matter. He admitted that the protest was made. He was at the previous sale, and therefore he purchased at the second sale with due notice of what had taken place. At the second sale the defendants retired from the contest, and this property was not knocked down at a public sale, but afterwards an arrangement was entered into between Van Noorden and Van Zyl that it was to be sold to Van Zyl for £200, and that any dividend owing to the estate of Gideon van Zyl was to be deducted from the purchase price. On his own showing Van Noorden here became with Van Zyl a party to a gross breach of trust. Up to this time no accounts had been filed. I was very anxious to see such an account if it had been filed, to see whether Van Zyl, as executor, has ever credited the estate of his father with the sum of £175 which is said to be due. It is quite clear that Van Noorden would greatly benefit by any funds which came into the hands of Van Zyl. Under these circumstances, I think it is as clear a case of a mistake which ought to have been rectified as any case which has ever come into court. If the case had been one between the trustees of Smuts and the defendants, there is no doubt whatever that the Court would have at once ordered a rectification to carry out what was the true intention of the purchasers at the time. Van Zyl has no greater rights than the trustees. He had full knowledge of everything that passed, of

the rights of the defendants, and of the fact that the defendants had been in actual occupation of the property. He never entered into occupation of the property, and now he has brought an action to have a partition of the property. He has failed in that action, and not only has he failed, but the defendants are entitled to succeed in reconvention. But it seems to me that there should be something to show that any judgment which is given must be without prejudice to the rights of the mortgagees, who became such after the sale. This is a matter, however, which must be settled between Van Zyl and Van Noorden. As far as the defendants are concerned if they pay the £85 and the £65, they will be entitled to recover these amounts again from Van Zyl. The Court gives judgment for the defendants on the claim in convention with costs, and judgment for the plaintiffs in reconvention in terms of the prayer with costs, without prejudices to the rights, if any, of the mortgagees. The Court therefore will set aside this transfer in favour of Van Zyl. The property stands registered in the estate of Smuts. The Court therefore will grant a rule *nisi* calling upon Van Noorden as surviving trustee of the insolvent estate of Smuts to show cause on or before March 13 why he should not be ordered to pass transfer in favour of defendants in convention of the land improperly transferred to the plaintiff in convention on June 5, 1891.

Buchanan and Maasdorp, J.J., concurred.

*Putea* (March 14th).

Mr. Jones moved that the rule *nisi* be made absolute calling upon E. H. van Noorden, as surviving trustee of the insolvent estate of J. J. H. Smuts, to show cause why he should not be ordered to pass transfer in favour of the defendants in the original action (Engelbrecht and others) of the land improperly transferred to the plaintiff on the 5th June, 1891.

Mr. McGregor appeared for the respondent Van Noorden, not to oppose the application, but to read an affidavit explaining the respondent's conduct, upon which comments had been passed in the judgment delivered.

The rule was made absolute, with costs.

Mr. Jones asked that costs might be costs in the original action.

De Villiers, C.J., said that as Van Zyl was not a party to this motion, and as the rule granted had not even been prayed for in the declaration, the costs would have to come out of Smuts' estate.

[Plaintiff's Attorney, D. Tennant; Defendants' Attorneys, Messrs. W. E. Moore & Sons; Attorneys for Van Noorden, Messrs. Dempers & Van Ryneveld.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAABDORP.]

DUMEYER V. PRIESTLEY. { 1898.  
 { Feb. 25th.

De Villiers, C.J., said: In the matter of Dumeyer v. Priestley an application was made in the August term for the discharge of a notice of appeal. The application was refused, but the question of costs was ordered to stand over. Subsequently the appeal was heard and dismissed, but nothing was said about costs. What the Court will do now is to order that the appellant pay the costs of the previous motion unless he apply successfully on the 18th March for a different order if so advised. I would not advise him to take any such steps, but at the same time an opportunity of doing so should be allowed him.

GREEFF V. PETERSEN.

This was a claim for £30 for rent of a farm in the Piquetberg district from May 15, 1897, to May, 1898. The defendant admitted that the rent was due, but said that £50 was due to him from the plaintiff in that he was the legal holder of a promissory note made by the plaintiff in favour of one Carstens and ceded to the defendant, that £25 10s. was due for money expended on the premises, which plaintiff had promised to repay, and £11 15s. for goods sold and delivered, and thus there was a set-off. In reconvention he claimed the balance, namely £57 5s.

Mr. Benjamin (with whom was Mr. Gardiner) appeared for the plaintiff.

Mr. Howel Jones appeared for the defendant.

The defendant, Cornelius Jacobus Petersen, said he resided in the district of Piquetberg. He leased a farm from the plaintiff,

from 1872 to 1898. When he first leased it the farm consisted merely of bush. From 1873 to 1878 he paid £6 a year as rent. In 1878 plaintiff told defendant he would have to pay a rent of £10 a year, and provide all the buildings. Plaintiff added that if defendant left plaintiff would compensate him for all the improvements he had made. Defendant agreed to this arrangement. It was further stipulated that in the event of defendant's death, this arrangement would not take effect. Defendant paid rent of £10 a year in advance until 1896. On the due date of the note which he had obtained from Carstens he went to the plaintiff. Plaintiff then said the rent would have to be increased to £30 a year for that year and the next year. Defendant said he had already paid £10 for that year, but as defendant did not wish to leave he agreed to pay the additional £20, and gave notice that he would quit in May, 1898. He let plaintiff keep the note because he did not wish to quarrel, but he was dissatisfied. Defendant did not pay his rent for the last year because plaintiff had the promissory note in his possession. During his occupation of the farm defendant had greatly improved it. He claimed £25 10s. for wood and zinc buildings erected on the farm, and £7 10s. for manure which plaintiff retained. Defendant abandoned certain other claims in reconvention. Defendant had spent £150 for improvements on the farm.

Cross-examined: He had not paid £30 a year rent for the past three years. Plaintiff promised to pay him for the buildings for which the wood and zinc were used. Defendant did not present the manure to plaintiff. Defendant had no stock; some of his stock he had sold for £250. This money was in the hands of Mr. Malan.

By the Court: The £250 belonged to his children.

Re-examined: Plaintiff had told defendant that Mrs. Greeff copied defendant's signature. Defendant had often accommodated plaintiff with notes.

The plaintiff stated that defendant had paid him £30 a year as rent for the last four years. Early in each year the parties had a settlement. The promissory note was tendered by defendant in part settlement of a debt of £30 for rent, and for other debts, the particulars of which he could not remember. Defendant owed plaintiff about £100. Defendant signed the promissory note, writing his name across the stamp. Subsequently other

were made, but defendant still owed plaintiff £30 for one year's rent, and plaintiff did not owe defendant a farthing.

Cross-examined: Defendant never paid his rent in advance. Occasionally witness was hard up—like every farmer, sometimes his pocket was full and sometimes it was empty. Witness never pressed defendant for his rent immediately it was due, as he knew that defendant could pay. Witness had never obtained accommodation notes from defendant, but he had given notes upon the bank for the assistance of defendant.

By the Court: Witness had been accommodated by Petersen through the bank. Witness had denied this in cross-examination, as he did not understand the question.

Cross-examination continued: Defendant had accommodated witness with promissory notes from 1893 to 1897.

Re-examined: Witness paid all the notes in the bank.

Mrs. Greeff, the wife of the plaintiff, gave evidence in partial corroboration of plaintiff's statement.

The Court gave judgment for the parties for £30 each, each party to pay his own costs.

De Villiers, C.J.: It is common cause in this case that in March, 1897, a settlement of some kind was arrived at, and that this so-called promissory note was handed over by the defendant to the plaintiff. The question is now, what was the nature of that settlement, and in that respect the two parties differ, but upon the whole I am of opinion that the settlement must be taken to be this: that at that time there was still owing £20 in respect of the year's rent, and it was arranged that this £5) was to go off in settlement of that £20, which was due in May, according to the defendant's version, and that is accepted by the plaintiff, because he sues from May to May. Therefore there is £20 paid up to May, 1897, £30 remaining, and then it was arranged that this £30 was to be paid off by the balance of the promissory note. If this is the correct version, there is nothing owing to the plaintiff at all, the whole amount has been paid. Then again the defendant puts in claims which are wholly unsubstantiated, and therefore I think the defendant must fail upon his claim in reconvention, except to the amount of £30. The defendant admits that the rent is due, £30, and that £30 somewhat complicates things, but I think that a fair judgment, under all the circumstances,

would be judgment for the plaintiff for the £30 rent, and judgment for the defendant upon the promissory note for £30. There will therefore be due nothing to either. Each party to pay his own costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

CHANGE OF VENUE. } 1899.  
} Feb 27th.

Mr. Sheil, Q.C., applied for leave to change the venue of the case *Queen v. Aries* from the Supreme Court, Cape Town, to Worcester Circuit Court. The accused was charged with assault with intent to do grievous bodily harm.

Granted.

Mr. Sheil made a similar application in the case of *Queen v. Maag*, in which the defendant is charged with befouling a well.

Granted.

Mr. Sheil applied for leave to change the venue of the *Queen v. Landman* and the *Queen v. Catharina Landman*, both defendants being charged with perjury, from the Supreme Court, Cape Town, to the Circuit Court, Uitenhage.

Granted.

### CORK V. CORK.

Mr. Molteno applied for leave to sue by edictal citation for a decree of divorce.

The petitioner, Louis E. Cork, alleged that the defendant had committed adultery with one James Windsor, and was at present living with him at Johannesburg.

The Court granted the application, the citation to be made returnable on or before May 1.

## SEARLE AND SON V. ARKELL AND DOUGLAS.

This was an application for leave for the defendants to enter appearance and plead; the case had been set down for trial through default of appearance.

Mr. Graham, Q.C., appeared for the applicants, and Mr. Searle, Q.C. (with whom was Mr. McGregor), appeared for the respondents.

The Court granted leave to enter appearance, the plea to be filed within fourteen days, the case to go to trial next term, the question of costs to stand over. Leave was also granted to have the evidence of the defendants taken by commission in America, the commission to be joint, the commissioners to be nominated later by the Chief Justice.

## ELLMAN V. WERTH.

1899.  
Feb. 27th.

Grant—Condition—Transfer · Crown land—Right of road.

*The condition in grants of Crown land, that all roads and thoroughfares shall remain free and uninterrupted, does not create any rights where none existed before, but reserves such rights of road as had been acquired against the Government before the date of the grant.*

The declaration alleged that:

1. The parties were farmers, residing at Wynberg.

2. On July 6, 1898, defendant transferred to plaintiff, lot No. 48 on the Cape Flats.

3. Plaintiff was in September, 1898, the owner of the said land.

4. On September 14, 17, and 19, the defendant in the exercise of an alleged right trespassed on the land, and destroyed certain wire fencing, and drove a cart and mules upon the land, causing damage to garden ground.

The plaintiff claimed:

(a) A declaration that he was entitled to the full and free ownership, and enjoyment, free from any servitude of the said land.

(b) £100 damages.

The defendant in his plea admitted paragraph 1 of the declaration, and paragraph 3 subject to the qualification hereinafter set forth. He said that on July 29, 1885, lot No. 48 was granted to one August Schlooms on

quitrent title, subject to the following condition amongst others: "That all roads and thoroughfares existing over the land hereby granted, whether they are described in the diagram or not, shall remain free and uninterrupted." Schlooms transferred to him in 1894 subject to the same condition, and he transferred to the plaintiff subject to the same condition.

He said that for many years there had existed a road and thoroughfare running over his land, adjoining that of plaintiff, and over lot No. 48 to the Wynberg main road.

That it was expressly agreed between the parties at the time of sale that he should have the right as owner of the adjoining farm to use the road. He said that on the days mentioned in the declaration he had used the road as he had a right to do, but had done as little injury as possible to the obstructions placed across it by the plaintiff. He denied the damage.

In reconvention he claimed an order declaring him entitled to the free and undisturbed use of the road.

Mr. Uplington appeared for the plaintiff, and Mr. Buchanan appeared for the defendant.

Johan Ellman, the plaintiff, said he was the owner of lot 48 on the Cape Flats. He bought the lot from the defendant, and obtained transfer on July 6, 1898. The sale took place on October 21, 1897, his son and Mr. Le Sueur being present. At this sale no mention of a road was made. The defendant said nothing about reserving a right of way across defendant's farm. Shortly after transfer was obtained plaintiff erected a fence between his property and the property of the defendant. On September 14, 1898, defendant's workman chopped through the wire of the fence, whereupon plaintiff said, "Oh, that's enough; I have seen you cut through the wire." The man made no reply. On September 17 plaintiff saw the man use the road and again cut the wire. The road in dispute commenced at the defendant's house, and crossing the corner of plaintiff's ground, joined the main road. There was a sluit round lots 48 and 49. Plaintiff had known the property for five or six years, and nobody save the defendant and his workman had tried to go over plaintiff's land. As a result of the damage done to the fence, and the straying of cattle, plaintiff had sustained damage to the extent of £5.

Cross-examined: He did not know that any condition was made in the terms of the

grant of the land as to a road. For some time after plaintiff had obtained transfer of the land, defendant used the road almost daily. He first raised the question when defendant's cattle strayed on plaintiff's land. Defendant was plaintiff's son-in-law. When plaintiff told the defendant that he intended to fence the farm, defendant said he would chop the fence to pieces.

By the Court: Plaintiff paid £700 for the property, exclusive of the house.

James J. Bieset, Government surveyor, produced a sketch plan which he had made of the property. He said that the road in dispute was a well-defined road, which he did not see go beyond defendant's house. It was easier than the Government road.

Carl Johannes Werth, the defendant, said he bought lots 48 and 49 from one Schloms in 1894, when the road in dispute was in existence. Witness then used the road, and continued to use it. In 1897 defendant sold a portion of the property to plaintiff, his father-in-law, who agreed that the road should belong to defendant as long as he lived. Witness used the road without interruption until plaintiff and defendant had a dispute about peasticks, when plaintiff said he was going to fence his farm. A few days later defendant found that the property had been fenced, and he pulled down the fence. Defendant still used the road, which was the only practicable road. He would not have sold the land to the plaintiff if he had not had the right to the road.

By the Court: He sold one lot to the plaintiff for £700. He had previously obtained both lots for £400.

Cross-examined: The sale took place partly at the house and was concluded at Silberbauer's. At Silberbauer's nothing was said as to the use of the road being reserved to defendant.

Re-examined: He said nothing about the road, because he did not think that any quarrel would take place.

By the Court: The public had no longer access to the portion of the road which ran through his (defendant's) property.

Abram Schulde was called, but in reply to the Court he said he had no personal knowledge of the road in dispute.

George Redinger, a farmer residing on the Flats, said the road in dispute was not a public road.

Ernestina Wilhelmina Werth, the wife of the defendant, corroborated the evidence of her husband.

After argument for the defendant,

The Court gave judgment for the plaintiff for £5 damages, and costs.

De Villiers, C.J.: The defendant, being the owner of lots 48 and 49, which adjoin each other, sold and transferred lot 48 to the plaintiff. The deed of transfer is silent about roads, but it states that the land is transferred subject to the conditions contained in the grant of the land originally made by the Governor to one Schloms. One of the conditions in the original grant is that all roads and thoroughfares shall remain free and uninterrupted. This condition, or something similar to it, is found in all grants of Crown land. The defendant contends that by virtue of this condition he is entitled to claim the free use of a road leading from his land over the plaintiff's land on to a public road. There is no question of this being a road of necessity, for the defendant's land borders on the public road. The advantage to the defendant of having the use of the road would be that it shortens the distance, and enables him to avoid a bad portion of the public road when going in an easterly direction from his lot 49. The disputed road was in existence at the time when the defendant sold it, for he had himself used it for purposes of egress from and ingress to lot 49. But in order to succeed the defendant was bound to prove that the road was in existence as a public road, at the time of the grant to Schloms. The condition that all roads and thoroughfares shall remain free and uninterrupted was not intended to create any right of road, if none existed before, but to reserve any rights which may have been previously acquired as against the Government. No question can now arise as to whether the owner of lot 49 had acquired a right as against the owner of lot 48, because both lots were granted to Schloms, and both lots were by him transferred to the defendant. The separation of the lots was effected by the defendant, who transferred lot 48 to the plaintiff. If, therefore, the defendant has any right whatever it can only be as one of the public. The evidence of the antiquity of the road has been of the most meagre description, and has wholly failed to satisfy the Court that the public has ever acquired a right to use the road. An application has been made to the Court for leave to amend the plea by claiming a rectification of the transfer on the ground that by mistake the conveyancer omitted to reserve a servitude on lot 48 for the owner of lot 49. The Court might have allowed an amendment of

the pleadings, if the evidence had shown that there was a mistake, but the vague evidence on the point given by the defendant and his wife is wholly insufficient to prove any definite agreement as to a road at the time when the defendant sold the land. The defendant having broken down the fence, which had been lawfully placed on the plaintiff's land, must pay the damages, which the Court assesses at £5, and costs.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorney, G. J. O'Reilly;  
Defendant's Attorney, P. M. Brink.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1899.  
{ Feb. 28th.

On the application of Mr. Benjamin, William Carey Miller was admitted as an attorney, the oath to be taken at Maclear.

## PROVISIONAL ROLL.

SEARLE V. JONES.

Mr. Close applied for provisional sentence on a promissory note for £100.  
Granted.

BOWER V. STEPHAN.

Mr. Maskew applied for provisional sentence on a mortgage bond for £400, the property specially hypothecated to be declared executable.

Granted.

LOGAN AND CO. V. GALLOWAY.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £800 and £12 ls. 6d. insurance premium paid.  
Granted.

PROCTOR'S EXECUTORS V. SPENCER.

Mr. Ujington applied for provisional sentence for £600 on a mortgage bond, and 10s. premium paid.

Granted, and the property declared executable.

PHILLIPS V. HART.

Mr. De Waal applied for provisional sentence on a mortgage bond for £1,600, the property specially hypothecated to be declared executable.

Granted.

## ILLIQUID ROLL.

CLARK'S EXECUTORS V. GLUSING.

Mr. Buchanan applied for judgment under Rule 329 for £78 for rent.

Granted.

RIDDELSDELL'S EXECUTOR V. JOHNSTON.

Mr. Gardiner applied for costs of suit on a summons for a debt of £36 15s., the debt having been settled.

Granted.

MAPPIN V. MAPPIN.

This was an action for a declaration of nullity of marriage instituted by James Arthur Mappin against Jessie White, to whom he had been married, on the ground that the defendant was previously married to one Arthur Henry White, the said White being alive at the time of the second marriage.

Mr. Benjamin appeared for the applicant; the defendant was in default.

Francis Henry le Sueur, a clerk in the Colonial Office, produced a certificate of marriage between Arthur Henry White and Augusta Alexander on the 28th April, 1892, and a certificate of marriage between James Arthur Mappin and Jessie White on October 6, 1895.

The plaintiff, James Arthur Mappin, said he formerly belonged to the East Yorkshire Regiment. He was married to Jessie White in October, 1895. At the time plaintiff courted her he courted her as a spinster. Subsequently plaintiff heard something, and spoke to defendant. He charged her with having been previously married, and she replied, "I know I am married, and my husband is alive." Plaintiff then left defendant. At that time he was living at



Wynberg, and was employed by Auret. He subsequently left Claremont and went to Port Elizabeth, where he met a man named Joe White, who worked on the harbour works with witness, and Joe White told witness that Arthur Henry White was married to Augusta Alexander, who used to work at Kleinschmidt's at Wynberg. This was in April, 1896. Witness identified the photograph produced as the photograph of Arthur Henry White.

By the Court: Before he was married to defendant witness had no idea that defendant was a married woman. Defendant was then in service at Kleinschmidt's.

Helen van der Schuyff said she was a witness to the marriage of Augusta Alexander and A. H. White. She had seen her after the marriage, when she was living with Mappin. She did not tell Mappin until after the marriage. John Fraser said he knew the defendant at Wynberg as Mrs. White. After her marriage to Mappin, he used to meet them.

The Court granted a decree.  
[Plaintiff's Attorney, D. Tennant.]

KING BROS. V. RETIEF, DE VILLE AND CO.

This was an application on behalf of the defendants for leave to purge their default and file a plea. The action was one for £1,000 damages, alleged to have been sustained by the plaintiffs in respect of the use of a brake, patented by them, by the defendants.

Mr. Searle, Q.C., appeared for the applicants, and Mr. Innes, Q.C., appeared for the respondents.

The Court granted the application, on the condition that the defendants keep accounts of all brakes of the kind complained of in the declaration and made by them, the costs of the application to be costs in the cause.

HANSLO V. HANSLO.

This was an action for divorce instituted by the wife on the ground of the husband's adultery.

Mr. Buchanan appeared for the plaintiff.

Mr. Benjamin applied for leave to intervene on behalf of the woman with whom the declaration alleged that the adultery had been committed.

It appeared that no proof of service of notices of bar and of trial could be produced. The case was consequently postponed until next term, and leave to intervene granted.

AFRICAN BANKING CORPORATION V. MAYNIER.

Mr. Currey applied for an extension of the return day of the edictal citation.

The return day was extended to April 12.

LIND V. MUNICIPALITY OF } 1899.  
OUDTSHOORN. { Feb. 28th.

This was an application for the removal of the above action (for declaration of rights in respect of the transfer of certain erven and damages), from the Supreme Court to the Circuit Court, Oudtshoorn.

Mr. Innes, Q.C., appeared for the applicant.

Sir Henry Juta, Q.C., appeared for the respondents.

The Court granted the application, the evidence only to be taken in the Circuit Court; costs to be costs in the cause.

ACTING CHAIRMAN AND MEM- }  
BERS OF THE DEACONS' COURT } 1899.  
OF THE NATIVE CONGREGATION } Feb. 28th.  
AT LOVEDALE OF THE FREE }  
CHURCH OF SCOTLAND V. }  
MZIMBA AND OTHERS.

Free Church of Scotland—Native congregation—Deacons' Court.

*The defendants were members of a native congregation of the Free Church of Scotland and officials of the Deacons' Court connected therewith; as such officials they were in possession of certain moneys, books and other movables belonging to the congregation; and vested in the Deacons' Court for the time being: they tendered their resignations, seceded from the congregation, and founded a new church.*

*Held, that the plaintiffs as members of the Deacons' Court were entitled to sue the defendants for and obtain possession of the said moneys and other assets.*

This was an action for a declaration of rights with respect to certain property, payment of £1,050, orders for the delivery of certain books, papers, &c., and an account,

The declaration was as follows :

1. The plaintiffs are the chairman and members, duly and lawfully appointed, of the Deacons' Court of the Lovedale native congregation, which is a congregation duly constituted under and in connection with the Free Church of Scotland, and governed by the ordinances, rules, regulations, and customs of the said Free Church.

2. According to the rules and regulations of the said Free Church, the property and assets of any congregation belonging to the said church is vested in the Deacons' Court of such congregation, and the members of such Court in their said capacity are the proper persons to demand, sue for, recover, and control all such property and assets.

3. Before and up to the month of June, 1898, the defendants were members of the said congregation, and were members of the Deacons' Court connected therewith. The defendant Mzimba was the chairman of the said Court; the defendant Kala was the treasurer; the defendant Sihawu was clerk or secretary; and the defendant Mabeqa was a deacon of the said Court.

4. In or about the month of June, 1898, all the defendants seceded from the said congregation, and resigned their offices as members of the said Deacons' Court, and they have now ceased to belong to the said congregation, or to have any connection therewith or rights therein.

5. Prior to the said month of June, 1898, a certain sum of money, amounting to the sum of £1,050 or thereabouts, which was vested in and under the control of the Deacons' Court for the time being, was by the said Court placed in possession of the defendants Mzimba, Kala, and Mabeqa, as a committee, to be by them held for the purpose of a building fund, with a view to the erection of a new church for the use of the said congregation.

6. Prior to the said month, all the movable assets, minute books, documents, papers, and accounts of the said Deacons' Court were in the custody and possession of the defendants, but more especially of the defendants Mzimba, Kala, and Sihawu, in their said capacities.

7. It became and was the duty of the defendants, and each and all of them, to account to and hand over to the said Deacons' Court as duly constituted, after their resignation, all moneys, books, documents, writings, and other assets in their possession,

which were and are vested in and under the control of the said Deacons' Court according to law.

8. The defendants and each and all of them wrongfully contend that the plaintiffs in their said capacities are not entitled to obtain possession of or to demand or control the said moneys, books, documents, writings, or other assets, and they refuse to account for or to deliver up the same to the said plaintiffs.

The plaintiffs claim : (a) An order declaring that they, as members of the Deacons' Court aforesaid, are entitled to obtain possession of and to control all moneys, books, and other assets belonging to the said Lovedale congregation; (b) an order compelling the defendants Mzimba, Kala, and Mabeqa to pay to them the sum of £1,050 aforesaid; (c) an order compelling the defendants Mzimba, Kala, and Sihawu to deliver up to the plaintiffs all books, papers, documents, or writings connected with the said congregation, and which came into their possession as members of the said Deacons' Court; (d) an order compelling all the defendants to render an account of and deliver or pay over to the plaintiffs any property or assets of any kind which came into their possession as members of the said Court in trust for the said congregation; (e) alternative relief; (f) costs of suit.

The plea was as follows :

1. The defendants admit that the plaintiffs, except the first-named, were members of the Deacons' Court of the Lovedale Native Congregation before the happening of the events hereinafter in paragraph 8 set forth, and that before the happening of the said events the said congregation was connected with the Free Church of Scotland, and governed by its rules and regulations.

2. As to paragraph 2, they deny the allegations therein generally, and say specially that the Deacons' Court of the Lovedale Native Congregation had never had vested in it, or had possession of, any property or assets of the said congregation.

3. As to paragraph 3, they admit that they formerly held the offices and positions therein mentioned, save that the defendant Mabeqa was an elder of the said Court, but not a deacon; the defendant Mzimba was also the minister of the Lovedale native congregation.

4. As to paragraph 4, they say that the defendant Mzimba resigned his office as minister in or about April, 1898. Shortly after the said date, in or about May, 1898,

the defendants seceded from the said native congregation, and have formed a new church or congregation. In or about October, 1898, they received a notification from the Kirk Session of the Free Church of Scotland that they were disjoined as members of the said native congregation.

5. As to paragraph 5, they deny that the sum of money in question or any sum of money was vested in or under the control of the said Deacons' Court for the time being, or that it was ever placed in the possession of the defendants mentioned as a committee for the purpose mentioned. They admit that a sum of money amounting to about £950 was raised by subscriptions from members of the said native congregation for the erection of a new church for the congregation. They say that a building committee of fourteen persons belonging to the said congregation was appointed to manage and control the building operations. The defendant Mzimba was chairman of the said committee, which appointed one Bokwe, at that time treasurer of the Deacons' Court, to be treasurer of the said building fund, and that the money raised by subscriptions as aforesaid was paid to him; but none of the defendants ever had possession of the said moneys.

6. As to paragraph 6, they say that the defendants Mzimba and Mabeqa never had the custody and possession of any books, documents, or other property of the Deacons' Court. The defendant Sibawu, as secretary of the said Court, had possession of the minutes, books, and accounts, and the defendant Kala, as treasurer of the said Court, had control of the general funds subscribed and collected by the congregation (other than the building fund above referred to): but the other movable assets of the Church were vested in and in the possession of the native congregation. At or about the date of the secession hereinafter mentioned the said books, accounts, and moneys were handed over, at the instance and request of the members of the congregation who seceded as hereinafter set forth, to certain persons, named Eliza Myimbane, Zindweni Mbema, Oimisiile Gwabai, and Peter Mavawu, to hold for and on behalf of the said members.

7. They deny the allegations in paragraph 7, and say that the moneys, books, documents writings, and other assets are the property of the members of the congrega-

tion who have seceded, and they specially deny that any church properties were or are vested in any Deacons' Court.

8. As to paragraph 8, they say that the native congregation of Lovedale comprised the congregations of eight stations or churches, but that in the year 1898, on account of disagreements between the Kaffrarian Presbytery of the Free Church of Scotland and the said native congregation, six of the said congregations seceded from the Free Church of Scotland, and have formed an independent church. They say that the members of the said congregations who have seceded number between 3,000 and 4,000, and are a very large majority of the persons formerly composing the native congregation of Lovedale.

9. They do not admit that the plaintiffs are entitled to obtain possession of or to demand or control the moneys, books, and other assets referred to, or that they are entitled to sue in this action as a properly-constituted body; and they say further that the said moneys, assets, and books are not in their (the defendants') possession.

10. There was at the date of the said secession, and is now, in the possession and control of or available for the members of the native congregation who have not seceded, an amount of Church money and property (including a parsonage and glebe lands, and also a sum of about £1,676, collected by the exertions of the defendant Mzimba for the building fund of the said church) at least equal in value to that now claimed in the action.

Wherefore, they pray that the plaintiffs' claim may be dismissed with costs.

Mr. Innes, Q.C. (with whom was Sir Henry Juta, Q.C.), appeared for the plaintiffs.

The defendants appeared in person.

The Rev. John Davidson Don said he had for twenty-two years resided in this colony, and had for many years been a member of the Free Church of Scotland. For some time he was clerk to the Presbytery of Kaffraria, but had recently resigned his post owing to failing eyesight. He knew Moncrieff's "Practice of the Free Church of Scotland" (a copy of which was put in), which was prepared and published by the authority of the General Assembly. It was the official handbook of the Assembly, as embodying the general laws of the Church. The Presbytery of Kaffraria was duly constituted under the rules and regulations of the Free Church of Scotland and formed part of the Free

Church. It sent members to the General Assembly every year. This was the case in India also, and in Italy. As far as colonies other than Cape Colony were concerned, an independent church had been formed. The affairs of a congregation of the Free Church were ruled by what was called the Kirk Session of the Deacons' Court. The Kirk Session had charge of all spiritual matters of the congregation, and the secular affairs of the congregation were in the hands of the Deacons' Court. The Kirk Session was composed of ministers and elders. The Deacons' Court consisted of a minister, elders, and deacons. The movable property of the congregation was vested in the Deacons' Court, which disposed of all the funds of a congregation. It was sometimes the practice to vest immovable property in trustees. There was only one congregation at Lovedale, which comprised Lovedale itself and the outstations. This congregation had only one minister, one Kirk Session, and one Deacons' Court. The elders and deacons of the congregation were elected by the congregation as a whole, not sectionally. The Kirk Session always determined the number of members of a congregation. The minister, if present, presided over the Deacons' Court, but in the absence of the minister the Court could elect its own chairman.

By the Court: There was only one minister for Lovedale and all the outstations. The minister was Mzimba, and the acting minister was now Mr. Stormont. Mzimba was sole minister of Lovedale and all the outstations.

Rev. John Lennox, a minister of the Free Church of Scotland, said he was a member of the Presbytery of Kaffraria. Witness had resided at Lovedale since October, 1893. General meetings of the whole congregation were held in the Central Church, which meetings were attended by members from the outstations. The meetings were announced from the pulpit by the minister. Outstations might nominate deacons, but they were elected by the whole congregation. Witness attended a meeting at Lovedale, at which a letter of resignation from Mzimba was received. There had previously been some dispute as to a new church, but eventually the Presbytery gave way on this point, and allowed Mzimba to have his way. Mzimba still said he resigned, but the Presbytery refused to accept his resignation, pending a satisfactory statement from him as to the money and church property in his

charge. He was still a minister, as his resignation had not been accepted. From May, 1896, until July, Makewane was acting minister, and from July, 1898, to the present the Rev. Mr. Stormont was acting as minister but Mzimba was still the real minister. His resignation would not be accepted until the present action had been settled. In July, 1898, a letter signed by several members of the congregation was received by the Presbytery, and in this letter it was stated that 1,273 members of the congregation had seceded from the Free Church of Scotland. They expressed a desire to carry on an independent church for Africans, as the Europeans had a Union of their own. This reference to Europeans presumably alluded to a recently-formed Presbyterian Union of South Africa. The Presbytery of Kaffraria had not joined the Union, as it was thought that the natives would prefer to be governed direct from Home than by a Colonial Union. The Free Church of Scotland had contributed £1,400 to the new church at Lovedale, and Mzimba informed the Presbytery that £100 had been subscribed by the congregation. The books of the congregation were in the hands of the defendants. Mzimba ought to have placed any moneys collected by him on behalf of the congregation in the hands of the treasurer. Mzimba had been summoned to give an account to the Presbytery of all the moneys collected by him, but he had not done so.

Cross-examined: Witness was not aware that meetings of the congregation had been held elsewhere than at Lovedale.

Mzimba: If my resignation has not been accepted, and if still considered a member of the Free Church of Scotland, why am I sued as a seceder?

Witness: I think you are included as a defendant.

The Rev. David Duncan Stormont, acting minister at Lovedale, said he had resided at Lovedale since 1891. Services were proceeding in the church at Lovedale, and at those outstations which had not seceded, as usual. At some of the outstations the people had seceded, and witness had been refused admission to buildings there. Several of the documents of the congregation were missing. Since the resignation of the defendants no meeting of the congregation had been held.

Rev. Elijah Makewane, an ordained minister of the Free Church, and in charge of the Macfarlane congregation in Victoria East, said there was only one Kirk Session and

Deacons' Court for all outstations in his district. The witness then gave corroborative evidence as to the practices of the Church.

By the Court: The seceders exceeded the members of the Free Church at Lovedale. Witness did not think that the secession was a tribal matter.

James Wilson Weir, a merchant, residing at King William's Town, and the treasurer in South Africa of the Foreign Missions Committee of the Free Church of Scotland, said that for many years a portion of Mzimba's salary was paid by the missions. This payment ceased in 1893. The Free Church also contributed towards Mzimba's Church School. In November, 1894, witness received the sum of £222 10s. 2d. from the Free Church of Scotland towards a new church at Lovedale. Witness forwarded this money to Mzimba as minister of the church. In March, 1895, £1,106 was sent by the Free Church for the new church. This money was handed over to the Presbytery.

John Knox Bokwe, deacon of the Lovedale congregation, and Andrew Gray, a clerk in the Standard Bank, gave evidence as to Mzimba's banking transactions, the accounts being put in.

This closed the case for the plaintiffs.

The defendant Jeremiah Mzimba said he had been minister of Lovedale congregation for twenty-three years. He was ordained by the Kaffrarian Presbytery of the Free Church, and he was called by the Lovedale congregation to become their minister. When he spoke of "congregation," he meant the united congregation, the outstations as well as Lovedale itself. Certain difficulties arose in 1897 and 1898, and he resigned his pastoral charge of the Lovedale location and its outstations, and he also resigned his connection with the Kaffrarian Presbytery of the Free Church. When asked by the Presbytery why he desired to resign, he replied that he did not desire to be connected with the Kaffrarian Presbytery any longer, and when he was informed by them that he could not remain a member of the Free Church unless he was under the mother Presbytery, he said that he desired to become a Presbyterian. His intention was to leave the district. When he reached Mafeking he found letters from Lovedale, which interfered with his work at Mafeking. He went to Mafeking for the purpose of starting a church connected with the Presbyterian Church of Africa. He left the session books of Love-

dale in the hands of two office-bearers of the congregation, to one of whom he handed the keys of the manse. He transferred all congregational matters to Cala. The £100 contributed by the congregation towards the new church was collected for the most part by witness, and he placed the money in the bank to his account, and when he left the congregation he gave Cala a cheque for that amount. The only moneys which he did not touch were those which came from Scotland, which were on fixed deposit. The congregation money was kept separate from the money from Scotland. He was prepared to refund the £271 to the church. He obtained this money from Mr. Weir. He was also prepared to return the money and the books.

De Villiers, C.J.: If you are prepared to do that, what are you defending the case for?

Defendant: The amount asked for from me is £1,060. For that position I am not prepared.

And you say you have only £271 in your possession, and that they must get the rest from Cala?—Yes.

You have got no books or documents of any kind?—I have got the church account book. Some of the accounts were put in my private book. (Put in.)

Who kept the books?—Cala was not very well educated. I was not at first. We taught ourselves.

And you kept the books?—Yes.

Have you anything else to say?—I should like to say this: It is said that this movement, which I am leading, is to upset the country, that it is a political movement. I wish to state it is nothing of the kind. It is not even a sectional or tribal matter. It is just a feeling of some of ourselves that we should try and work a religion and guide ourselves, and see whether we could not make something better if we were guided by ourselves. There is nothing in this matter in connection with the Government, or any political movement. It is entirely religious, and is entirely confined to natives.

De Villiers, C.J.: Yes. Of course, we have nothing to do with that. Do you admit that this money was collected for the Free Church, and that having left the Free Church, you must give back the money to them?

Yes. But nobody has ever asked for this money from me.

Cross-examined: In his plea he meant to state that so far as he was concerned the

£950 and the books were not in his hands. When the Presbytery asked him about the money he told them that there was money, but he did not remember how much.

By the Court: He did not hand the £271 to Cala because Cala was not the treasurer of that fund.

Cala, the treasurer, said that Mzimba handed £700 to him as treasurer. Part of this money was sent by Mr. Bokwe. Witness handed over the money to the congregation at a meeting. He placed the money on the table.

De Villiers, C.J.: Did they scramble for it?—I don't know what became of it.

De Villiers, C.J.: You can't impose upon the Court like that. You had better tell us everything.—The £700 is not the whole amount; £973 was in my charge.

Very well. Where is that money?—It is in the congregation.

What are the names of the people who received it?—So far as I am concerned, I put it on the table at a public meeting. That ended my part. The chairman of the meeting is not here.

Then you left the meeting?—Yes.

And you do not know what became of the money?—I just put it on the table. I don't know what became of it.

Mr. Innes: Did you close your eyes after you put it on the table?—I did not close my eyes.

You saw somebody take it?—I put it on the table and went away.

Before you saw anybody take it?—Yes. The congregation told me to do so.

Who told you to put it on the table?—It was the congregation.

Yes, but what men?—I did not take the books.

Keep to the money. Did you have the money in a bag?—It was in a bag.

Where did you put it after you had taken it out of the bank?—I gave it to the congregation.

Did you hand it to the congregation on the same day that you took it from the bank?—Not the same day.

What did you do with it in the meantime?—I kept it with myself.

You have not kept any of it since?—You mean the money for building?

Yes.—No.

Did you keep any other congregation money?—No.

In reply to further questions the witness said the money had not, so far as he knew,

been divided amongst the members of the congregation. He had never inquired as to what had become of the money.

Mabekwa said the books were handed over to him by Mzimba, and he (witness) handed over the books to Seehow.

Seehow said he received the books from the last witness, and he then handed them over to the congregation. He did not know what had become of them. He did not hand the books over to the Presbytery because the congregation stopped him.

Rev. John Lennox (recalled) said Mzimba had been practically suspended, and explained the procedure adopted in the event of a minister deserting his congregation.

This concluded the evidence.

After argument,

The Court gave judgment for the plaintiffs with costs.

De Villiers, C.J., said: It is not necessary to go into the merits of the case, as the Court has sufficiently indicated its views in the previous case. The defendant has admitted that as he has left the Free Church of Scotland he has no longer the right to retain any of the books or money which he has received in his capacity as minister of this church, and the only question now is, what form the order of the Court should take. The first prayer is, that the plaintiffs, as members of the Deacons' Court, are entitled to obtain possession of, and to control, all moneys, books, documents, and all assets belonging to the congregation. The explanation given by Mr. Lennox as to the power of the Deacons' Court to sue the defendants is, I think, satisfactory. Mzimba not only tendered his resignation, but he practically left the Church. He deserted his congregation, and therefore I think that the Presbytery was quite justified in appointing an interim moderator, who should also preside as chairman of the Deacons' Court. It is this Deacons' Court, which has control of the assets of the congregation, which has brought the present action. The plaintiffs are entitled to succeed on the first ground. As to the second prayer, for the defendants to pay the sum of £1,861, I am of opinion that, in so far as Mzimba is concerned, inasmuch as he paid £700 to Cala before the secession, and while Cala was still lawful treasurer of the fund, that was a sufficiently valid payment, and as against Mzimba the plaintiffs are only entitled to receive £388, traced into his possession. Then as to Cala, there is

clearly traced into his possession the sum of £978, and for that amount judgment must be given against Cala. As to Mabekwa, there is no proof that money was received by him, and therefore there is no order against him on the second count. As to the third prayer for an order compelling defendants to deliver up to the plaintiffs all books, papers, and documents, it is quite clear that these books and papers must be handed over to the plaintiffs. The fourth prayer, that the defendants render an account, must also be granted with costs. Then the Court will grant a rule *nisi* calling upon the persons named in the plea to show cause on the 13th of March next why they should not be ordered to hand over to the plaintiffs all moneys, books, accounts, and documents belonging to the Deacons' Court, and which came into their possession.

Buchanan, J., in concurring, said it was a duty which Mzimba owed to his office and his Church to use all his influence to induce all the four men mentioned in the plea to restore the money, which did not belong to them, to its rightful owners.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys, Messrs. Innes & Hutton; Defendants' Attorneys, Messrs. Bauer & Standen.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

FLETCHER V. SCOTT. { 1899.  
March 1st.

This was an action for the recovery of £100, alleged to be due to plaintiff from defendant, having been paid to defendant by Messrs. Fairbridge, Arderne & Lawton on account of plaintiff, with interest at 6 per cent. from March 26. The defendant denied that he had not accounted for the sum, and said he paid plaintiff £100 by cheque, which cheque had been cashed by plaintiff, and for which defendant held plaintiff's receipt.

Mr. Buchanan appeared for the plaintiff, and Mr. Molteno appeared for the defendant.

James Scott, the defendant, said he was a broker, and resided in Cape Town. He had been employed by the plaintiff in connection with certain loans, which were raised for building purposes. The loans were obtained from Mr. Arderne. Before the money was paid over witness's certificate had to be given to the lender, to the effect that the buildings upon which money was lent were progressing satisfactorily. On March 26 last plaintiff saw defendant as to raising a loan from Mr. Arderne. Defendant having explained matters to Mr. Arderne, the latter gave witness a cheque for £100, and witness gave plaintiff his own cheque for £100.

Cross-examined: The accounts rendered by Messrs. Fairbridge & Arderne were correct. Mr. Arderne's cheque was dated March 23, instead of March 26, but this was a mistake. In some cases defendant had paid plaintiff £150 before defendant received the money from Mr. Arderne. Defendant still owed plaintiff £30 on another account. Defendant had guaranteed £70 to plaintiff on behalf of his brother, in respect of a purchase of property. This £70 was still due to plaintiff.

By the Court: Defendant's brother was able to pay plaintiff the £70.

Cross-examination resumed: On the 26th of March he did not receive £100 from Mr. Arderne on behalf of one White. Defendant verbally guaranteed the £70 owing to plaintiff by defendant's brother.

Re-examined: Plaintiff had never demanded payment of the £70.

Thomas Daniel McSweeney, a clerk in the employ of defendant, said he saw defendant pay plaintiff £100 in respect of the cheque for £100, paid by Mr. Arderne to defendant.

By the Court: The account rendered by witness did not agree with the defendant's cash-book, but it agreed with the ledger.

Hudson Scott, a brother of the defendant, said he bought property from the plaintiff for £120. Witness paid plaintiff £50, and obtained transfer of the property. £70 was still owing to plaintiff. Witness owed the money, and was quite ready to pay.

Buchanan, J.: But the broker's note says you are to pay on obtaining transfer?

Witness: But Fletcher said he did not want the money. He said he was quite satisfied so long as my brother stood security.

Cross-examined: His brother made out the broker's note. He arranged all witness's business. Witness had never received a

notification from plaintiff, asking witness for the £70. Witness's brother asked witness for the £50 which he paid.

Henry R. Arderne said the cheque for £100 which defendant received from Mr. H. M. Arderne was wrongly dated.

This closed the case for the defendant.

Moses Fletcher, the plaintiff, said that he sold property to the defendant, and not to his brother, for £120, of which amount defendant still owed £70. Defendant also owed witness £30, which he received from Mr. Arderne in Reid's matter, and which he had not paid to witness. He frequently obtained advances from Mr. Arderne direct.

After argument, the Court granted absolution from the instance with costs.

De Villiers, C.J., having reviewed the evidence, said: There is no doubt that on March 26 defendant received a cheque for £100 on behalf of the plaintiff from Messrs. Fairbridge, Arderne & Lawton, and that defendant gave plaintiff his own cheque for £100. It is impossible to bring the £70 and £30 into the present case, which is founded upon a specific claim for £100, and the payment of that claim has been satisfactorily accounted for. Therefore there must be absolution from the instance with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorney, (Gus. Trollip; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.)]

LIBERMAN AND ISAACS V. LYONS. 1899.  
(March 1st.)

This was an action for the recovery of £30, the purchase price paid by the plaintiffs for the lease and good-will of certain premises at the corner of Wale and Loop-streets, such purchase having been made as a result of the wrongful representations of the defendant, and £10 as damages.

The declaration alleged that the contract was entered into on May 31, 1898, but that the plaintiffs subsequently discovered that the defendant had no authority to enter into the contract, and that the owner of the property, one Hendricks, refused to recognise the plaintiffs as lessees.

The defendant was barred from pleading.

Mr. Buchanan appeared for the plaintiffs, and he defendant appeared in person.

Abraham Isaacs, one of the plaintiffs, said he carried on business with Mr. Liberman. The lease of the premises in question was put up for auction, but was subsequently withdrawn. Subsequently defendant agreed

to sell the lease, right, and goodwill of the premises to plaintiffs for £30, which amount they paid. Witness occupied the premises and spent £23 odd upon repairs to the premises. Witness paid his rent to Mr. McGregor on behalf of defendant. Witness asked defendant for the lease, and paid rent for three months. The real landlord, one Hendricks, had repudiated plaintiffs as the lessees, on the ground that defendant had no right to sell the lease. Defendant supplied plaintiffs with a document purporting to be a lease. Plaintiffs were still in occupation of the premises.

Defendant, in reply to the Court, said plaintiffs had behaved in a disgraceful way and had never paid rent. He admitted the contract, but denied that he had broken it, as he said plaintiffs had never been disturbed in their occupation.

Alexander McGregor said the occupants of the premises paid their rent to him, and he paid it to Hendricks. Lyons, when he occupied the premises paid the rent to witness, and witness paid the rent to Hendricks. Witness had to obtain Hendricks' consent to sub-let the premises to Lyons. When the plaintiffs occupied the premises they paid the rent to witness, and witness paid it to Hendricks. Defendant was looked upon as the lessee. In November last witness wrote to Lyons stating that for the future he would not collect the rent. He did not think that he had ever told Hendricks that the rent was paid to witness by the plaintiffs.

This closed the case for the plaintiffs.

Defendant said he did not guarantee occupation to plaintiffs.

For the defence,

Solomon Koski said he bought the lease of the premises from McGregor for £32 10s. He could not obtain money to pay for it, and he borrowed £37 from defendant and deposited the lease with him as security. Hendricks agreed to witness selling the lease so long as witness paid the rent.

Defendant said the value of the fixtures put in the premises by plaintiffs did not amount to £3. He had tendered £30 to the plaintiffs. He was willing to give the agreements and other documents to the plaintiffs.

After argument,

The Court gave judgment for the plaintiffs for £30 and costs.

De Villiers, C.J., said: Had not the defendant expressed his willingness to pay £30 to the plaintiffs, I confess I should have had a great deal of difficulty in holding that



the plaintiffs are entitled to recover. It is extremely doubtful to my mind whether the defendant sold more than such right as he had, but seeing that the defendant makes a tender of £30, I think it is unnecessary to go further into the case. The defendant also expresses his willingness to pay the plaintiffs £8 for costs. I think that is the utmost that the Court can order. Judgment will, therefore, be for the plaintiffs for £30 and £8 costs, it being understood that the plaintiffs no longer have any rights under the contract with the defendant.

[Plaintiffs' Attorneys, Messrs. W. E. Moore & Son.]

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and a jury.]

ROCK V. DIVISIONAL COUNCIL OF THE CAPE. { 1899.  
March 2nd.  
" 3rd.  
" 4th.

This was an action for £2,000 damages, caused by the defendant Council's acts of trespass upon the farm Frogmore, belonging to the plaintiff.

The declaration alleged that the plaintiff had placed a large portion of his land under the cultivation of chicory. Certain water flowing across the farm had for several years been led partly across the farm into a culvert running under the main road from Cape Town to Wynberg, and partly along a furrow running along the northern boundary of plaintiff's land, and thence into a certain ditch, and after that into the culvert.

That about July 11, 1893, the defendants trespassed on the plaintiff's land and broke certain sluice and culvert on the plaintiff's land, and obstructed the flow of water in the furrow on the northern boundary, and so caused a flood on the land, which destroyed and ruined the chicory crops and did other damage.

The defendants, in their plea, alleged that at the time of the grievance complained of, there was a certain ditch adjoining and parallel to the main road which was constructed by them for the purpose of protecting the road. That in 1893, one Carl Poppe, the predecessor in title to the plaintiff, wrong-

fully and unlawfully deepened the ditch and diverted the water flowing over the said land. By reason of this diversion the water flowing into the ditch greatly imperilled the safety of the main road, and on July 11, 1893, the defendants in order to preserve the road from destruction entered upon the plaintiff's land and diverted the water into its original course as they were entitled in law to do.

Mr. Innes, Q.C. (with whom was Mr. Searle, Q.C.), appeared for the plaintiff, and Mr. Graham, Q.C. (with whom was Mr. Benjamin), appeared for the defendants.

Chas. Marais, Government land surveyor, said he had surveyed the property Frogmore, and the plan produced was correct. There had originally been a vlei on the west side of the property, the outlets of which had been, one near the culvert, and the other at the other end of the farm. Distinct traces of the vlei still existed. The sluiceway was at one part blocked up. The furrow on which the trespass was committed was 2 or 3 feet deep. The width of the sluiceway on the private property varied from 2½ to 4 feet.

Wilhelm Westhofen, engineer to the Public Works Department, said he had seen the property in question, and corroborated the previous witness as to the natural outlets.

Dirk Gysbert Eksteen said he was a farmer, residing at Helderberg, near Somerset West. He bought Frogmore in 1877, when the land was not cultivated, with the exception of a small patch. All the rest of the property was marshy ground. At that time witness resided at Mowbray, but frequently visited the farm. In the second year he found out that there was too much water, and that the farm could not be cultivated unless it was properly drained. Witness then had drains made all over the western and eastern sides, and several drains from the centre. The head drain was so constructed that the water coming down from the Steenberg side could be carried away to the big culvert in the main road. He sold the farm in 1886. In his time they had trouble with the Divisional Council with regard to the culvert, but the Council never took any notice of the matter. The culvert would not carry off winter water. The main drain was on the mountain side. Witness had recently visited the property, and he saw that great changes had been effected since he owned the farm, and that the sluices and ditches were wider than they were formerly. In his time there were drains on each side of the road.

By the jury: Before the ditches were made the water ran towards the place where the plantation now existed.

Frederick Jacobus Kotze, residing at Somerset Strand, said he lived upon Frogmore during 1882, 1883, and 1884. He hired the farm from the last witness. When witness occupied the farm drains had been constructed. In witness's time the water ran by a drain to the main road. The culvert was not large enough to carry off the water.

Cross-examined: There were two sluice gates on the property when he occupied it.

Frederick Knuckenberg said he was a farmer living on the Claremont Flats. He was in the employ of the late Dr. Messon for six months while Dr. Messon occupied Frogmore. In 1886, the sluic, which had since been blocked up by the Divisional Council ran right down to the main road.

Olif Nelson said he was employed on Frogmore in 1886, 1887, and 1888. He made trenches and cleaned the sluic on the ground. In 1886, 1887, and 1888 the furrow came right down to the main road.

Van Reenen gave corroborative evidence.

Martin Hedensborg, the manager of plaintiff's chicory factory, said he saw the Divisional Council men come on to plaintiff's property, and, though witness told them they were trespassing, they filled up the sluic. Previously the sluice gate was broken, and witness to remedy this constructed an embankment, placing a pipe in the embankment to carry the water through. After filling up the sluic the men broke down the embankment and smashed the pipe, with the result that the water flooded the fields and the chicory. When he protested the men told him that they had received order to do the work from the Divisional Council. The water also flooded the stable and the pigsties.

Cross-examined: Two hundred and seventy tins of chicory were saved and 400 were washed away.

George Wilson, a police constable stationed at Retreat, said the last witness, in July last, asked him to drive the Divisional Council men off plaintiff's property, but he declined to do so, as the matter was not one for the police, but was of a private nature.

Anton Zutphen gave evidence as to a conversation which took place between Hendricks and the road inspector of the Divisional Council, previous to the date on which it was alleged that the embankment was broken down. They examined a portion

of the sluic where the sides had fallen in, and Hendricks, who held an old plan in his hand, said, "The water has not been flowing round this corner for three years. The pipe is in the place where the water ran earlier. The embankment ought to be opened up again." The inspector said he would send two men to do the work on the following Monday, and Hendricks said he would send two of his men also. Witness pointed out that if this were done the chicory would be washed away, but they replied that if a portion of the main road were washed away by the water accidents might happen to carts and horses.

Cross-examined: There was a strong flow of water when Hendricks and the inspector were present. There were heavy rains at the time, and all the low-lying ground suffered from floods. Most of the ground on the Wynberg side of the chicory factory was submerged after the ditch was obstructed.

At this stage the case was adjourned in order to give the judge, jury, and counsel an opportunity of viewing the property.

*Postea* (March 3rd).

O. Albertyn, a farmer, residing at Diep River, said the culvert was too small to receive the water.

Richard Johnson, a farmer, residing at Retreat, said the water had run from the property to the main road for the last two years. He could not say whether water ran there in 1894 when he bought property in the vicinity. In July, 1896, a large portion of plaintiff's chicory farm was under water. At two points the water flooded the main road. He noticed that several of the sluic were silted up, and that some of the embankments had been washed away. Before the farm would be ready for cultivation again the drift sand would have to be levelled and the ground retrenched. Repairs could not be effected during the wet season.

Charles van Renen said two culverts were washed away by the water.

Cross-examined: Last winter was exceptionally severe.

James Charles Smith, residing at Retreat, said that in 1897 he did some work for the Divisional Council in the culvert.

Expert evidence was given as to the loss sustained by the plaintiff as a result of the flooding of the crops. It was estimated that the loss by reason of the chicory crop being destroyed amounted to £1,215. Since the ground was flooded attempts had been made to raise a new crop, but the attempts

failed, as the ground was too wet. It cost about 11s. a tin to produce chicory, which was sold at an average price of 17s.

Carl Hermann Poppe, who formerly owned the property, said he extended the sluic. and Petersen asked him to deepen it.

Other evidence having been led, the case for the plaintiff was closed.

For the defence,

Carl O. V. E. Becker was called. He said he now resided at Muisenberg, but formerly he grew chicory at Frogmore. When he occupied the farm in 1888, the stream did not extend to the main road. In that year the whole farm was inundated, 1888, being a very wet year.

Cross examined: If witnesses said there was a stream running to the main road, they told untruths. Witness was a very observant man. It was not true that he used to drink a good deal. When he occupied the farm the ditches and sluic. were constantly cleaned out. He found the culvert rather small during heavy rain. He knew that one Hendrik Albertyn was sent home yesterday because it was discovered that he intended to give evidence hostile to the plaintiff.

Re-examined: He had no interest in this case.

By the jury: If he had a good year he obtained 2,000 tins of chicory. Sometimes he obtained only 1,000 tins, but an average would be 1,500 tins. He cultivated the ground on both sides of the road. The plaintiff cultivated less ground than witness cultivated. The area of ground on Frogmore itself had been increased.

Johnson, a former Divisional Council inspector, said that when he was inspector there was no stream connecting the land, on which the trespass was alleged to have been committed, with the main road.

Joseph William Norman, assistant overseer to the Divisional Council, aged seventy-four, said he had known the road in question for many years, and during his time a stream had never flowed from the property to the main road.

Cross-examined: In 1896 the water might have come down, but he did not see any.

Jan Frederick Kirsten said he was forty-four years of age and was born on the property, the whole of which originally belonged to his grandfather. During his time the stream had never run into the main road, but followed a course at the

back of the house. Before any ditches were made all the water flowed under the bridge to the culvert.

Hendrik van der Poel Kirsten, aged forty-eight, a brother of the preceding witness, gave corroborative evidence.

R. Allen, a member of the Divisional Council, gave evidence as to the filling up of the sluic. In reply to the jury, he said that presumably one reason for not blocking up the sluic between 1896 and 1898 was this—that the winter of 1898 was exceptionally severe.

Edward Gatty, inspector to the Divisional Council, said that when Poppe was the owner of the property witness told him that he must not deepen the sluic, or it would become dangerous to the public. Poppe replied that he would see the Council about the matter, but he continued to deepen it. Witness first saw water running down through the place where the obstruction now existed after the sluic was extended, which would be within the last four years, but he had never seen a large quantity of water running down until last year, when the water was diverted on to the road. Witness gave instructions to have the embankment broken down. If this had not been done the road would have been washed away. The overseer broke down the embankment. Very heavy rains had just fallen, and the neighbourhood was flooded, Ottery Bridge being washed away. If things were not altered between the present and next winter, and if heavy rains fell, the road would be destroyed—nothing could save it. The culvert had been doubled in size.

Cross-examined: When he gave the order that the embankment be broken down he did not consider plaintiff's chicory; he had to think of the road, and the safety of the public. He would do the same thing again if necessity arose. Witness personally gave instructions for the work to be done. The road had not been repaired at the point in question since July last. The only damage done in July was suffered by the banks. If the water had not been set free by breaking down the embankment the road would have been undermined. Witness never told Hendricks to send men to assist in the work.

Re-examined: He did not know that Hendricks did send men.

The witness Johnson (recalled) said the road would have to be lowered considerably to allow the water to run over the road. If the road were lowered, witness's property on

the other side would have been swamped. So far as he was concerned, Mr. Westhofen's plan would not have been a success.

David Frederick Hendricks said he owned land adjoining the plaintiff's property. The plan drawn in 1894, a correct plan, did not show a stream running down to the main road. The sluic was extended to the main road, about three years ago, by Poppe. Witness objected to the extension of the sluic, as it would throw a very large quantity of water on to his property. Witness complained about the matter, but nothing was done. The ditch in front of plaintiff's property was deepened about three years ago. Witness said he did not send men to assist in breaking down the embankment or filling up the sluic.

Cross-examined: Plaintiff did not open the sluice because he had no desire to flood his own property. When plaintiff declined to take any action witness approached the Divisional Council. If the Council had not pulled the chestnuts out of the fire witness would have had to do so. Three years ago a trench, not a sluic, flowed down from the property to the main road. When he said that the sluic was made three years ago he meant that the trench was deepened and widened.

Re-examined: He did not think that the trench was connected with the stream from the mountain.

William Thomas Olive said he had inspected the property, and taken certain levels. He made the plan put in.

This closed the case for the defendants.

The jury returned a verdict for the plaintiff of damages, £912.

Judgment was entered accordingly.

[Plaintiff's Attorney, D. Tennant; Defendants' Attorneys, Messrs. W. E. Moore & Son.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAABDORP.]

MILNERTON ESTATES, LIMITED, } 1899.  
V. COLONIAL GOVERNMENT. } March 6th.  
Grant—Diagram—"Sea-shore."

*A piece of land granted by the Government was described in the deed of grant as being bounded on the north-west "by the sea-shore," but the diagram annexed represented the boundary on the north-west to be more than 200 feet above the ordinary high-water mark. The area mentioned in the grant corresponded with the area contained within the boundaries shown in the diagram. At the time the grant was made the Government had no power to grant land within 200 feet of the sea unless such grant were approved of by both Houses of Parliament and there was no proof that such approval had been obtained.*

*Held, that the term "sea-shore" should be construed in its popular sense and that the true boundary of the land was that shown by the diagram.*

This was an action for a declaration of rights.

The declaration alleged as follows:

1. The plaintiff is a company duly registered, with limited liability, in this colony, and was formed with the objects, amongst others, of acquiring by purchase, developing, laying out, building upon, selling, leasing, or otherwise disposing of land situated in the division of the Cape, including especially the land hereinafter referred to.

2. The defendant is sued in his capacity as Secretary for Agriculture, and as such properly represents the Colonial Government in this action.

3. On the 15th November, 1897, the plaintiff obtained transfer pursuant to previous pur-

chase of a certain piece of land, situate in the division of the Cape, field-cornetcy of Paalen and Riet Vlei, being Lot Q, called Paarden Eiland, granted by His Excellency the Governor to Pieter Gabriel de Villiers on the 16th March, 1874.

4. In the grant aforesaid, and upon the diagram annexed to the said grant, the boundaries of Lot Q are described as follows, to wit: Bounded N.W. by sea shore, N.E. and S. by the Diep River, and W. by property of Mr. P. de Villiers.

5. According to the true intent of the said grant, Lot Q extends towards the north-west to the sea shore, and the plaintiff is now entitled to all land above the high-water mark of the sea in that direction.

6. The defendant wrongfully and unlawfully disputes the title of the plaintiff, and denies that the plaintiff's title extends to north-west as aforesaid to the sea shore, and denies that the plaintiff is entitled to all land above the high-water mark of the sea in that direction.

7. After purchasing Lot Q, the plaintiff caused a survey thereof to be made with a view to obtaining an amended title under Act 9 of 1879, and was then and still is ready and willing to accept an amended title and diagram in accordance with the recommendation of the Surveyor C. Marais, then employed by the plaintiff, albeit such title and diagram would along the sea shore exclude a certain portion of the land actually granted as aforesaid in 1874 to the plaintiff's predecessor in title, but the Surveyor-General refused to issue amended title accordingly.

8. By reason of the premises the plaintiff is seriously prejudiced and damaged, and is delayed or prevented in carrying out the objects aforesaid of the company, particularly in respect of the laying out of a township called Milnerton upon land of the plaintiff, which includes the said Lot Q, and the plaintiff is entitled to ask for a declaration of right and title as aforesaid in respect of the said Lot Q.

Therefore the plaintiff prays for: (a) A declaration that Lot Q extends towards the north-west to the seashore, and that the plaintiff is entitled to all land above the high-water mark of the sea in that direction, or (b) for such other declaration of boundary and title as this Honourable Court may deem right, together with costs of suit.

The defendant in his plea admitted paragraphs 1, 2, and 3 of the declaration. As to paragraphs 4 and 5 he craved leave to refer

to the grant and diagram of Lot Q for the true boundaries of the said lot. He denied that the boundary of the said lot on the north-west is the seashore, and he further denied that the plaintiff company is entitled to all the land above high-water mark in that direction.

He specially said with reference to the said paragraphs that on or about the 21st February, 1874, the Colonial Government agreed to sell to Pieter Gabriel de Villiers under the Act 5 of 1870, the aforesaid Lot Q, otherwise known as Paarden Eiland, which had been previously leased to the said De Villiers under the Act 19 of 1864.

On the said date, to wit, the 21st February, 1874, the said De Villiers signed certain conditions of sale, subject to which he purchased as aforesaid Lot Q, otherwise known as Paarden Eiland.

In the said conditions of sale, the boundaries of Lot Q, otherwise known as Paarden Eiland, are described as follows, to wit:

Bounded northward, southward, and eastward by the Diep River, westward by property of P. de Villiers, and extending north-west towards the seashore. The grant referred to in paragraphs 3 and 4 of the declaration was made subject to the said conditions of sale.

The defendant craves leave to refer to the said conditions of sale at the trial of this action.

The defendant further says, with reference to the said paragraphs, that before the sale and grant of Lot Q, otherwise known as Paarden Eiland, to P. G. de Villiers on the 16th March, 1874, the said land was surveyed for the purpose of such sale and grant by one H. Kuyt, a Government Land Surveyor.

The diagram referred to in paragraph 4 of the declaration was framed by the said Kuyt, and the true boundary of the said Lot Q, otherwise known as Paarden Eiland, on the N.W. is shown on the said diagram, and marked by beacons at the letters E, F, G, A on the said diagram.

The full extent of land, to wit, 122 morgen and 434 square roods, granted to P. G. de Villiers on the 16th March, 1874, and subsequently transferred to the plaintiff company on the 15th November, 1897, is included within the said letters E, F, G, A.

As to paragraph 6 of the declaration, the defendant admits that he disputes the title of the plaintiff company to all the land between high-water mark and the beacons as

fixed by Surveyor Kuys on the north-west boundary of the said land, and marked E, F, G, A on the aforesaid diagram, but he denies that his action is wrongful and unlawful.

As to paragraph 7 of the declaration, the defendant admits that the Surveyor-General refused, as he lawfully might, to issue an amended title to the plaintiff company, under Act 9 of 1879, and that the plaintiff company, in their application for an amended title as aforesaid, claimed much less land than they claim in the present action.

As to paragraph 8 of the declaration, the defendant has no knowledge of the allegations contained therein. He says that if the plaintiff company has been prejudiced or damaged as alleged in that paragraph, or if the operations of the company have been impeded or delayed, such prejudice, damage, and delay have not been occasioned by any act or omission on his part.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

In reconvention the defendant alleged that the true boundary of Lot Q, otherwise known as Paarden Wiland, on the N.W. is the beacons marked E, F, G, A, on the diagram framed by Surveyor Kuys, and more fully referred to in paragraph 2 of the plea. He claimed a declaration accordingly with costs of suit. The replication was general, and joined issue.

Mr. Searle, Q.C., and Mr. McGregor appeared for the defendant.

Mr. Rose-Innes, Q.C., and Mr. Sheil, Q.C., for the Government.

For the plaintiffs,

Frederick J. B. Langerman, residing at Sea Point, said that he was one of the directors of the plaintiff company, and purchased Paarden Island from Mr. Mellish for that company. Witness owned a property called Jan Biesjeskraal, adjoining that island. He had for years passed Paarden Island. He got the transfer and diagram, but never saw any conditions of sale. He asked Mr. Mellish about the boundaries, and the latter said he could not point out beacons, but the boundary was between the seashore and the river.

Cross-examined: He had known Paarden Island since some time prior to 1874. He never saw any beacons, but he had never gone to look for them, so there might have been some.

Re-examined: He saw a fence there when the land was purchased.

Edward H. F. Mellish, residing at Cape Town, said he sold all his property there, including Paarden Island, to the plaintiff company in 1897. He had purchased that property in 1887. He had never seen any beacons along the north-west side of the property.

By the Chief Justice: He considered the sea shore as his boundary.

Examination continued: He had often prosecuted persons for trespass and gathering shells there. He had put a fence along the seashore side. When witness sold the property he handed over to Mr. Langerman all the documents. When Mr. Langerman's cattle came across the Diep River witness very often impounded them.

Cross-examined: Witness knew nothing about an aloe beacon marked on Mr. Kuys's survey. He had never known an aloe to grow on the farm. He had seen two whalebones on a recognised road coming up from Blaauwberg Beach. The whalebones had been put there so that anyone coming up in the dark would know where to turn in. Witness, when he had the property, considered his boundary as between the river and the sea. Witness had fenced in the ground where the grass grew. In spring tides the water came right up to the fence.

Re-examined: He had fenced as near to the sea as he considered reasonable.

Peter Eckermann said that he was forty-one years old, and had been working on the farm Paarden Island for nine years. He knew it in Mr. De Villiers' time. Then there never were any beacons along the seacoast there. He knew there was a large whalebone right down near high-water mark. That had been there all witness's time, as had another one further inland. He thought the sea had receded in some places.

Cross-examined: The sea had receded during the past twenty-one years, since witness had known it. Witness remembered an aloe growing at one part, but he did not see a small beacon under it. He had seen the aloe lying on the ground near there about a fortnight ago. That aloe did not quite mark the boundary of Mr. Esterhuyzen's property. The whalebone beacon was about five yards from the aloe. The beacon stood a good long distance from ordinary high-water mark. He had always regarded that whalebone as a beacon, having been told so by Mr. De Villiers and others. It would be a beacon between the old out-

span and Mr. Esterhuysen's property. Witness had last seen the aloe growing about two years ago.

Re-examined: The whalebone beacon stood there.

Charles Marais, a Government surveyor, practising in Cape Town, gave evidence as to a survey he had made of the Paarden Island and adjoining property in 1897. Witness searched for beacons, and found a whalebone beacon between Diep River mouth and the old property. There was a second whalebone close to the sea. The red dotted line on his (witness's) plan would be the high-water mark according to Mr. Kuys' diagram. Witness had put his line back from actual high-water mark at one place, because there was some loose waste sand which might at some time become submerged. He had no doubt that ordinary high-water mark was from 100 to 200 feet back from his line. He did not think the sea could ever possibly reach his line. The Milnerton Estates were willing to adopt that line. Witness was satisfied that the beacon G was a beacon. He had seen a small aloe about three years old near that beacon. Witness could not say whether the sea had receded or not.

In answer to the Court, Mr. Searle said that if the sea had receded of course the plaintiffs would lay claim to the reclaimed land.

Cross-examined: While he was surveying he saw the aloe, and told his boy to clear it out of the way. The boy picked it up and threw it out of the line of observation. It was not growing at that time.

Re-examined: Witness was almost certain that the diagram annexed to the grant was in old Mr. Kuys' handwriting.

This closed the case for the plaintiffs.

For the defence,

Henry van Reenen, Second Assistant Surveyor-General, said that there had been a good deal of correspondence between his department and Mr. Marais about the fixing of Kuys' beacon. Witness had been to the property several times, and a year ago had fixed the corner beacon. Some old aloe roots were found at a spot pointed out to them. He did not agree with Mr. Marais that the whalebone was an old beacon. Kuys was a careful man, and had acted as Surveyor-General, and at one time was Deputy Surveyor-General. He considered Mr. Kuys very accurate in his work. If the plaintiffs

now got what they claimed they would have about 28 morgen more land than was mentioned in the grant.

Cross-examined: He did not agree with Mr. Marais that the fixed points agreed much more accurately with the point G than with the point C.

Re-examined: There was no dispute between Mr. Marais and witness as to the position of C, taking Mr. Kuys' diagram and every available data.

Jacobus Lecoque stated that he was fifty-one years of age and had lived at Maitland ever since he was a boy, and when a boy had herded cattle at Paarden Island. There was a ditch there in Esterhuysen's time. At the end of the ditch there was an aloe tree standing. There was also a whalebone as high as the tree standing there. He had remembered that for many years. The other day witness had pointed out to Mr. Alston where the aloe had stood. Witness had last seen the aloe about a year ago. At the spot they found roots. The beacon now standing there was 25 yards nearer to the sea. That beacon had not been there very long.

Cross-examined: If Eckermann said that the beacon had stood where it now does for over twenty years it might be so, as witness had not taken any particular notice. The whalebone might have been put there to direct people to the farm. The one lower down was to show people coming from Blaauwberg where to turn in for Cape Town.

By De Villiers, C. J.: He had never heard that aloe spoken of as a beacon.

Ludowyk Muller, living at Bentskies Farm, said he had known Paarden Island ever since he was a boy. He remembered the ditch that went along Esterhuysen's boundary. There was an aloe bush and whalebone at the corner nearest the sea. He remembered the aloe and whalebone being there for many years, and had always looked upon them as a beacon. The aloe was not there now, and there was a whalebone with stones round it, but nearer to the sea. It had been there about two years.

Cross-examined: There was no ditch there now, it having been ploughed over. The whalebone was now twenty-five yards nearer the sea. He was certain it had not stood there for twenty years.

Johannes Williams also deposed to the aloe bush and whalebone standing at the end of a ditch. A whalebone with stones

packed round it now stood nearer the sea. Witness saw that for the first time on Sunday.

Cross-examined: He could not say exactly how long it had been there. Mr. Mellish had in his time stopped people from gathering shells on the beach.

G. Alston, a sworn Government land surveyor, stated that on Saturday week last he inspected the place, and the witness Lecoque pointed out the place where the aloe used to stand. Lecoque went straight to the spot without any hesitation. The spot was then dug and aloe roots found. The spot was 106 feet from where the whale-bone now stood. The aloe agreed very closely with Mr. Kuys's position. He found Kuys's beacon approximately at C. The aloe was about 9 feet from where he would place the beacon by mathematical calculation. There were slight indications of a ditch having been there.

Mr. Searle: Upon the question what is the sea-shore, see *Uitenhage Divisional Council v. Reed* (1868, p. 126); *Anderson & Marison v. Colonial Government* (Juta 8, p. 291); *Stephen's Commentaries* (Vol. I., page 453, note). Where the sea has receded the land goes by alluvion to the owner of the land up to the sea-shore. *Wharton's Law Lexicon, Imperial Dictionary*. These show that sea-shore is land bounded by high-water mark.

[De Villiers, C.J.: But the extent shown is very different to what it would be if high-water mark were taken.]

It is difficult to ascertain the true extent because of the shifting nature of the sand and the river. Where land is sold or granted within natural boundaries, and not defined by measurement, the ground within those boundaries must be taken independently of the measurement. Grotius, *De Jure Belli et Pacis* (Vol. 2, Chap. 8, section 12).

[De Villiers, C.J., referred to Act 2 of 1860, section 14: "No lands known to contain valuable minerals . . . or so much of the land on the sea-coast lying above and within two hundred feet of high-water mark shall be considered waste lands of the Crown for the purposes of these regulations, and all such land shall not be disposed of, except in the manner set forth in section 10 in regard to the lands therein mentioned."]

It may be said that the Government intended to grant as much as it could, if it could not grant land up to the high-water mark. The Court will not go behind the grant. *Visser v. Du Toit* (J. 8, p. 64).

[De Villiers, C.J.: The Imperial Dictionary gives a wide definition to the word "sea-shore." Where there is a discrepancy such as appears in this case, could not the Court find that the popular meaning of the word was understood?]

This is a solemn legal grant and the legal interpretation should be given to the words in the judgment in *Anderson & Marison v. Colonial Government* (Juta 8, at p. 296), "sea-shore" is defined as "the land between high and low water marks." The Crown cannot impeach the validity of its own grants. *Heutlie v. Colonial Government* (Juta 5, p. 353). It appears meaningless to make a grant up to the sea-shore if it is intended to reserve a strip of *veld* between the land granted and the sea-shore. As to the construction of grants, *Kent's Commentaries* (Vol. I., p. 360); *Stephen's Commentaries* (Vol. I., p. 453). The Court has frequently said that a diagram is a mere picture and useful where there is ambiguity. *Reid v. Surveyor-General* (7 Sheil, p. 26) was an entirely different case. There the land was not granted to the sea-shore. Here, not only the grant but an endorsement on the diagram states that the land is granted "to the sea-shore." *Hirsch v. Gill* (10 Juta, p. 156)

Mr. Innes was not called upon.

De Villiers, C.J., said: By the grant of the 16th March, 1874, the Governor conveyed to the grantee "the piece of land bounded on the north-west by the sea shore, on the north-east, and south by Disp River, and on the west by the property of Mr. P. de Villiers, represented and described on the diagram hereunto annexed." When we refer to the diagram which represents the land which has been so conveyed, we find that the bounding lines on the north-west side are clearly drawn some distance from the sea, certainly not approaching to within 200 feet of the sea. There is therefore in this case a discrepancy between the boundary, according to the strict legal definition of the sea shore as described in the body of the grant, and the picture which the diagram conveys, and if there were no other circumstances in this case to assist the Court as to what was the real intention of the parties to the grant, then undoubtedly Mr. Searle's arguments would have been good and convincing, and the Court would have given judgment in terms of the body of the grant in preference to the picture appearing upon the diagram. The only question now to decide is whether there are any circumstances in this case to justify—indeed, to compel—the



Court to hold that the words sea shore were used by Mr. Kuys in the more popular and general sense, instead of in the strict legal sense, and that what was intended to be conveyed was a boundary some distance from the sea. Now the circumstances which exist in the present case are these: First of all we find the area is definitely fixed in the grant, the extent of the land to be conveyed being 122 morgen 434 square roods. This area is mentioned in the body of the grant and also in the diagram, and it corresponds almost exactly with the area contained within the boundaries mentioned in this diagram. Mr. Marais, who surveyed it, says that the area is a little in excess—126 morgen—that is, assuming his survey to be correct, but I do not think that weighs much, — and as nearly as possible the area is exactly that represented by the diagram. If, therefore, the plaintiffs get the land conveyed by the diagram, they get at all events exactly the area which was conveyed to them, and which was intended to be so conveyed. The case, therefore, differs in this as in other respects from the case of *Barrington v. Colonial Government*. In the case of *Barrington* the surveyor was incompetent, and his diagram was admitted to be inaccurate, and if in that case the Court had taken the diagram as a guide, it would have been entirely erroneous, because it would have conveyed to the grantees many hundreds more morgen than were actually mentioned in the body of the grant. In this case the body of the grant mentions 122 morgen, which is almost exactly the land intended by it to be conveyed. Then there is another circumstance, which the Court cannot lose sight of in considering this grant, and that is, that at the point E, or very near point E, there has been standing a beacon for a considerable time. Witnesses for the plaintiff had not observed it, but, on the other hand, there are witnesses for the defendant who know this land intimately, and continually passed it, and who state that as long as they could remember there was a beacon as near as possible to the point E at the place where the aloe was found, where also a whalebone was fixed about a foot or a foot and a half above the ground. One beacon, therefore, at all events of these three beacons along the coast boundary has been identified as the beacon which corresponds with the diagram which the defendant claims. That beacon corresponds as closely as possible with the corner beacon adjoining

the property of Mr. Esterhuys. But there is another circumstance in this case, and one which leads necessarily to the conclusion that the surveyor at the time he framed this diagram intended that the diagram should represent only the portion within the lines, and that it should not be bounded by the sea shore. It is this: The north-west boundary in question is simply a continuation of Mr. Esterhuys's boundary. We have got Esterhuys's grant, and that shows that his boundary at the point E is several hundred feet from the sea shore. If, therefore, the boundary in dispute is a continuation of the north-west boundary of Mr. Esterhuys's property, then, at all events, the boundary in this case must have been more than 200 feet from the sea shore, and it could not have been intended to convey to the grantee the right to the sea shore. But a circumstance almost conclusive, in the present case is that in 1874, when this grant was made, the Government had no power legally to grant land within 200 feet of the sea unless such grant were approved of by both Houses of Parliament. There is no proof of such authority, and the presumption therefore is that the Government intended to abide by the law, that the Government had no intention of contravening the law, and that this diagram showed the true boundary, not the sea shore represented in the body of the grant, but the sea shore as mentioned by Mr. Kuys, mentioned in a somewhat more popular sense, and not intended as the sea shore in the strict legal sense as the place between high and low-water mark. Reference has been made to Mr. Justice Watermeyer's judgment in the case of *Visser v. Du Toit*, but our judgment does not conflict with that judgment at all, because the learned Judge there held that, under certain circumstances, the Court might have to look to the diagram in preference to the body of the grant. When the Court had to do with the older diagrams, it preferred, in case of conflict, to look to the body of the grant rather than the diagram; but in recent years there is no doubt surveys are much more accurate than formerly. When we have to deal with a survey made by a gentleman like Mr. Kuys, who is admitted to have been a competent surveyor, and when we have to deal with the figures given by him, wholly different circumstances arise. Looking at this diagram, we find that the sides are definitely given. The different angles are given, and it has not been denied that if

we accept the diagram given, in reality the sides and angles correspond. Under these circumstances we must hold that the mere fact of the sea shore being mentioned would not overrule all the other facts. It simply comes to be a question of construction. Taking all the circumstances into consideration, I think that the true construction of this grant is that the boundary line on the north-west side is the line E, F, G, A given in the diagram of Mr. Kuys. It therefore follows that the plaintiff cannot succeed in this action, and that judgment must be given for the defendant upon his claim in reconvention declaring the boundary of this Lot Q to be E, F, G, A, as shown on Mr. Kuys' plan. Plaintiffs to pay costs.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorneys, Messrs. J. C. Herrangé & Son; Defendant's Attorneys, Messrs. J. and H. Reid & Nephew.]

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## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

COLONIAL GOVERNMENT V. THE  
THAMES IRONWORKS AND  
SHIPBUILDING COMPANY, } 1899.  
LIMITED. } March 7th.

Railway contract—Act 40 of 1898, section 1.

*The T. Company entered into a contract with the Colonial Government for the construction of certain lines of railway; in one of the terms of the contract (section 3, sub-section 2), it was agreed that work on a particular portion of the line should remain in abeyance until a detail survey of an alternative route had been made and "if need be the instructions of Parliament sought and obtained as to what route should be adopted." The survey referred to was completed, but no*

*application was made to Parliament for the purpose of having the route altered, although there had been opportunity for such application. The contract was confirmed by Act of Parliament subject to certain conditions, one of which provided that the company should give security before a certain date for the completion of each and every of the said lines. The company gave security coupled with a condition incorporating clause 3, sub-section 2, of the contract.*

*Held, that the security required by the Act had not been given, and that the company should be interdicted from proceeding with the lines.*

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This was an application on notice to the respondents that they would be required to show cause why they should not be interdicted from proceeding with the lines of railways: (a) From Oudtshoorn, *via* Willowmore, to a point on the Graaff-Reniet Railway at or near Klipplaat; (b) from a point at or near Somerset East, *via* Cookhouse and Bedford, to Fort Beaufort; (c) from Fort Beaufort, *via* Alice, to King William's Town; (d) from Mossel Bay, *via* George, to Oudtshoorn; and why they should not be ordered to give up possession of the same to the Colonial Government, and why they should not be ordered to pay the costs of the application. The notice of motion was supported by the affidavit of the Commissioner of Public Works who deposed:

1. That under Act 28 of 1895 the Colonial Government was empowered to enter into contracts for the construction of certain railways.

2. That in pursuance thereof contracts were entered into with the Grand Junction Railways (Limited) on the 19th May, 1896, and 13th October, 1896, for the construction of the lines of railway referred to in the notice of motion.

3. That subsequently on the 20th July, 1898, the said Grand Junction Railways (Limited) ceded and assigned their rights

under the said contracts to the Thames Ironworks and Shipbuilding Company (Limited), of Blackwall, London.

4. That subsequently on the 2nd August, 1898, the Commissioner of Public Works entered into a contract with David Urquhart, representing the respondent company, in connection with the construction of the said lines of railway, and which contract was annexed as a schedule to an Act of Parliament, No. 40 of 1898, passed for the ratification and approval of the said contract, and for the authorisation to build other railways than those mentioned in the said schedule.

5. That the said contract was modified as set forth in section 1 of the said Act.

6. That the respondent company have not satisfied the Commissioner that it is within their power, as defined within their memorandum of association, to construct railways as required by the said Act, nor as a matter of fact have they such powers, nor have they as further required by the said Act, given security to the satisfaction of the Commissioner to complete the said railways.

7. That in consequence the said contract of the 2nd August, 1898, has lapsed by operation of law.

8. That the respondent company has not availed itself of the provisions of section 1 sub-section 3, of the said Act, whereby it is empowered to give notice on or about the 7th February, 1899, of its intention to construct the said railways under the contracts with the Grand Junction Railways (Limited), but on the contrary it has given notice that it does not intend to revert to the said contracts.

9. That therefore there are no contracts existing between the Colonial Government and the respondent company, or any other company or person, for the construction of the said lines of railways.

10. That the Colonial Government has intimated its intention to take possession of the said lines as authorised in sub-section 3 of section 1 of Act 40 of 1898, and has expressed its willingness to pay to the said company such amount as shall be due for work done in respect of the said lines, and has requested the company to authorise some person by telegraph to settle accounts and receive payment.

11. That the said company has replied that it will authorise the said David Urquhart, but no formal authority has up to the present been produced.

12. The said contracts having become inoperative, notice was given by the Colonial Government to the said company to cease work in connection with the said lines, but notwithstanding that the said contracts have ceased to be in force, and notwithstanding the said notice the company is proceeding with the construction of the said lines.

13. That the action of the said company in so doing is detrimental to the public interests.

The correspondence was attached to the affidavit.

The affidavit of David Urquhart, of Port Elizabeth, replying to the foregoing alleged *inter alia* that due and satisfactory security had been given in terms of the second proviso of Act 40 of 1898, section 12, while as to the first proviso the applicant was well aware of the position of affairs in regard to the company's powers and arranged to give a reasonable extension to rectify matters on condition that £50,000 was deposited before 7th February, 1899, and further, that this sum had been duly deposited on the 6th of that month; further, that the respondents were quite capable of completing the railway; and further, that a certain agreement referred to in applicant's affidavit was entered into before 7th February, and its terms had been carried out. It denied that the contract of August 2, 1898, had lapsed, but said that even if it had the original contracts of May 19, 1896, and October 13, 1896, were still in full force and effect, and that the respondents were under them entitled to carry out to completion the railways in question.

As to paragraph 8 of the applicant's affidavit it said that the original concessions were of full legal force and effect and the application for an interdict was immature, and apart from this under proviso 3 of section 1 of Act 40 of 1898, the entry upon and taking possession of so much of the lines of railway as had been constructed by the company could only be done upon payment of the actual cost which might have been expended upon the said lines, or upon payment of the amount to be fixed by the Lands and Arbitration Clauses Act of 1882, and further, that there was no necessity for the respondents to give notice of reversion to the agreement under the contracts with the Grand Junction Railway Co., as those contracts had always been acted upon and were still being acted upon, and had in no way been cancelled.

The applicant in an answering affidavit alleged that Urquhart had not produced to him his authority to represent the respondent company, and deponent believed he had no such authority.

That he was not satisfied that the company had the power to construct the lines of railway referred to in his previous affidavits, and did not believe that they intended to build or complete all the said lines, having been informed by the said Urquhart that they did not propose to construct the line from Mossel Bay *via* George to Oudtshoorn.

As to the security, he said that the company had not deposited any security for the construction of the said lines, but only security for the alteration of the company's memorandum of association, and intimated their willingness to agree to certain terms conditionally on the question of the route from Mossel Bay *via* George to Oudtshoorn being submitted to Parliament, which condition deponent declined to accept, the Government having determined that the route from Mossel Bay *via* George should be constructed, and that determination having been conveyed to Parliament. He said further that previous to the intimation to Parliament of the route *via* George, a detailed survey had been made of the Gouritz Gorge and the line from Oudtshoorn to Klipplaas had been proceeded with under the contract of 2nd August, 1898, as a Government line, whereas the construction of the line under the contract of the 19th May, 1896, was to have been proceeded with on the basis of a subsidy line.

Mr. Solomon, Q.C., A.G., Mr. Sheil, Q.C., and Mr. Molteno, appeared for the Government.

Mr. Innes, Q.C., and Mr. Searle, Q.C., for the defendant company.

Mr. Solomon, A.G.: Act 40 of 1898, section 1, provided that the company should, on or before the 7th February, 1899, satisfy the Commissioner of Public Works that it was within their power to construct the railways mentioned in the agreement set forth in the Act; that on or before the same date the company should give security to the satisfaction of the Commissioner that it would complete the construction of such lines; and that in the event of its failing to give such satisfaction or such security, the agreement should cease and determine; and thereupon unless the company should, on or before the 7th day of February, 1899, give notice to the Commissioner that it was their intention to construct the lines under

the contracts of the Grand Junction Railways Company, it should be lawful for the Government to enter upon and take possession of so much of the lines as should have been constructed by the company, on payment to the company of the actual cost which might have been expended, or on payment of an amount to be settled by arbitration. The main question is whether security has been given for the completion of each and every line of railway mentioned in the Act to the satisfaction of the Commissioner. The Commissioner is quite prepared, if the company give security, to grant them an extension of time for having their memorandum of association altered, to give them power to construct railways, but the position is this—that no security whatever, not only “to the satisfaction of the Commissioner,” has been given for the completion of these lines of railway, and therefore several lines of railway are now being constructed by a company which has no power to do any such work under its articles of association, and which has given no security of any kind for the proper fulfilment of the contracts, while it has, as a matter of fact, no contract whatever from the Government. The security required by the Government was the retention of 10 per cent. of the construction money under the existing contracts, to be kept in hand by the Government until all the lines were completed, and an additional sum of £50,000, in a form to be approved by the Commissioner, to be lodged not later than the 7th February last. Urquhart's affidavit alleges that the terms have been complied with, but no communication has been received from the company accepting the Government terms. If they are prepared to accede even now, the Government will not stand in their way; let them lodge security which will satisfy the Commissioner, and they may go on with the work. The Commissioner will take the responsibility of accepting the security now instead of on the 7th February, as the Act provided. We do not want to stop them, but we must carry out the wishes of Parliament, and they refuse to do that. The £50,000 which was lodged was not lodged as security for the completion of the lines but as security for the alteration of the memorandum of association, and that has not yet been altered. The retention moneys amount to about £100,000, so that with the £50,000 we should have security to the extent of about £150,000 for the completion of the

railways. The company say they are prepared to give us the security on condition that we will submit to Parliament next session the question as to whether the line from Mossel Bay to Oudtshoorn should go *via* George or by the Gouritz Gorge, but they have no right to couple any condition with their security. We want proper security from them, until each and every line shall be completed. Act 28 of 1895 authorised the Government to enter into contracts for the construction of a line from Mossel Bay to Oudtshoorn *via* George, and such a contract was entered into in October, 1896, by the then Commissioner and the Grand Junction Railway Company. The later contract of the 2nd August, 1898, is set forth in the schedule to Act 40 of 1898, and the Government, in that contract (section 2, sub-section 3), agreed that the work on the Mossel Bay-Oudtshoorn line should remain in abeyance until a detailed survey had been made of the route through the Gouritz River Gorge, and, "if need be," the instruction of Parliament had been sought and obtained as to what route should be adopted. If, after that detailed survey had been undertaken, the Government thought it desirable to have the line from Mossel Bay to Oudtshoorn constructed *via* the Gorge, and not *via* George, then they would submit the matter to Parliament, but there was no obligation on the Government to do so. If, after the detailed survey, the Government were of opinion that it was better to stick to the line previously authorised by Parliament, *via* George, they could do so. That detailed survey was made along the line from Mossel Bay to Oudtshoorn, *via* the Gorge, before the last session of Parliament, and the Government decided, as they had the right, that they would not adopt that route, but would adhere to the route *via* George, so that there was no necessity to bring the matter before Parliament at all. The company now say they are willing to give the security provided the Government promise to bring the matter of the Gorge v. George route before Parliament next session, but the question is settled by the Act, and the company has no right to cumber their offer with any such condition. The company clearly do not want to make the line *via* George; that will not pay them, but they can make money on the line *via* the Gouritz Gorge. Now the Government declines to allow the company to revert to the old contract of the Grand Junction Company, because the time has

elapsed, and they have not given notice of their intention to so revert before the 7th February, as the Act directed.

Buchanan, J.: I understand they claim to go on under the old contract!

Mr. Urquhart says so in his affidavit, but he does not represent the company; the responsible people in London have not only failed to find the security, but they have deliberately accepted the lapse of the contract.

Mr. Innes: If Mr. Urquhart does not represent the company this is an *ex parte* application, and the Court would give time to allow the Thames Ironworks Company to have notice of this application. As a matter of fact Mr. Urquhart signed the contract with the Government in behalf of the company; he has been in charge of hundreds of men on the works since August; his authority so far has never been questioned, but now simply because his power-of-attorney has not arrived it is said that he does not represent the company. The company has tendered the £50,000 security, together with the retention money, and is willing to lodge the same security tomorrow. The only point between the parties is the meaning of clause 3 of sub-section 2 of the contract: has the Company the right to ask Government to take the instructions of Parliament? The contract of August 2, 1898, only provisionally cancels the contract of May, 1896, and does not cancel the contract of October, 1896, relating to the line through George. The general effect of the new contract was that the King William's Town line was to be pushed on and the George line to remain in abeyance. Then time was given to the company to have its memorandum of association altered and the strict application of section 1 of Act 40 of 1898 was waived on condition that security was given as required. The words "will duly complete" mean completion under the contract of August 2, that is, of each and every one of the lines. The security is given by the company on a condition taken out of the Act itself. We are entitled to have the matter brought before Parliament.

De Villiers, C.J.: The facts in this case are really not in dispute and the simple question to be dealt with is whether the respondent company has complied with the conditions enacted by the first section of Act 40 of 1898. The section enacts that the agreement entered into between the Colonial Government and the Thames Ironworks and Ship-building Company, dated the second day of

August, 1898, and set out in Schedule A, is thereby confirmed, subject, however, to certain conditions, which are as follows: (1) "The said company shall on or before the 7th day of February, 1899, satisfy the Commissioner of Public Works that it is within their powers as defined by their memorandum of association to construct the railways mentioned in the said agreement." Now, it is common cause that on or before 7th February the company did not satisfy the Commissioner of Public Works that it was within their power to construct the railways, nor is it even alleged that at the present day, the 7th March, a month afterwards, the company has power to construct these railways, but then it is contended on behalf of the respondent company that this condition has been waived by the subsequent conduct of the Commissioner. Now we come to the second condition: "The said company shall on or before the 7th day of February, 1899, give security to the satisfaction of the Commissioner that they will duly complete the construction of each and every of the said lines of railway mentioned in the said agreement." Well, security has been given, but that security is not that they "will duly complete the construction of each and every of the said lines." It is coupled with a condition that incorporates the third sub-section of section 2 of the agreement, which is as follows: "The Government agrees that the work on Mossel Bay-Oudtshoorn line shall remain in abeyance until a detail survey undertaken by an engineer approved of by the Government has been completed of the route through the Gouritz River Gorge, and if need be the instructions of Parliament have been sought and obtained as to what route should be adopted." It is stated on affidavit, and not denied, that a detail survey had been made by an engineer approved of by the Government, and that not only had that survey been effected, but that it was completed before the last session of Parliament. An opportunity, therefore, was given to the Government or to the company to make some application to Parliament for the purpose of altering the route which had already been decided on. I cannot lose sight of the fact that by the provisions of the Act of 1895 it had been deliberately decided by Parliament, by means of an Act of Parliament, that the railway from Mossel Bay to George was to go by way of George, and in order to alter that route it was necessary to make an applica-

tion to Parliament. No such application has been made, and there is even a statement by the Commissioner that Parliament was informed that the route by way of George would remain. Its exact terms are: "The deponent says that the Government of the Colony having determined that the route from Mossel Bay *via* George shall be constructed, and that determination having been conveyed to Parliament." That being so, it is impossible to contend now that the company is entitled to ask that this work should remain in abeyance until further instructions have been obtained from Parliament. An opportunity has already been given Parliament to say whether the route should be altered, but as Parliament has not so decided, the presumption is that that route is to remain. I confess that I do not see how it is possible for the respondent company to take advantage of the third sub-section of section 2. Then there is the further condition that in the event of the company failing to give the Commissioner the satisfaction required in sub-sections 1 and 2 "the agreement in Schedule A shall cease and determine, and thereupon, unless the said company shall give notice to the said Commissioner on or before the 7th of February, 1899, of their intention to construct the railways mentioned in the said agreements under the contracts with the Grand Junction Railway Company (Limited) mentioned therein, it shall be lawful for the Governor to enter upon and take possession of so much of the said lines of railway as have been constructed by the said company upon payment to the said company of the actual cost which may have been expended upon the said lines of railway, or upon payment of the amount of a valuation to be fixed by arbitration under the Land and Arbitration Clauses Act, 1882, less the amount of any sum or sums advanced to the said company on account of the said railways." A further question raised is whether the company has given notice to the Commissioner on or before February 7, 1899, of their intention to construct the railways mentioned in the contract. Mr. Urquhart, in his affidavit, states that he is prepared to go on with the construction of the railways, but that statement is inconsistent with the telegraphic correspondence, which shows that Mr. Hill, the chairman of the company, is not prepared to construct the railways. That condition, therefore, has not been complied with, and now the ques-

tion is whether the Court shall grant the interdict applied for, which is to restrain the company from proceeding. Clearly the Act of Parliament leaves the Court no choice. It is not for the Court to comment upon the policy of the Act. There is the Act which gives the Government the power to enter upon the railways, and if the company stands in the way of the Government taking possession, the Government has no other course than to come to the Court. The Court must therefore grant the interdict as prayed, but as there is still a possibility of some arrangement being arrived at, the Court will suspend the operation of the interdict for seven days from this date. The order will therefore be granted with costs to be suspended for a period of seven days.

Buchanan, J., in concurring in the judgment, pointed out that it was better that it should be clearly understood that it was for the Government to decide which was the route to be proceeded with, and that that was not a subject for mutual agreement between the company and the Government.

Maasdorp, J., also concurred.

The order made was as follows: The order to be granted as prayed, the said order to take effect upon such payment as the Government shall find to be the actual cost which has been expended upon the railways, without prejudice to the company's claim for a higher sum: the execution of the order to be suspended for seven days.

[Applicants' Attorneys, Messrs. J. & H. & Nephew; Respondents' Attorney, Gus. Trollip.]

#### JOSEPH'S EXECUTORS V. PARKIN AND OTHERS.

##### Common passage — Obstruction — Prescription.

This was an action for a declaration of rights. The plaintiffs—the trustees of the Guardian Assurance and Trust Company—were the executors in the estate of the late Morice Joseph, of Port Elizabeth, who died on December 21, 1894. Morice Joseph in his lifetime was the registered owner of certain property known as Lot D in Jetty-street, Port Elizabeth, and that property is still registered in his name. By the will of the late John Parkin Lot G, a portion of the same erf, was bequeathed to four of his

children, and in the will there was a clause that upon the death of the longest living transfer should be passed to the issue of all of them as fiduciary heirs. A certain share of a deceased heir had been sold to another person, and he and all the other heirs joined in the defence. At the date of the subdivision of the erf—about 1827—a certain passage was laid down between D and G, and this was reserved as common to the proprietors of the two lots. This passage was six feet wide. Since then it had been used by the said proprietors as a common passage, but it was alleged that in 1886 the defendants obstructed the passage by a barrier, and in September, 1894, still further obstructed the passage. The plaintiffs therefore asked for an order declaring that they were entitled to the free use of the passage, and further for an order compelling the defendants to remove such obstruction. In their plea the defendants denied that the passage had been used as a common passage, and said that since 1864 the defendants and their predecessors had had the sole use of the passage. From the year 1864 a portion of the passage had been built upon, and used as a stable, and since 1879 another portion had been built upon, and let as a fruit-shop, while in September, 1898, certain repairs and alterations were made to that shop. The defendants contended that they had by prescription acquired the sole right to the said passage, and that they had the right to erect and maintain the said buildings.

Mr. Innes, Q.C. (with whom was Mr. Close), appeared for the plaintiffs.

Mr. Searle, Q.C. (with whom was Mr. Uppington), appeared for the defendants.

The onus of proof resting on the defendants

Thomas Parkin, living at Port Elizabeth, one of the defendants in the case, said he was one of the heirs under the will of the late John Parkin, and amongst the property was the Lot G, situated in Jetty-street. He had known Lot G since his earliest youth, and at one time had lived on it himself. As long as he had known it, there had always been a gate at the Jetty-street end of the passage. That was for considerably more than thirty years. The gate had always been under the control of the Parkins. At the back of the passage for as long as he could remember there had been a stable. There was a small covered passage there which had been made last year. That was

made by a tenant. Three shops on Lot G had been continuously let for more than thirty years.

By De Villiers, C.J.: He could not tell who put up the gate. It had been there as long as he could remember.

Examination continued: There used to be a bar on the gate, but between 1881 and 1882 one of the tenants put a lock on the gate, and since then that had been used. With the exception of a few months in 1880, when he was out of the Colony, witness had had control of the letting.

Cross-examined: Witness had been at sea nine years and three years at the Diamond Fields. He was now fifty-two years of age, and when he went to sea he was sixteen years of age. He was away during part of the seventies. Witness knew that Benjamin had been for a long time the lessee of the plaintiff's property, but he would be surprised to hear that Benjamin had a key. The stable at the back of the lane had always been there. About 1864 a man named Steyns had used it as a stable. It was not until 1881 that any other building was erected in the passage.

By De Villiers, C.J.: Until 1881 the defendants used that lane for printing photographs.

Cross-examination continued: He had never known anyone except themselves use that lane. They had never turned anyone out of the lane, because they never saw anyone there. The structures in the lane were all of wood and iron.

Re-examined: There was no key of the place in Benjamin's time. There was no exit from Joseph's place into the lane. There were two windows looking out on it. These had iron bars.

William H. Beldon, a bootmaker, living in Mr. Parkins's property, said that he rented a portion of the property in 1864, and in 1866 came to reside in it. He had lived in the middle portion. The gate at the passage was then there and he had control of it, putting up the bar in the gate at night. He had sole control of that gate, no one ever interfering with him. He lived in that property until 1875. There was a stable at the end of the passage, which witness sometimes used. No one else used it. There was no access to the lane from Joseph's property.

Cross-examined: He took the bar down in the daytime. So far as he was aware there was no key. Witness could not say whether there was a door from the lane into the stable.

Re-examined: There was a door to the stable facing the Jetty-street end. The photograph produced was about 1871 or 1872. It was about the time Roebuck's Company were at Port Elizabeth.

By De Villiers, C.J.: The gate was kept open in the daytime to allow witness's workpeople to enter.

In answer to Mr. Innes, witness said he could not remember any workmen with ladders using the passage to repair Jacobs's house.

Joseph Beldon, a son of the last witness, gave corroborative evidence.

By De Villiers, C.J.: Witness considered the lane to belong to his father as lessee. The lessees of Joseph's place never to witness's knowledge made any claim to the lane.

Charles William Smart, a photographer, said that in December, 1875, he went into occupation of the premises in which Mr. Beldon had resided. Witness had used the lane for printing photographs. Witness never heard of any claim made by Joseph to the lane. Witness used to keep the gate barred day and night.

Cross-examined: Witness never used the gate except to take in cases of material. There was a bar on the inside, but so far as witness knew, no key.

Alfonse Mossot, a barber in Port Elizabeth, and the occupant of the centre shop in defendant's premises, said he first commenced his occupation in 1880. Witness sublet a portion of the lane to a man who kept a newspaper stall. Witness had roofed the lane over. Afterwards he let it to Chitty as a fruit-store, the latter erecting the store. There was also a sort of refreshment-room there. Chitty at first paid witness 30s. a month rent, afterwards £3. Then another Indian, Sammy, took it, and paid witness £5, which was afterwards increased to £10 a month, the present rental. That was for the passage. There used to be a bar on the gate, which Sammy took away, and had one-half of the gate made so that during the daytime it could be taken away and replaced at night. Witness always regarded the lane as the Parkins's property.

Cross-examined: In the passage, 6 feet wide, there was a room with little round tables. The Indian who had the store slept in an adjoining room. Witness had never seen any repairs being made on the adjoining property in the lane.

Philip Ernest Wrangmore, an architect practising in Port Elizabeth, deposed that in



September last year he was called in by Sammy in order to execute certain alterations in the passage. Witness gave evidence as to the buildings then existing there. The work that was executed cost £98. There was no obstruction to the light of the windows looking into the lane; in fact, the arrangements gave a better light. Beyond a question about a beam going into the wall, which was removed, no objection was made to those buildings going up.

Cross-examined: Witness was not instructed to give Joseph's windows more light. That was his own idea.

Kay Sammy, a fruit-dealer at Port Elizabeth, deposed that he came from India in 1882, and he then leased the passage from Mr. Mossot, and had occupied it ever since. There were two shutters to the lane, which witness closed every night, and kept open in the daytime to sell fruit. He had paid rates on the property ever since he occupied it, and no one had ever interfered with him in his occupation. He had alterations made last year.

Cross-examined: Witness could not say whether anyone ever used the lane for repairs or used his roof for that purpose.

Vincent Harris deposed that he had used the passage along with Chitty between 1881 and 1882. It was then used as a fruit store. Chitty put the lock on the place. Before then there was no lock.

This closed the defendant's case.

Robert Ponsonby, a plumber at Port Elizabeth, deposed that he was forty-seven years of age, and he had for twenty-six years been repairing properties for the Guardian Company. On Benjamin's property witness first began doing work in 1870. He had repaired the spouting from the lane. He got a key from Benjamin and opened the gate and took his ladders in. He was positive the lane was open from back to front, for he took his ladders through to the back of the property without taking them down. There might have been a small portion of the stable. There was no roof on the lane in 1881, but it was there when witness came back from Graaff-Reinet in 1883. He had then used the roofs of the sheds for his ladders. He got in from the stable side, and took some of his ladders out through the Coolie's store. When witness used the passage twenty-two or twenty-three years ago no objection was ever made.

Cross-examined: Witness was positive he had used the lane, notwithstanding what other witnesses had said.

Janse Jacobs, now working for the Municipality at Port Elizabeth, said that for many years he was storeman to Mr. Benjamin, and during all that time he had the store next to the Parkins's property. That was from 1869. There was a gate of planks between the properties. They sometimes used the lane for storing things. Mr. Benjamin had a key to the gate, and witness used that. They could get small things right through the lane from Jetty-street to the lane at the back.

Cross-examined: There was another lane between Benjamin's and Keytel's property which they could use, but they did not do so. There was nothing obstructing the lane from Strand-street side. He did not know when the stable was erected there.

Thomas Middleton, a feather merchant of Port Elizabeth, said that in 1874 there was a gate at the end of the passage in question. He had known the gate to be open, and had passed through it himself. He could only remember seeing work going on in the passage on one occasion.

After Mr. Innes had addressed the Court for the plaintiff,

De Villiers, C.J., said: The defendants have to prove that they had a prescriptive right to do what they have done, and in order to prove this they have called several witnesses, who swear positively that since 1864 up to 1898 defendants' tenants have occupied this passage continuously as part of the premises belonging to them. Mr. Beildon, who came there in 1864, states that he exercised exclusive control over the passage, and that he had an entrance to this passage. In the face of this evidence, it would be impossible to hold that no right by prescription has been proved, simply because two witnesses for the plaintiffs say that Mr. Benjamin had a key, and that that key gave admission to this lane. That does not prove, even supposing it did give access to the lane, that the actual possession was that of the tenants of the plaintiff. One witness (Mr. Ponsonby) states that he on two or three occasions obtained admission to this lane by means of a key obtained from Mr. Benjamin, but his evidence is somewhat contradicted by the photograph produced, from which it is impossible to discover any trace of a padlock or a key. I am quite satisfied that when that photograph was taken there was no padlock or key on the outside, and it is quite possible that Mr. Ponsonby may be mistaken, and that having a great many

other cases to attend to he has mixed up this particular case with others. Now his evidence cannot weigh against the evidence of the people who have actually stated what took place there. Mr. Benjamin and all the others have stated that the gate was closed by a bar on the inside, and that it was only opened in the morning for the purpose of being used by servants, and that afterwards when the photographer occupied it, it was open during the day. Then we have the evidence of Jacobs, who also stated that a key was kept by Mr. Benjamin, but this evidence does not carry the case any further, because he repeatedly stated that Mr. Benjamin never used this key after 1874. The plaintiff seems never to have objected to the building of a house with a roof over the way, but used this roof for the purpose of making some repairs to his property. I think that this showed on the part of the complainants a recognition of the right of the building to be there. It is not necessary for the Court to go into the question of lights. It is quite possible that the plaintiffs might then set up a case that the prescriptive right did not go further than the right of occupation, and that if the plaintiffs did not object to the roof being placed there so long as it did not obstruct their lights, it did not follow that when the roof was further extended so as to obstruct their lights they would not object. Judgment will be for the defendants with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiffs' Attorney, Gus. Trollip; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

WILLOUGHBY'S CONSOLIDATED COMPANY V. A. D. PENNANT AND CO. } 1899.  
DATED COMPANY V. A. D. } March 8th.  
PENNANT AND CO. } " 13th.

Contract — Construction of — Recital in written contract.

*The defendant company being the owner of certain farms employed the plaintiffs to cut fuel and timber on the land. A written contract was executed which, after reciting that the company was engaged in mining operations and required supplies of fuel and timber for mining purposes, stipulated that the plaintiffs should cut fuel and timber in certain lengths in consideration of certain payments to be made for such cutting.*

*Held, that in the absence of anything in the operative part of the contract showing the quantity to be cut, the recital might be referred to for the purpose of ascertaining the purposes for which the fuel and timber were required and the quantity which the plaintiffs were justified in cutting.*

This was an appeal from a judgment by Mr. Justice Vincent in the High Court of Matabeleland in an action in which the plaintiff, now respondent, claimed the sum of £4,500 from the defendant company as damages for breach of a contract entitling the plaintiffs to cut certain timber on the property of the defendant company.

The plaintiffs' declaration was as follows:

1. The plaintiffs are a firm of general agents and brokers carrying on business at Bulawayo under the style or firm of A. D. Pennant & Co. The defendant is a company duly incorporated in England, and carrying on business at Bulawayo and elsewhere in the territory of Rhodesia.

2. In or about the month of April, 1898, and at Bulawayo aforesaid, the plaintiffs entered into a certain agreement with one

Herman Melville Heyman, the managing director of, and acting for and on behalf of, the said defendant company, by which agreement the plaintiffs undertook to cut certain wood and timber for the defendant company, and the defendant company agreed to pay the plaintiffs certain sums of money for the cutting and stacking of such wood and timber. The terms of the said agreement are more fully set out in the copy of agreement hereunto annexed and marked "A," and which the plaintiffs crave may be considered as inserted therein.

3. The said agreement was to continue for a period of six months, and in pursuance of such agreement, and for the purpose of carrying it out, the plaintiffs engaged a large number of natives to cut and stack the said wood and timber, and also a number of Europeans to superintend and look after the said natives in their work, and made large and extensive purchases of tools and plant.

4. The plaintiffs duly proceeded to carry out the said contract, and have at all times been ready and willing to do so, but on the 9th day of July, 1898, the defendant company wrongfully and unlawfully and without probable cause cancelled and broke the said contract.

5. By reason of the aforesaid wrongful and unlawful breach the plaintiffs were compelled to dismiss from their service the aforesaid natives and Europeans, and had to pay them considerable sums of money in lieu of notice, and lost largely by being compelled to sell their tools and plant at a loss, and have suffered further and other damage by the aforesaid wrongful and unlawful breach.

6. The plaintiffs have at all times been ready and willing to fulfil the said contract, and suffered damage by the said breach in a total amount of £4,500, for which they are now entitled to sue.

Wherefore the plaintiffs claim judgment: (1) For the sum of £4,500 as and for damages sustained; (2) with alternate relief; (3) costs of suit.

*Annexure A.*

An agreement made at Bulawayo the — day of April, 1898, between Willoughby's Consolidated Company (Limited), by Herman Melville Heyman, the managing director thereof (hereinafter called the company), of the one part, and Algernon Douglas Pennant and George Michael Isaac, carrying on business in co-partnership

under the style or firm of A. D. Pennant & Company (hereinafter called the contractors) of the other part:

Whereas the company is engaged in mining operations in the Selukwe district and require supplies of fuel and timber for mining purposes: And whereas the company is the owner of certain farms in the same district whereon there is growing timber suitable for fuel and mining timber: And whereas the contractors have agreed with the company to cut and stack timber in accordance with the terms and conditions hereinafter mentioned: Now therefore these presents witness:

1. The contractors shall cut wood suitable for fuel in lengths of 3 feet 6 inches, and at least 3 inches in diameter, and stack the same as cordwood, each cord being 8 feet by 4 feet by 4 feet (8' x 4' x 4'). The contractors shall not cut saplings less than 3 inches in diameter.

2. In consideration of such cutting and stacking, the company shall pay to the contractors the sum of 5s. per cord.

3. The contractors shall cut mining timber according to the following conditions: The timber shall be all of the kind known as Mahobo-hobo. The poles shall be more than four feet six inches (4 ft. 6 in.) in length, and at least five inches in diameter at the thin end, and shall be cut in the longest lengths that the nature of the timber will permit. The poles to be absolutely straight and suitable for mining. The contractors shall bark the poles and stack them.

4. The company shall pay the contractors for such mining timber at the rate of 1½d. (one penny farthing) per running foot in respect of poles up to 8 in. (eight inches) in diameter at the thin end, and 1½d. (one penny halfpenny) per running foot in respect of poles in excess of that measurement.

5. The contractors shall cut poles suitable for lagging, at least three inches in diameter at the thin end, and not less than five feet in length and bark and stack the same. The company shall pay the contractors for such lagging at 1d. (one penny) per running foot.

6. The company shall once in each calendar month measure all the wood cut and stacked by the contractors, and on receipt of such measurements in Bulawayo the company shall pay the contractors in Bulawayo the amount found to be due to them.

7. The contractors shall be entitled to the right of grazing oxen, and of erecting huts

for their native servants required for the purpose of carrying out this contract on the said farms free of charge.

8. The period of this contract shall be six calendar months from the date of execution.

9. The contractors shall cut the wood on such farms and at such places on each farm as may be indicated by the company.

10. If the company are desirous of giving out a contract for the transport of any wood cut by the contractors, the contractors shall have the preferent right to such contract at the lowest price offered by any other person or persons.

11. No stack of cordwood will be measured by the company for payment unless the packing of the same be approved of by the company, and each stack shall have the letter "W" painted in a prominent position on the stack.

Thus done and executed at Bulawayo on the day of the date first mentioned.

The plea was follows :

1. The defendants admit the allegations in paragraph 1 of the declaration contained.

2. In answer to paragraphs 2, 3, and 4, the defendants admit the execution of the said agreement, but say further that the quantity of timber to be cut thereunder was to be limited to such quantity as might be required for fuel and timber for mining purposes by the defendants for their mining operations in the Selukwe district, and that prior to the said 9th day of July, 1898, the plaintiffs had cut sufficient quantity of timber for the purposes, and had thereby performed and completed the said contract.

3. In answer to paragraphs 5 and 6, the defendants deny that the plaintiffs have suffered the damages alleged, or any damage, and say that if the plaintiffs have suffered any damage, such damage was not caused by any breach of contract or other wrongful act done or committed by the defendants.

Wherefore the defendants pray that the plaintiffs' claim may be dismissed with costs.

The replication was general.

The correspondence between the parties showed an offer of £400 by the defendants in satisfaction of the expense to which the plaintiffs had been put in getting rid of labourers in their employ.

After hearing the evidence, judgment was given for the plaintiffs for £1,000 and costs.

The following reasons were forwarded by the learned judge: In this case I was of opinion that the construction attempted to be placed upon the contract by the defendant company was not correct. I held that there was a distinct breach and that the defendant company was liable for damages flowing from such breach. In estimating the damages with respect to the cutting I was of opinion that the plaintiffs' estimate of wood likely to have been cut was far too extravagant. It appeared to me that plaintiffs would not have been able to have kept up the large staff of native labourers they had when they were told to cease cutting in consequence of the scarcity of obtaining labour during the months following. I therefore arrived at the conclusion that £1,000 would fully meet the justice of the case. In amplification of my reasons I annex hereto typed copy of my judgment (with a few corrections) as reported in the "Bulawayo Chronicle."

*Revised copy of report of judgment in "Bulawayo Chronicle."*

His lordship said that in this case the plaintiffs sued the defendant company for the sum of £4,500 by way of damages for alleged breach of contract. It appeared that on the 19th April last plaintiffs and defendants entered into a contract for the cutting of wood for fuel, mining timber, and other mining wood known as "lagging." The contract to cut wood was to last for a period of six months, and the cutting was to take place on such spots and on such farms belonging to defendant company as might be pointed out by the latter to the plaintiffs. As his lordship understood the evidence, plaintiffs commenced cutting wood on a farm pointed out by the defendants on the 8th May, and continued cutting on that farm till 11th July. One of the terms of the contract was that the wood cut should be stacked and payments made monthly after such stacks should have been measured up. Two payments were made, and when at the end of June or beginning of July the accounts came in, it was discovered by the defendant company that a much larger quantity of wood had been cut than what they anticipated would be cut by the plaintiffs during the course of the contract. Then an interview took place between Mr. Isaac and Colonel Spreckley, one of the managers of the defendant company, and an attempt was made by the parties to come to an amicable arrangement. Colonel Spreckley told Isaac that in the opinion

of the company the plaintiffs were employing too large a number of boys on the farm cutting wood, and that it had not been anticipated that such a large quantity of wood would have been cut in such a short time, and that no provision had been made by the defendant company on the estimates to meet such very large monthly accounts. Some correspondence then passed between the parties, and during the course of such correspondence, viz., in one of Colonel Spreckley's letters, it seemed that in the mind of the defendant company there was some impression that the plaintiffs were standing on their rights under their interpretation of the contract. Further correspondence took place, and as the parties could not come to an amicable arrangement, the defendant company gave notice to the plaintiffs that the contract must be considered cancelled. The consequence of that cancellation was the present action. Plaintiffs sued the defendants for £4,500 for damages for breach of contract, they alleging that under the contract they had the right of cutting wood at such spots on such farms as the defendants should point out. A spot was pointed out, and the wood at this particular spot would have kept them at work fully until the expiration of the contract. Defendants in their plea said that according to their interpretation of the contract a sufficient supply of wood had been cut for mining purposes, and contended that the contract had really been performed, although really only two months had elapsed. During the hearing of the case some evidence was led with a view to showing that it was understood by the parties, previous to the signing of the contract, that the requirements of the company were only for a six months' supply for the mines, and that from 6,000 to 7,000 cords of wood would have been necessary for the company. Now in dealing with the interpretation of a written contract, one must first of all look at the contract with a view to ascertaining whether it is clear in its terms, and it was only when there is an ambiguity that it is possible for the parties to lead evidence to show what was the real intention. Looking at the contract, it seemed to his lordship that it was impossible to show that the intention of the parties as to the amount of wood cut, should only be such as was required for a six months' supply. During the course of cutting and after the expiration of one month the plaintiffs were

still told to go on cutting on that belt, and it seemed to his lordship, therefore, that the plaintiffs' contention was a very fair and sound one, that no evidence can be adduced to explain or vary the terms of the contract—in short, that there was no ambiguity. That being so, his lordship had to determine whether there had been a breach of the contract, and it was perfectly clear to him that there had been. It seemed to his lordship that the action of the defendants themselves in making a tender of £400 was practically an admission that the rights of the plaintiffs had been prejudiced under the contract. Then the only question to be decided was that of damages. His lordship must at once say that the claim for damages set up by plaintiffs, viz., £4,500, was exorbitant. It seemed to him perfectly clear that the effect of the contract was, "you (plaintiff) undertake to cut wood for a period of six months at such spots and on such farms as may be pointed out by us (defendants)." From the evidence led, it appeared that a large belt was pointed out to the plaintiffs, and they were told to go on cutting in this direction pointed out, for a distance of something like six miles. In determining what quantity of wood was likely to be cut by the plaintiffs during the remaining three months, one must look at the surrounding circumstances. Mr. Cotton had said that one boy could cut about two-thirds of a cord per day. His lordship did not agree with him; he had himself taken the trouble to go into some calculations on the matter, and found that during the time the plaintiffs commenced working to the time they ceased—two months—they had cut about 12,000 cords of wood, an average of about 6,000 per month. They had 600 boys at work. On looking at the list put in by Mr. Driver, his lordship found that the greater number of those boys would have probably left the plaintiffs' employ some time at the end of July, and from the evidence there would have been some difficulty in keeping up that number. Taking all the probabilities of the case into consideration, his lordship did not think that it was likely that the plaintiffs would have been able to keep up that average till the end of October. Mr. Isaac had told the Court that he estimated the profits on the cutting during the four months at £200 per week, equal to £800 per month. His lordship accepted that *cum grano salis*. It was always difficult for the Court to arrive at an estimate of damages,

He had arrived at this conclusion. Plaintiffs would have derived a profit of a certain amount, and he considered that an estimate of 30 per cent. was a very fair margin of profit on the remaining three months. With regard to the wages, plaintiffs were entitled to something like £30 or £40 for wages paid in consequence of their having to pay their employees in lieu of notice. As to the tools it was not clear to his lordship's mind that the plaintiffs were entitled to anything. Therefore (a) there had been a breach of contract; (b) plaintiffs were entitled to damages; and (c) £1,000 damages and costs would fairly meet the case.

Both parties appealed from this judgment.

Mr. Searle, Q.C., and Mr. Close appeared for the defendants in the original action.

Mr. Innes, Q.C., and Mr. Howel Jones appeared for the plaintiffs in the original action.

Mr. Innes said that the plaintiffs did not intend to proceed with the appeal noted by them, but merely appeared to oppose the appeal lodged by the defendants.

Mr. Searle: The contract must be construed reasonably. On its true and fair interpretation only so much wood should be cut as might be required by the defendants. The damages awarded are too high. A reasonable construction as to how much should be cut is the amount required for six months: if the plaintiffs stopped cutting and defendants sued them that is the construction which would be placed upon the contract. The evidence shows that the plaintiffs were told that only six months' supply was wanted. The defendants practically availed themselves of the protection afforded them by the ninth clause of the contract, in that they stopped the cutting and refused to point out any fresh places for cutting. The amount allowed as damages is apparently based on the supposition that the plaintiffs would be able to employ two hundred boys to the end of the period, but apparently they would not be able to get that amount of labour after the end of July.

Mr. Innes: The defendants clearly required wood not only for present use but for storage: they did not want the miners to cut the wood at Government prices. Other claim-holders had the right of cutting under the Rhodesia Mining Ordinance, No. 1 of 1895, section 60. Having once pointed out the place for cutting and authorised the plaintiffs to cut there they could not revoke the

authority. The contract is in the plaintiffs' favour, but the amount to be cut was not limited purposely because the defendants knew that they would always cut as much as was wanted. The defendants have not revoked the order to cut at the particular places pointed out: they have cancelled the contract. Their offer of £400 is not consistent with the legal position taken up on their behalf. *G. N. Ra. Co. v. Witham* (L.R.C.P. 9, p. 16); *Bealey v. Stuart* (7 H. & N., p. 758).

Mr. Searle in reply.

*Postea* (March 13th).

Judgment was delivered.

De Villiers, C.J., said: This is an appeal against a judgment of the High Court of Rhodesia, whereby a sum of £1,000 was awarded as damages against the defendant company for breach of contract. The contract is in writing, and recites that the company is engaged in mining operations in the Selukwe district, and requires supplies of fuel and timber for mining purposes; that the company is the owner of certain farms in the same district, whereon there is growing timber suitable for fuel and mining timber, and that the contractors, that is the plaintiffs, have agreed to cut and stack timber in accordance with the terms and conditions thereafter mentioned. The contract then proceeds to enumerate the different kinds of timber and fuel to be cut, and the prices to be paid for the cutting and stacking, but it is silent as to the quantity to be cut. The 8th clause, however, provides that "the period of this contract shall be six calendar months from the date of execution," and the 9th clause provides that "the contractors shall cut the wood on such farms, and at such places on each farm as may be indicated by the company." The contract was entered into in April, 1898, and the plaintiffs, without any delay, obtained the plant and entered into contracts with others to cut the wood for them. Among the persons who thus obtained an interest in the original contract was one Cotton, who saw Allwright (the manager) and was told by him to cut along a certain line. Afterwards Cotton saw the defendant company's ranger, Storrier, who told him to cut to the south-east beacon and across to the Dunraven mine. A great number of labourers, over 500 in number, were employed, with the result that within two months the plaintiffs had cut more fuel and timber than the company could use

during a period of six months. Cotton himself seems to have entertained a serious doubt as to whether the contract justified him in proceeding at that pace. 'I met Allwright again,' he says in his evidence, "and I told him I was cutting 700 cords a day. This was a wrong statement, but I said so as I wanted to find out whether he objected to such a large quantity being cut." Allwright then told Cotton to go on, but in July, when the manager of the defendant company discovered that sufficient wood for a six months' supply had been cut in two months, at a cost to the company of £2,000 a month, he objected to the contract being carried out in this manner. The plaintiffs maintained that they were acting within their rights, and the consequence was that on the 9th July the defendant company's attorneys informed the plaintiffs that "a sufficient quantity of firewood and mining timber to meet their requirements for some time to come having been cut and stacked, they have decided to cancel the contract." The plaintiffs thereupon brought their action for £4,500 as damages, being the profit which they would have made if they had been allowed to carry out the contract according to their construction of it during the full period agreed upon. The defence raised by the plea was that "the quantity of timber to be cut under the contract was to be limited to such quantity as might be required for fuel and timber for mining purposes by the defendants for their mining operations in the Selukwe district, and that prior to the 9th of July the plaintiffs had cut sufficient timber for the purposes aforesaid, and had thereby performed and completed the said contract." The learned judge held that there had been a breach of contract for which the defendant company was liable in damages, but he considered the amount claimed to be exorbitant by reason of the scarcity of labour during the months following July. He accordingly awarded the sum of £1,000 as damages. If the learned judge was right in taking as the measure of damages the profits which the plaintiffs could have made under the contract as construed by them for the period which it still had to run, I confess I see no sufficient reason why he should not have awarded the full sum claimed. He held that the scarcity of labour after the 9th of July would have prevented the plaintiffs from making a profit at the same rate as before that date, but the plaintiffs themselves had

anticipated no difficulty in obtaining the necessary labour. The Native Commissioner, who gave evidence for the company, stated that he supplied 655 boys altogether, and that he could get no boys after July. He added that at the end of September all the boys he supplied would have left. But by the end of September the term of the contract would very nearly have expired, and the plaintiffs would have earned all the profits which they could make according to their reading of the contract. The construction placed upon the contract by the plaintiffs, and apparently adopted by the learned judge, is that, as no limit was expressly placed on the quantity of timber and fuel to be cut, the plaintiffs were entitled to cut as much or as little as they pleased. They employed over 500 labourers, but if they had employed 6,000 instead they would, according to this view, have been entitled to cut as much wood as that number of men could fell and cut up during a period of six months. In this court, however, plaintiffs' counsel admitted that there was a limit to the quantity which they could claim to cut during the six months, provided only that limit was indicated by the company under the ninth clause of this contract. His contention was that the company could indicate as large or as small an area as it chose, but that so soon as the company had indicated any area and the plaintiffs had acted on such indication there arose a binding contract entitling the plaintiffs to cut down as much wood as they could within that area during the continuance of the contract. The fact that such an area was pointed out might affect the question whether reasonable notice was required from the company before pointing out another area, but it did not, in my opinion, place it out of the power of the company to alter the site. If the plaintiffs had not altered their condition in any way in consequence of such indication, the company could legally have indicated another place without previous notice. The plaintiffs were to cut wood at such places as might be indicated by the company. Mr. Innes says that as soon as a place has been indicated and not objected to, the company can no longer alter it. It appears to me to be a more reasonable construction that the company might from time to time indicate the places where wood was to be cut, and that they might from time to time change the site, giving, however, reasonable notice in those cases in which the plaintiffs had

altered their condition by reason of the previous indication. The present legal position of the company appears to me to be no worse, at all events, than it would have been if the 9th clause had been omitted from the contract altogether. In that case the plaintiffs would have had all the defendant company's farms in the Selukwe district to cut wood upon, but the question would still have remained whether there was to be no limit to the quantity which they could legally cut. The managing director stated, apparently without any objection being raised to the admissibility of the evidence, that he gave the plaintiffs to understand that he wanted a six months' supply of fuel and timber for the mines. More evidence to the same effect was tendered, but was held to be inadmissible. The learned judge was right in holding that the contract should speak for itself, but he appears to me not to have attached sufficient weight to the purposes for which the fuel and timber were required as disclosed by the contract. The instrument should be read as a whole, and should receive a reasonable construction with due regard to the relative positions of the parties and the requirements of the defendant company. The contract expressly recites that the company is engaged in mining operations in the Selukwe district, and requires supplies of fuel and timber for mining purposes. If the company had, immediately after entering into the contract informed the plaintiffs that a definite quantity of fuel and timber would be required every month for mining purposes, the plaintiffs would clearly not have been entitled to cut or claim payment for more than that quantity. In the absence of any indication in the operative part of the contract of the exact quantity required the recital may fairly be referred to for the purpose of ascertaining the real intention of both parties to the contract. The company did not, in fact, inform the plaintiffs of the quantity required, but allowed them, during the first three months, to cut down wood beyond their probable monthly requirements. Suddenly, in discovering that the supply was far in excess of the probable demand, the company cancelled the contract, which still had fourteen weeks to run. Its proper course would have been to give notice to the plaintiffs to cut in future only such a quantity per week or per month as would supply the probable weekly or monthly requirements. The

measure of damages, therefore, for the company's breach of contract is the profit lost to the plaintiffs by reason of this course not having been adopted. The monthly requirement of cords of firewood appears to be about 800, and therefore for the fourteen weeks the requirement would have been about 2,000. The profit on this quantity would have been £225, being at the rate of 2s. 3d. per cord. It is not clear what the requirement for mining timber or the profit thereon would have been. The chief profit seems to have been on the cutting of wood for fuel, and we may take it that the profit on the mining timber required for a fourteen weeks' supply would not have exceeded £175. It lay upon the plaintiffs to prove their damages upon the basis which I have pointed out, but as the defendants are prepared to abide by their original offer of payment of £400, the amount awarded will be reduced to £400. To this extent the appeal will be allowed with costs in this Court, and judgment will be entered for the plaintiffs for £400. The defendants, not having adhered to or pleaded their tender, must pay the costs in the Court below. Upon the question of damages it might be necessary to take further evidence. Of course it lay upon the plaintiffs to prove their damages, but if they were to consent to estimate further damages at £175 that would make £400, which was the amount originally tendered by the company.

Buchanan, J., said: I think we may take out the various parts of the contract to understand what was the intention of the parties thereto. The contract on first reading certainly seems very one-sided. It is a contract to cut timber for six months at a certain specific price. No limit is given, but I think that the limit must have been understood to have been such supply as the defendant company should require, and I think the defendant company also protected themselves to a still further degree, in that they could limit the supply to what their requirements were. I am prepared to go further than the Chief Justice, and say the company had the sole power to determine the quantity to be cut, unless, of course, they fixed such an amount as was manifestly unjust and out of the consideration of the parties. This being the case, the learned judge in the Court below was mistaken in the basis upon which he should have estimated the damages. The damages should have been awarded because the company, without legal ground, cancelled the



contract. The contract was a binding contract for six months, and was to have held good for that time. The amount of damages appears to have been measured by the amount of wood that could possibly have been cut by the plaintiffs, but it ought to have been the amount of wood likely to have been reasonably required by the plaintiffs during the contract time. The tender of £400 had been withdrawn, and consequently that could not be taken as a basis. I am willing to adopt his lordship's suggestion that the amount of damages should be reckoned upon the ordinary monthly requirements for the period of the contract; the Chief Justice suggests £400, and that amount seems to me a reasonable amount. With reference to the matter of appeal, I have had frequent cause to point out that the rules of the Court require that purely formal documents, such as sheriff's notices, &c., should be omitted from the documents printed. In this case the rule has been disregarded, and every little document in the whole case has been printed.

Maasdorp, J., also concurred. He said: The plaintiffs in this case claim the right to cut upon a certain portion of the defendants' farm as much wood and timber as they are able to cut during the period of six months, and to receive from the defendants, in remuneration for their services, certain payments in accordance with the tariff specified in the agreement. The defendants dispute this right, and contend that the fuel and timber cut by the plaintiffs was to be limited in quantity to their requirements for mining purposes, and that when such limit was reached they were entitled to stop further work by the plaintiffs. The question therefore arises whether the quantity of fuel and timber which the plaintiffs had a right to demand, and the defendants were entitled to supply and charge for, was fixed by the contract. Upon reference to the stipulations and conditions of the agreement, I think it will be found that they furnish no clear and certain answer to this question. The eighth clause of the contract limits the period for which it is to run to six months, but it has been found, and it may have been anticipated when the agreement was made, that this time limit affords no guide as to the quantity of fuel and timber to be supplied. By increasing or diminishing the working power employed by the defendants the supplies could be enormously increased, or reduced to next to nothing during the

specified six months. It may be asked, with what object was this time limit introduced if it has not a direct bearing on the question of quantity? I should say that what was intended was that during this period the plaintiffs placed their services at the disposal of the defendants, and the defendants agreed to avail themselves of those services whenever they might require them under the contract. That still leaves the question of quantity open. Clause 9 of the contract contains the condition that the plaintiffs shall cut the wood on such farms and at such places on each farm as may be indicated by the company. It is argued that we have here an indication as to the manner in which the defendants could limit the production of fuel and timber, and that if they failed to take advantage of the means of doing so, they left the plaintiffs a free hand. But for my part, I do not think that that was in the contemplation of the parties when they made the contract. The defendants by that clause reserved a right by which they might prevent the plaintiffs from injuring their property, or might get the wood cut in localities conveniently situated with respect to their mines, but I do not think the right was intended to be used to hamper the work of the plaintiffs, or to stop their work when they might fairly have claimed to go on with it in terms of the contract. The portions of the contract already referred to still leave the intentions of the parties upon the point at issue between them in doubt and uncertainty. The question arises whether this doubt and uncertainty can be removed by reference to other portions of the contract. In cases of doubt or uncertainty in the construction of any portion of an instrument, the whole of it may be considered, and if necessary the recital may be referred to for the purpose of removing such doubt and uncertainty. One part of a contract may be used to throw light upon another part which may be obscure. Portion of the recital reads as follows: "Whereas the company is engaged in mining operations in the Selukwe district, and require supplies of fuel and timber for mining purposes." The use of the words "require supplies" throws a strong light upon the purpose and intention of the parties when they contracted. Certain requirements of the defendants were to be satisfied, and certain wants were to be supplied, and the plaintiffs agree to satisfy those requirements, and supply those wants. The quan

tity of fuel required could not under the circumstances be definitely fixed at the time the contract was made. It remained for the plaintiffs to ascertain from time to time what the requirements of the company were, and it was the duty of the company to communicate their requirements from time to time to the plaintiffs. The contractors were during six months to supply wood required by the company, and the company alone, while it acted in good faith, could ascertain and decide what their requirements were. But then it is asked, to what period must the requirements of the company be referred? In my opinion they must be limited to the six months, during which the contract lasted. This case is not free from difficulty, but it seems to me any other interpretation of the contract would lead to results which the parties could never have contemplated. A considerable tract of country might, if the plaintiffs' contention be correct, have been denuded of timber and firewood, and immense quantities of fuel and timber might have been stacked upon the land, which could not have been put to use for an indefinite period. It may be said that fuel, being constantly consumed, may reasonably be supplied in large quantities. But if the right to supply an unlimited quantity of fuel is extended to the right to supply an unlimited quantity of timber for mines of limited extent, then the unreasonable nature of the claim will be recognised. I also think that when the company had once indicated a place where they desired the contractors to cut wood, they should have given the contractors reasonable notice when their wants would be supplied, since that would be a fact within their knowledge, and not within the knowledge of the contractors. And in default of such notice the plaintiffs would be entitled to reasonable compensation.

Counsel having consented to accept £175 as the amount of loss of profits on mining timber for the fourteen weeks.

De Villiers, C.J., said that judgment would be for the plaintiffs for £400, the appellants to pay the costs in the Supreme Court; while the defendants must pay the costs in the Court below.

[Appellants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Findlay & Tait.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MALCOMMESS AND CO. V. THE } 1899.  
COLONIAL GOVERNMENT. } March 9th.

Customs duty—Customs Union—Convention.

*There being an undertaking in the Customs Union Convention that the Cape Government will allow the importation from Natal, duty free, of goods for which Convention duties have been collected in Natal, but no such undertaking in respect of goods imported into Natal before the Convention came into force,*

*Held, that the plaintiffs, who had imported whisky into Natal before the Convention came into force and had then paid the lower duty, were not entitled afterwards, under Act 6 of 1898, to import such whisky free of duty into this colony.*

This was an action to recover the sum of £7 10s., instituted by the plaintiffs against the Treasurer-General of the Colony. The declaration alleged that in the month of April, 1898, a certain Customs Union Convention was entered into between the Governments of the Colony of the Cape of Good Hope, the Orange Free State, and the colony of Natal, in terms of which a certain tariff of Customs duties upon goods imported into any place within the Union was agreed upon, and each of the said Governments bound itself to levy and collect within its jurisdiction the said duties upon all goods so imported from outside the limits of the Union.

3. The said Convention was ratified by the Legislatures of the said State and colonies respectively, and thereafter the "Customs Amendment and Tariff Act, 1898," was passed by the Parliament of this colony, in terms of which it was enacted that from and after the taking effect of the said Act

the duties provided for by the said Customs Union Convention should be then levied upon goods brought into this colony.

4. The said Act was duly proclaimed, and took effect from and after the 3rd January, 1899.

5. Thereafter, on or about the 25th January, 1899, the plaintiffs shipped from Durban, in the colony of Natal, to East London, both places being within the Union, certain five cases of whisky, containing ten gallons. The said whisky was the property of the plaintiffs, and when it was shipped from Durban there had been paid upon it all duty legally chargeable in respect of it when imported into the colony of Natal, nor was any duty claimable upon the said whisky on the said date in the said colony.

6. The plaintiffs, when the said whisky was landed at East London, had complied with all lawful regulations and forms required by the Customs authorities to identify the said whisky and to enable it to pass through the Customs.

7. The officers of the Colonial Government wrongfully and unlawfully demanded from the plaintiffs payment of the full duty under the said Customs Union tariff as if the said whisky was being imported from a place beyond the Union, and refused to allow the said whisky to pass the Customs until the full duty had been paid.

8. The plaintiffs paid the sum of £7 10s., being the amount of duty demanded, under protest, and without prejudice to their right to recover the said sum by this action, and the said officers accepted the said amount on the said condition.

9. The plaintiffs contend in the premises that the whisky was not liable to pay the Customs Union duty, and that they are entitled to reclaim the said amount.

The plaintiffs claimed the sum of £7 10s. and costs.

The defendant in his plea admitted the first, third, fourth, and eighth paragraphs of the declaration.

As to the second paragraph, he admitted that in May, 1898, a Customs Union Convention was entered into between the Governments of the Colony of the Cape of Good Hope, the Orange Free State, and the Colony of Natal. He referred the Court to the said Convention for the terms thereof.

He admitted the third paragraph of the declaration, but said that the duty paid on the said whisky in Natal was not the duty provided for in the said Customs Union Con-

vention. The said whisky was imported into the Colony of Natal prior to the proclamation of an Act of Parliament of the said colony by which it was enacted that from and after the taking effect of the said Act the duties provided for by the said Convention should be then levied upon goods brought into the said colony.

He denied the sixth paragraph of the declaration.

As to the seventh paragraph of the declaration, he admitted that payment of the full duty provided by the said Customs Union tariff was demanded from the plaintiff on the said whisky by the officers of the Colonial Government, and that the said officers refused to allow the said whisky to pass until the said full duty had been paid. He denied that the said demand was wrongful and unlawful, but said that it was authorised under Section 2 of the Customs Amendment and Tariff Act of 1898.

The defendants finally said that the plaintiffs' contention set forth in the ninth paragraph of the declaration was bad in law, and prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Innes, Q.C., and Mr. McGregor appeared for the plaintiffs.

Mr. Solomon, Q.C., A.G., and Mr. Sheil, Q.C., for the Government.

Mr. Innes: Act 6 of 1898 must be read in the light of the Customs Convention; unless they are read together goods imported from Natal must pay duty twice. To explain the meaning of the Act one must look to what it was intended to cure. *Maxwell on the Interpretation of Statutes* (p. 30); *Attorney-General of Hong Kong v. Ah Sing* (5 F.C., App., p. 179); *Regina v. Wilson* (3 Q.B.D., p. 42). If the Act is construed literally it will be clearly in conflict with the arrangements made under the Convention between the different States. Sections 2 and 3 and Schedule B of the Act refer to the Convention. The Act was passed for the purpose of giving effect to the Convention. If the Convention is looked to and read as a schedule to the Act, it is clear that the goods come in free. *Vide* the preamble and article 2. No. 11 of the regulations framed under Act 1 of 1899 provides for one payment of duty only; this case is a *casus omnisus*.

Mr. Solomon: Clause 50 of Schedule B. provides for the free entry of the native productions of Natal. This would not have

been necessary if all goods coming from Natal were to be duty free. On the other hand, only those articles which have paid the Convention duty can come into the Colony free, and these articles have not paid that duty, but the duty in force before the Convention. The objects of the Convention, as shown in articles 2 and 3, were to carry out uniformity of tariff within the Convention States, and to secure to each State the duty on goods imported for it through another State, subject to a reduction for collection, but that applies to the Convention duty only, and in this case as the duty was paid before the Convention, Natal is not bound to pay it to the Colony.

Mr. Innes in reply: The plaintiffs have complied with the Natal forms, and those do not draw any distinction between duty paid before or after the Convention.

De Villiers, C.J.: Under the Act (6 of 1898) the duty paid to the Government was clearly payable, and the plaintiffs can only succeed in their claim for a refund if the Convention, which is frequently referred to in the Act, contains a provision that the duty would not be claimed in respect of goods imported into the Colony from Natal, even although Convention duties had not been paid in Natal. The plaintiffs were of course not parties to the Convention, but if there was an undertaking on the part of the Cape Government not to charge such a duty, the plaintiffs would in my opinion be entitled to the benefit of an undertaking given to the Natal Government, and ratified by the Act of Parliament. The whisky was imported into Natal before the Convention duty came into operation. If it had been imported into Natal after that date, the higher duty would have been paid there, and Natal would have paid 85 per cent. of the duty so received to the Cape Government upon the whisky being imported into this colony. The remaining 15 per cent. would be retained by Natal for its expenses of collection. But the Cape Government having received from the Natal Government payment of the duty thus collected could not again claim payment of the duty from the plaintiffs in respect of the same whisky. But the Cape Government receives no part of the duty collected by the Natal Government on goods imported there before the Convention came into force. The Convention contains no undertaking on the part of the Cape Government to allow such goods to be imported here without payment of duty, and it does not therefore assist the

plaintiffs in their claim for an exemption. The judgment of the Court must be for the defendant with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

JACOBSON'S TRUSTEE V. } 1899.  
STANDARD BANK. } March 9th.

Cession of action—Instrument of debt—Indorsement—Delivery—Notice to debtor.

*A person whose life was insured in the M. Company executed a deed by which he ceded the policy to the plaintiff upon certain trusts in favour of his wife and children, but the cession was not indorsed on the policy, nor was it notified to the M. Company, and the policy was not delivered to the plaintiff. A brief notification was, however, registered in the Deeds Office to the effect that the policy had been assigned to the wife. Subsequently the insured ceded and delivered the policy for value to the defendant, the cession was indorsed on the policy, and due notice was given to the M. Company. The wife and the insured having both died, Held, that the plaintiff was not entitled, on behalf of the children, to claim a cancellation of the cession made in favour of the defendant.*

*Held, further, that the registration of the cession in favour of the wife did not constitute notice to the defendant of the cession in favour of the children.*

This was an action for the cancellation of certain cessions of a life policy, and a declaration of rights with respect to the vesting of the policy.

The plaintiff's declaration was as follows:  
1. The plaintiff is William Arthur Currey, who sues in his capacity as secretary for the time being of the General Estate and Orphan Chamber, carrying on business as a

trust company in Cape Town, and as such secretary the trustee under a certain deed of settlement executed by one Jacob Jacobsohn on October 7, 1870. A copy of the said deed is annexed to this declaration, marked A.

2. The defendant is Lewis L. Michell, in his capacity as General Manager of the Standard Bank of South Africa (Limited), a banking institution carrying on business in this colony and elsewhere.

3. Under the deed above referred to the said Jacobsohn assigned a certain policy of assurance upon his life numbered 2,995 and for the sum of £1,000, executed with the South African Mutual Life Assurance Society, and all benefit and advantage arising out of the same, to the secretary for the time being of the General Estate and Orphan Chamber as will more fully appear from the copy of the deed hereunto annexed, upon certain trusts in favour of his wife Ida Jacobsohn, and of the children born of the marriage.

4. Under the said deed the proceeds of the said policy were to be paid by the plaintiff after the death or remarriage of the said Ida Jacobsohn to the children in equal shares upon their attaining majority the portions of such as are minors to be invested, and the proceeds paid to their guardians during the minority of such children. The said deed was duly registered in the office of the Registrar of Deeds in Cape Town, but the said policy remained in the possession of the said Jacobsohn.

5. The said Ida Jacobsohn died on September 18, 1890; there are eight children living issue of the marriage of whom one Frangolt Nathan Jacobsohn is a minor.

6. On or about March 14, 1890, the said Jacobsohn wrongfully and unlawfully executed a cession of the said policy without the plaintiff's knowledge to one Henry Sallinger for value received, and on the same date the said Sallinger executed a cession to the branch of the Standard Bank at Potchefstroom, in the South African Republic, of the said policy as collateral security for a debt due by the said Sallinger to the said bank.

7. Thereafter the said Sallinger surrendered his estate as insolvent, and on 20th October, 1892, his trustee surrendered and made over the said policy to the said bank, and the said bank now has possession thereof.

8. In or about October, 1898, the said Jacobsohn died, and thereafter the said

plaintiff called upon the said defendant to deliver the policy to him for the purpose of carrying out the trusts thereof, but the defendant bank refuses to do so.

The plaintiff claims: (a) Cancellation of the cessions of the 14th March, 1890, and 20th October, 1892; (b) a declaration that the said policy is vested in the said plaintiff subject to the trusts mentioned in the said deed; (c) alternative relief; (d) costs of suit.

The plea admitted paragraphs 1 and 2.

The defendant admitted that the deed referred to was registered in the Deeds Office, and that the policy remained in the possession of Jacobsohn. He said that the policy was never duly delivered to the said Petersen (plaintiff's predecessor) and that no indorsement was made thereon from which the existence of any attempted assignment could be inferred. He admitted the cessions referred to in paragraph 6, but denied their illegality, and said they were completed in each case by due delivery of the policy. He admitted paragraphs 7 and 8, and said that the bank acquired the said policy for valuable consideration without knowledge or notice of any assignment, or attempted assignment to the plaintiff. He said that since 14th March, 1890, the bank had kept the policy alive by payment of premiums, viz., £173 2s. 6d., and that the plaintiff had never offered to pay the defendant the said sum, which was necessary before claiming the policy.

Mr. Searle, Q.C. (with whom was Mr. Currey), appeared for the plaintiffs.

Mr. Innes, Q.C. (with whom was Mr. Molteno), appeared for the respondents.

William Arthur Currey, secretary to the General Estate and Orphan Chamber of Cape Town, the plaintiff, said that he first became aware of this matter in October last in consequence of certain information given by a Mr. Sichel. In consequence of this information, witness wrote to the Mutual Society warning them not to pay the money. Witness had searched for the deed, but could not find it. He was eventually shown it at the office of Mr. Paul de Villiers. Witness was willing to pay the premiums in order to keep up the policy.

Paul de Villiers, attorney and notary, produced his protocol containing the deed of trust dated 1870. It was drawn up by Mr. Hofmeyr, and was executed before witness. Petersen was present. In the ordinary course of events, a copy of the policy would be attached to the deed.

Mr. Searle pointed out that there were wafers on the deed.

Witness (continuing) said that Mr. Hofmeyr would have registered the deed. Witness did not know what had become of the counterpart.

Cross-examined by Mr. Innes: Witness knew that the bank had paid the premiums. The notice was given when the cession was made.

After argument,

De Villiers, C.J.: This is an action for the cancellation of certain cessions of life policy and for a declaration that the policy is vested in the plaintiff subject to certain trusts. The claim is based upon a deed made in favour of the plaintiff's predecessor Petersen, as secretary of the Chamber, as far back as the 7th of October, 1877. By that deed the insured, Jacobsohn, purported to cede and assign the policy to the said Petersen, in his said capacity, upon certain trusts in favour of Jacobsohn's wife and children. The wife has since died and the plaintiff brings the action as trustee for the children. It appears that on the execution of the deed the cession was not indorsed on the policy, nor was notice given to the Insurance Company, but Jacobsohn retained possession of the policy and subsequently ceded it to one Sallinger, who on his part ceded it to the defendant bank as security for a debt. Upon Sallinger's insolvency his trustees relinquished the security and ceded and assigned the policy to the bank. This cession was also duly indorsed on the policy and notice thereof was given to the Insurance Company. It is evident that the plaintiff is not entitled to succeed unless he can prove that before the cession to the bank he or his predecessor had obtained a complete cession of action in respect of the policy. In the case of a negotiable instrument the Court has held that delivery, actual or constructive, is essential to transfer the ownership. *Mills v. Benjamin* (6 Buch., 122). In the subsequent case of *Morkel v. Holm* (2 Juta, 57), it was assumed that delivery was essential for the purpose of a complete cession of a life policy, but the Court held that there was sufficient proof of such delivery to the plaintiff. Where a right of action exists independently of any written instrument, the cession of such right may be effected without corporeal delivery of any document. Where, however, the sole proof of a debt is the instrument which records it, the cession of the debt is not complete until the instrument is delivered

to the cessionary. By the law of some countries notification of the cession to the debtor is required to complete it, but by the law of this colony the cession may be complete without such notification. *Voet* (18, 4, 15). Now, I am not prepared to say that circumstances may not arise under which a cession of action may be completed without delivery of the instrument which constitutes the proof of the debt. The document may, for instance, be lost and, in such a case, if the cedent has done everything in his power to divest himself of his right of action there is no reason why the cession should not be held to be complete. But among the things required, under such circumstances, to be done by the cedent, would certainly be the notification of the cession to the debtor. In the present case the life policy was not handed over to the plaintiff or his predecessor, and notice of the cession was not given to the Insurance Company. The cession, therefore, was incomplete and is of no avail as against the bank, which subsequently obtained cession and delivery, and duly notified the cession to the Insurance Company. To prove that the bank had previous notice of the claim of Jacobsohn's children, reliance is placed upon the registration in the Deeds Office of a note to the effect that Jacobsohn had ceded the policy to his wife. I do not quite understand by what authority this note was registered at all, but even if it was properly registered, the registration of the gift made by the husband after his marriage to his wife cannot be deemed to be notice to the public, including the bank, that a cession of the policy had been made in favour of the children. The judgment of the Court must be for the defendant with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

# SUPREME COURT

[Before the Right Hon. Sir HENRY DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

KEUR V. GAMBA. } 1899.  
March 10th.

Sale—Transfer—Cancellation.

*Where the plaintiff purchased a definite piece of ground of which the boundaries were pointed out by the seller, but the seller afterwards transferred another piece of ground to him as being that which had been sold,  
Held, that the transfer should be cancelled, and the purchase price refunded.*

This was an action for cancellation of transfer and refund of certain moneys paid by plaintiff in pursuance of the purchase price of certain property.

The declaration set forth :

1. The plaintiff resides at Mowbray, and the defendant resides at Butter's Field, lower road, Observatory.

2. On or about the 10th day of March, 1898, the defendant sold to plaintiff for the sum of £40 sterling certain land situate at Rondebosch, Cape Division, the boundaries of which defendant pegged off and pointed out to plaintiff, and which defendant falsely and fraudulently represented to plaintiff to be lots 3 and 4 of lot X of the Rondebosch Extension Estate, and which he further warranted to contain clay suitable for brick-making and building purposes. The land so sold to plaintiff measures 124 square roods and 93 square feet.

3. The plaintiff, relying on the aforesaid false and fraudulent representations made and the warranty given by defendant, purchased the land so pointed out for the sum of forty pounds (£40) sterling. and on the 25th day of March, 1898, paid defendant twenty pounds (£20) sterling on account of the said purchase price, and made out, signed, and delivered to defendant a promissory note in the defendant's favour for the balance of the purchase price, viz., twenty pounds (20) sterling, payable on the 19th day of July, 1898, which, however, has not yet been paid.

4. On the 19th day of April, 1898, the defendant caused to be passed to plaintiff transfer of lots 3 and 4 of lots X of the Rondebosch Extension Estate, which defendant falsely and fraudulently represented to be transfer of the land pointed out and sold as aforesaid to plaintiff.

5. The plaintiff subsequently discovered that the land so transferred did not embrace the whole of the land purchased by him as aforesaid, but only measured sixty-two square roods and seventy-two square feet, and that the said land was not as warranted by defendant.

6. The plaintiff was by the sale entitled to have transfer of the whole of the land pointed out to and purchased by him, but defendant has wrongfully and unlawfully refused to give transfer of the remainder of the said land containing the clay aforementioned, and has thereby failed to comply with the warranty in paragraph 2 hereof referred to; which was a condition of the said sale.

7. The plaintiff has, by reason of the aforesaid wrongful and fraudulent conduct of defendant, incurred costs and charges and otherwise suffered loss and damage to the extent of twenty-five pounds (£25) sterling.

Plaintiff claimed : (a) That the aforesaid sale be rescinded, and the transfer cancelled ; (b) that defendant be ordered to repay the plaintiff £20 sterling, paid as part purchase price, with interest thereon from the 25th day of March, 1898, at 6 per cent. ; (c) that defendant be ordered to deliver up to plaintiff the promissory note ; (d) judgment for £25 sterling, as and for damages as aforesaid ; (e) and costs of suit.

Defendant in his plea denied categorically the allegations in the declaration, and alleged that he had sold lots 3 and 4 and had transferred the same, and claimed £20 in reconvention upon the promissory note.

Mr. Buchanan appeared for plaintiff, Mr. Upington for defendant.

William Henry Butler, a Government land surveyor, said he was employed by plaintiff to make a plan of the property in question (produced). Lots 1, 2, 7 and 8 on plan were, on the day he visited the property, enclosed by a fence. Lots 3 and 4 were not enclosed, as far as he could remember. Lots A, B, C, and D on the plan were the portions pointed out to him by Keur. Witness found a surveyor's peg at the point A, and wooden posts at points B, C, and D. Witness made the survey in August, 1898.

Cross-examined: The road in the plan was marked by pegs.

Re-examined: These pegs were not visible to the naked eye; one had to dig for them.

De Villiers, C.J.: If there was no road made, what made you put it in the plan?—I had a plan which showed that there was a road, so I sought for the road and found it. Witness could not say to whom A, B, C, D, belonged.

Justin Johannes Keur, the plaintiff, said he had known Gamba for some time, and he worked with him at Salt River. In March, 1898, witness spoke to Gamba, and said he wanted to leave his master and buy land. Gamba said he had two nice pieces of land on the Flats near Black River, and offered to take witness and one Huys to inspect the ground. Witness went and saw a piece of land on the estate fenced. Defendant said Mr. Adonis's land consisted of two plots, beyond which was his (Gamba's) brother's lot. He then sold the piece marked ABCD on the plan. Defendant said each plot was 100 feet by 95 feet. Defendant put in an iron peg. Defendant said there was clay and stones on the land. Witness went to see the land a day or two later with his wife and sister, and eventually bought it. Witness signed a document agreeing to the purchase of the land, and paid over £20, arranging to pay £20 thirty days later. After he had bought the land, he went to live near the land at Black River. Defendant and his brother were on the ground one day in April. Defendant made various measurements and took up the corner peg. Defendant afterwards told witness, "Now, I have measured the ground off properly, and you can go on building." Defendant further said there was clay on the ground. On the adjoining property there were two clay holes. Witness put down a hole and found fine clay about three feet deep. Witness later on told Gamba he was going to build at a spot indicated on the plan. After witness had been working the clay-hole he heard from Adonis, owner of an adjoining plot, and in consequence of this went to see Gamba. Gamba then asked for a promissory note for the balance of the purchase price due from witness, and witness in giving the promissory note said that if there was any mistake Gamba must be re-ponsible for any expenses that might be incurred. Gamba frequently came down to the ground and used to say that the clay

hole was all right. In July Gamba came down with his brother and one Roberts. He again measured from the far corner of Adonis's land. The measurements made considerable alteration in the extent of plaintiff's land, and witness went to Gamba to try and arrange the matter. Eventually witness asked his attorney to write to the defendant demanding payment of £25 damages, and generally in terms of the present action. Witness had paid £4 15s. for the transfer, and had suffered damages through paying 4s. a day wages to workmen for thirty days. Witness had lost £7 or £8, besides the £8 15s.

Cross-examined: Witness wanted to build on the land, and to put up a shop, cottages, and a dwelling-house. Witness had just discovered that the land pointed out to him by Gamba was not land transferred to him on July 3. He denied that there was any agreement between him and Gamba to bring Roberts to measure the ground. On the day the deed of sale was drawn up no mention was made of clay nor of the size of the land. Witness knew on that day that Gamba had bought the land from Roberts. The deed of sale was read over to witness, and he was asked if he wished anything else put into it. Witness then signed the deed.

Robert Huys said he drew up the contract of sale between Keur and Gamba. Witness remembered Keur saying in Gamba's presence that he had repeatedly asked Gamba for the proper delimitations of the land. This took place before the sale was accomplished. Gamba said subsequently that if there were any doubts as to the size of the ground he (Gamba) would stand for it. Witness remembered Gamba saying that he had sold the ground according to the diagram.

Cross-examined: Witness never went with Keur to Roberts to speak about the extent of the ground. The deed of sale did not contain any reference to the size of the plots. It was mentioned, however, that there was clay on the property.

Mrs. Maria Keur, wife of the plaintiff, gave further evidence, corroborative of the plaintiff's evidence.

Henry Keur, plaintiff's cousin, also gave evidence.

For the defence,

Francisco Gamba, contractor, the defendant, stated the circumstances under which he offered to sell land to the plaintiff, Witness knew what was his land before he



sold it, and he showed it to plaintiff. He told plaintiff that he had not got the diagram of the land. Plaintiff told him that if his wife was satisfied with the ground he would buy it. When plaintiff had decided to buy the ground witness told him he would have to draw up the sale according to the transfer and diagrams, which he had not then got. Plaintiff was asked before the deed of sale was signed if there was anything else he wished inserted, and plaintiff said he was satisfied. Witness never made any mention of clay or of the size of the ground. Witness had searched for the pegs with Keur, and witness suggested that Mr. Roberts should be asked to help to find the pegs. Keur was present when Roberts pointed out the pegs.

Cross-examined: When witness went down in the cart with plaintiff, they neither of them got out of the cart.

William Roberts, the original owner of the property in dispute, said the whole block of land was simply carved with pegs, and it would be impossible, unless the pegs of a certain plot were pointed out, to find these particular pegs.

By the Court: Witness never thought that the plot coloured red in the plan belonged to him on the day witness sold the property to Gamba. Witness pointed it out to defendant. They were then standing on Adonis's lot. Plaintiff made the clay-hole in the road, and that was what witness objected to. Keur never told witness that he thought that the portion of land sold by Gamba was that coloured red in the plan.

Andrew Gamba, defendant's brother, corroborated the last witness's evidence.

After argument,

De Villiers, C.J., said: In this case the plaintiff seeks to set aside a transfer which has been passed, and to recover the sum of £20 that had been paid in pursuance of the purchase of a certain property and also the redelivery of a promissory note given in favour of the defendant in pursuance of the purchase. The plaintiff's declaration charges fraud against the defendant, but I do not think it necessary to enter into that question at all. The question to be determined is whether the defendant has transferred to plaintiff the property which the plaintiff understood was to be transferred. The defendant himself had bought the property, which consisted of two lots, upon a rough sketch which was shown to him in the neighbourhood of the ground where the sale

took place. Plaintiff on the other hand alleges that he purchased this land from defendant after the exact boundaries of the land had been pointed out to him, and that there was no rough sketch shown. Now if the plaintiff has proved to the satisfaction of the Court that the lot marked A, B, C, D, was the lot pointed out to him before the settlement, and that he afterwards obtained transfer of lots 3 and 4, it is plain that the plaintiff is entitled to claim that the transfer should be set aside. Upon the question whether the plot A, B, C, D, was pointed out there is great discrepancy in the evidence, and the simple question is, upon which side does the balance of the evidence lie? In my opinion it lies entirely upon the side of the plaintiff. There can be no doubt that the purchaser went to the spot with a view to the defendant pointing out where the ground was. That was on the 17th March. It is also said by plaintiff that when defendant went to the spot with him he took down a tape-line and pegs, and I am inclined to believe that that was a fact. If they were taken, it could only have been done with the object of pointing out the exact boundaries, and I quite believe that a great deal more was done in the way of pointing out the boundaries than the defendant would have the Court believe. Mr. Roberts has said that when he sold the property to defendant a rough sketch was shown, but they did not go to the ground itself. They stayed on Adonis's place, and a certain direction was pointed out. The defendant, on the other hand, wishes the Court to believe that he was actually taken to the spot, and that the exact spot where lots 3 and 4 were were pointed out to him. Here again is a very important discrepancy between the evidence of defendant and his own witnesses. I am quite satisfied that at the time he bought the land the defendant had a very vague knowledge as to where the land lay, but he seems to have known that it was somewhere beyond his brother Gamba's, and accordingly he started from wrong premises and pointed out to plaintiff the plot A, B, C, D, which the plaintiff believed to be the plot sold to him. This circumstance is in favour of the plaintiff, that he has lost no time in raising objections to the transfer passed in his favour. I am satisfied that the conversation with Roberts took place on July 3, and that the attorney's letter was sent subsequently. Under these

circumstances the plaintiff is entitled to succeed in respect of prayers (a), (b), and (c). The Court will therefore order that the transfer be cancelled; that the defendant repay the £20, and deliver to plaintiff the promissory note, and pay the costs of this suit, with the costs of the plan.

[Plaintiff's Attorney, H. P. du Preez; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

LITHMAN AND CO. V. HUNTER } 1899.  
AND MURRAY. } March 13th.

Mr. Graham applied for final adjudication of the partnership estate of the defendants as insolvent.

The application was granted.

### GEERINGH V. ARNOLD'S ESTATE.

Mr. Buchanan applied for provisional sentence on three mortgage bonds passed in 1889 for £100, £50, and £200 respectively with interest. Also for judgment for £6 7s. 6d., for goods sold.

Judgment granted.

### BUESKI V. DIETHELE.

Mr. Gardiner applied for provisional sentence on a promissory note for £112.

Granted.

### HIDDINGH V. SCHMADE.

Mr. Upington applied for the final adjudication of the defendant's estate as insolvent.

Order granted.

### MACLEOD V. LUCKE AND ANOTHER.

Mr. Joubert applied for provisional sentence upon a promissory note for £79 10s. Granted.

### J. G. STEYTLER AND CO. V. AJAM.

Mr. Jones applied for final adjudication of the defendant's estate as insolvent.

### LOUW V. TODT AND FAY.

Mr. Gardiner applied for the final adjudication of the defendant's estate as insolvent.

The order was granted.

Counsel further applied for the appointment of a provisional trustee, with power to sell perishables.

The order was granted as prayed.

### G. FINDLAY AND CO. V. ALBRECHT.

Mr. Cloose applied for the final adjudication of the defendant's estate as insolvent.

Order granted.

### G. FINDLAY AND CO. V. D. MATCHAM AND CO. AND D. MATCHAM.

Mr. Jones applied for the final adjudication of the partnership estate of D. Matcham & Co. and the private estate of D. Matcham. Order granted.

### SELLAR BROS. V. DE SWART.

Mr. Buchanan applied for provisional sentence for £90, on three promissory notes of £30 each, with interest.

Application granted.

### CAPE OF GOOD HOPE SAVINGS BANK V. GOOSEN.

Mr. Molteno applied for provisional sentence for £3,800, with interest at 5 per cent.

Order granted.

### COLONIAL BUILDING CORPORATION V. NEWLANDS.

Mr. Cloose applied for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £40 and costs.

The defendant appeared in person, and stated that he had paid £6 of the amount before judgment, and was willing to pay the rest in instalments of £10 a month.

By consent the debt was reduced to £34, and a decree of civil imprisonment granted, to be suspended on payment of £10 on the first day of each month.

### ILLIQUID ROLL.

### CHUBB AND MAXWELL V. HARRIES.

Mr. Gardiner applied for judgment under Rule 329 for £136 14s., for goods sold. Granted.

SMITH AND CO. V. PETERSEN.

Mr. Buchanan applied for judgment under Rule 329 for £242.  
Granted.

MACKIE, YOUNG AND CO. V. MCKENDRICK.

Mr. Cloe applied for judgment under Rule 329 for £44.  
Granted.

ARDERNE AND CO. V. PEDERSEN.

Mr. Molteno applied for judgment under Rule 329 for £609 6s. 2d.  
Granted.

WENTZEL V. PEDERSEN.

Mr. Gardiner applied for judgment under Rule 329 for the sum of £800, being the purchase price of certain property sold to the defendant.  
Granted.

POYNTON BROS. V. DAVIES.

Mr. Cloe applied for judgment under Rule 329 for the sum of £93 10s. 7d., goods sold and delivered.  
Granted.

REES V. LUCKE.

Mr. Gardiner applied for judgment under Rule 329 for the transfer of certain property purchased by the plaintiff from the defendant.  
Granted.

HUMAN V. BEYERS.

This was an action *de lunatico inquirendo*.  
Mr. Benjamin appeared for the plaintiff  
Mr. Buchanan appeared as *curator ad litem*.

Dr. Dodd's, medical officer at the Valkenberg Asylum, said that the defendant laboured under certain delusions, the chief of which was that the Lord had told him that he was not to eat meat or drink water, nor to wash himself. They had had very great difficulty in getting him to take food. Sometimes, indeed, it was necessary to use force, and feed him by means of the stomach tube. There was, however, a fair prospect of recovery. Defendant's memory was fairly good, and in all other respects he was fairly intelligent. He was certainly unable to take care of himself, and witness would not like to trust to his judgment in regard to his property. Defendant was twenty-

seven years of age. He owned a farm in the Transvaal and a small quantity of stock; worth altogether about £2,000.

The defendant was then called. In reply to questions by the Chief Justice, he said he was at present in the Valkenberg Asylum.

Why are you there?—I have been brought there by my brother-in-law.

Do you object to being there?—I don't object, but I should not like to be forced to take any medicine.

You won't eat at times?—I may not eat. The Lord does not want me to eat.

The Chief Justice (to Dr. Dodds): Is that his only delusion?—That and similar ones.

The Defendant: Also about drinking water. The Lord will not let me drink. They don't understand exactly my position.

The Chief Justice: What is it caused by?

Dr. Dodds: I should call it a form of religious melancholia.

Defendant's brother, Johannes Beyers, gave evidence as to defendant's property in the Transvaal, which was worth about £2,000. There were two bonds on it of £1,100. Witness's brother had been in an asylum at Pretoria. Witness thought it advisable that the *curator* should have power to sell the property.

The Chief Justice: But he may recover. It may be a passing delusion, which he will get over very soon.

Mr. Buchanan: He has no objection to the sale of the property.

The Chief Justice to defendant: Do you wish the property sold?—Yes, to Mr. Ogilvie for preference.

Charles Gabriel Human, defendant's brother-in-law, also gave evidence.

The Chief Justice asked what there was to show that defendant could not take care of his own property.

Witness said that he was very much mixed up in his politics and other matters.

The Chief Justice: A great many sensible people have the same opinion.

Witness added that defendant thought he ought to be President of the Transvaal.

The Court declared the defendant of unsound mind, and appointed respondent's brother and brother-in-law as curators to administer the property in the Transvaal, with power to sell if necessary. Costs to come out of the estate.

ADMISSIONS.

The following were admitted to practise: François Daniel Johannes Rousseau, as

attorney and notary; Peter Alexander Young Norman Botha, as attorney and notary; Theodore James Stanley Thompson, as attorney and notary; Mark Percival Milne, as attorney.

#### REHABILITATIONS.

The Court released from sequestration the estates of Pieter Jacobus Brisley, Petrus Arnoldus van Zyl, William Bunting Shaw, and Jacobus Stephanus Grove.

Mr. Howel Jones applied for the rehabilitation of Albert Cecil Oakeshott.

The Court ordered the application to stand over for some explanation from the insolvent of allegations in the trustee's report to the effect that his books were not properly kept.

*Postea* (April 12th).

Affidavits in explanation having been read,

The application was granted.

#### GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF MARY ANN MURPHY, EXECUTRIX OF THE ESTATE OF THE LATE JAMES MURPHY.

Mr. Buchanan applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

IN THE MATTER OF THE MINOR TABERER.

Mr. Buchanan applied for an order authorising the sale of certain property.

Order granted.

IN THE ESTATE OF THE LATE ABO SALIE.

Mr. Upington applied for an order authorising the transfer of certain property.

A rule *nisi* was granted returnable on April 12; one publication in the "Government Gazette" and one in a Port Elizabeth paper.

*Postea* (12th April).

On the application of Mr. Benjamin the rule was made absolute.

KAMPHOR V. JACOBS AND SILBERBAUER.

Mr. Innes, Q.C., applied for an order for the delivery of a certain deed of transfer belonging to the applicant.

Mr. Searle, Q.C., appeared for Mr. Silberbauer, Jacobs's attorney, in whose custody the deed was said to be, and upon whom notice

had been served. He objected to the notice on the ground that he had no power to accept service.

The Court granted a rule *nisi*, calling on Jacobs to show cause why Silberbauer should not be ordered to hand over the title deed. Returnable 12th April.

PEARSON V. DUFFY.

Mr. Benjamin applied for an order for leave to attach certain property to found jurisdiction, and for authority to sue by edictal citation.

Order granted, with leave to serve *intendit* at the same time.

IN THE MATTER OF THE MINOR INEZ BERYL ELLIOT.

Mr. Howel Jones applied for an order authorising the Master to pay out certain moneys to be expended on the minor's education.

Order granted.

IN THE ESTATE OF THE LATE GEORGE DUKE.

Mr. Upington applied for an order releasing David Solomon Barrable from the office of executor.

The Court granted an order in terms of the Master's report.

IN THE MATTER OF THE PETITION OF EDWARD GILFILLAN, AS SECRETARY FOR THE TIME BEING OF THE DIVISIONAL COUNCIL OF CRADOCK.

Mr. Close applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

IN THE MATTER OF THE PETITION OF WALTER REGINALD TUTTON AND ROBERT JOSEPH TUTTON.

Mortgage bond—Cancellation refused.

Mr. Howel Jones applied for an order for the cancellation of certain bonds. The first bond had been passed in 1883 and the second at a later date, and both were binding on the applicants jointly and severally. The applicants' partnership estate had since been sequestrated, but neither of the bonds had been proved; subsequently they had been rehabilitated. Their private estates had not been sequestrated. It appeared that the first mortgagee had assigned his estate in

1893, and his outstanding debts had been sold to one Tudhope. The second mortgagee, the Kaffrarian Colonial Bank, had been finally liquidated and dissolved. Neither Tudhope nor anyone else had ever claimed on the bonds. The Registrar of Deeds had, under Act 19 of 1891, written off the bonds as against the partnership estate, but refused without an order of Court to write them off the private folios of the petitioners. The Court refused to make any order.

JOB V. THEAL.

Arrest—*Suspectus de fugâ.*

This was an application for an order for the arrest of the defendant. The applicant had on February 17 obtained judgment against defendant for £15, and had now learned that defendant was about to leave for Rhodesia by the train leaving that night. There had been a return of *nulla bona*, and the applicant intended instituting proceedings for a decree of civil imprisonment. He desired, however, to have the defendant arrested, pending the institution of such proceedings.

Mr. Upington, for the applicant, referred to *Van Zyl's Judicial Practice* (p. 142); *Sande Deois. Fris.* (1, 17, 2); *Voet* (2, 14, 19), as to arrest of a person *suspectus de fugâ.*

De Villiers, C.J.: There was ample time to have issued a summons for a decree of civil imprisonment before, but that has not been done. I have no doubt whatever that it is in the power of the Court to grant arrest when the defendant is clearly proved to be attempting to evade the judgment for the debt. But it is quite possible that the debtor might be able to show that his object in leaving the Colony was to earn money to pay this particular debt. Where a decree of this kind is sought the facts should be clearly stated, and it should be shown that the defendant was attempting to evade payment of the debt. The proper steps have not been taken by the applicant, and it is not clearly proved that the defendant was leaving the Colony for the purpose of evading the debt. Therefore, the order will not be granted.

ATMORE V. CHADDOCK.

This was an application for an order authorising the transfer to the applicant of certain property situated in the Cape Division, and which was on the 9th June, 1896, ordered to be transferred to him upon

payment into the Guardian Fund of the sum of £830 to the credit of the minor child of the late Edward Atmore, such sum having been duly paid into the fund. A difficulty appeared to have arisen owing to the respondent having remarried since the power granted to her attorney had been so granted. *Wde Atmore v. Chaddock* (6 Sheil, p. 181).

Mr. Graham, Q.C., appeared for the applicant.

Mr. Innes, Q.C., for the respondent.

The order was granted.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MAGISTRATES' CASES RE- 1899.  
VIEWED. March 14th.

The Chief Justice, on taking his seat, stated that a batch of cases had been sent up for revision by the Magistrate of Clanwilliam, which had been tried before a Special Justice of the Peace in the neighbourhood of Clanwilliam. The Special Justice of the Peace did not seem to have been aware that the cases should be sent to a judge for review, but since 1897 he had been sending them to the Resident Magistrate at Clanwilliam, and the Magistrate, who did not seem to have been aware that they should be sent to a judge for review, had now sent up a batch. In most of them the Justice of the Peace appeared to have taken an equitable view of the cases, but he ought to be told that cases in which there was an acquittal ought not to be sent up for review at all. There was one case, however, in which several prisoners were charged with having made a noise and disturbance in the street to the annoyance of the general public. They were all found guilty. The first of the prisoners was fined a small amount, or three days' imprisonment, and the others were severely reprimanded and acquitted. The Magistrate pointed out, in sending the cases up for review, that the Act 27 of 1893 did not apply to the village in question, because it was

not a village in which there was a municipality, or in which the Governor had by proclamation declared that the first part of that Act was in operation, so that the sentences imposed in that case must be quashed.

SPRECKLEY V. SPRECKLEY.

Mr. Benjamin applied for a decree of divorce and custody of the children. The defendant husband had been ordered to return to or receive his wife on or before March 9, or to show cause on March 12 why the decree of divorce should not be made absolute. He had not complied with the rule.

The order was granted.

LIQUIDATORS OF THE CAPE OF  
GOOD HOPE PERMANENT  
BUILDING, LAND AND IN-  
VESTMENT SOCIETY V. 1899.  
RODEL AND OTHERS. March 14th.

Mortgage bond—Power of sale.

*Where certain bonds hypothecating immovable property contained powers of sale in favour of the mortgagees, the Court upon failure of the mortgagors to pay the amounts due upon the bonds granted a rule nisi calling upon them to show cause why authority to sell in pursuance of the powers should not be given.*

This was an application by the official liquidators of the Cape of Good Hope Building Society, who set forth that Rodel had executed a mortgage bond for £500 in 1888, hypothecating to the society certain land in Cape Town. Rodel had never paid the monthly instalments, and his whereabouts were now unknown. Application was made for leave to sell the land to satisfy the amounts due to the society. Similar applications were made in the case of Sabel Frederick and Edward Alfred Bailey, of whom the former was indebted to the society to the extent of £545 for mortgage bonds on property at Wynberg, and the latter to the extent of £504. In each case the whereabouts of the parties concerned were not known. The bonds contained a clause giving the mortgagees power to sell.

The bonds contained the following clause: "And further acknowledging the nomina-

tion and appointment of the said trustees, their successor or successors in office with power of substitution, to be the true and lawful attorneys and agents irrevocably and *in rem suam* for the purpose of letting or disposing of the said property by sale, and giving the purchaser or purchasers transfer thereof, and to pay out of the proceeds of such sale all amounts due to the said Cape of Good Hope Permanent Building, Land, and Investment Society on this bond or otherwise, and generally to do whatsoever may be necessary in the premises." It was alleged that Frederick had also authorised the secretary to the society by power of attorney to sell the property and pass transfer.

The Registrar of Deeds reported as follows on the application: "On a previous occasion an attempt was made to transfer property on the authority contained in a bond similar in its terms to these, and I then expressed the view that it was desirable that an application should be made to the Court. A petition was in consequence lodged, and the matter came before the Court on the 5th May, 1896, when the required order was granted. The applicants were the trustees of the Oradook Building Society. The Kimberley Permanent Mutual Building and Investment Society also obtained, under similar circumstances, an order from the High Court on the 10th March, 1892. *Mortgage bond, Sabel Frederick.* The power of attorney referred to is in favour of the secretary of the Cape of Good Hope Permanent Building, Land, and Investment Society, and as the society is in liquidation it cannot be utilised."

Mr. McGregor appeared for the applicants.

De Villiers, C.J.: We know too much of the history of this Building Society. We know that a great many others have paid their interest and it has not been recorded in the books of that society. There ought to be some notice to the debtors.

A rule *nisi* was granted calling on the respondents to show cause why the Court should not give authority to sell in pursuance of the power, the rule to be published once in a Dutch and once in an English Cape Town paper, returnable by the 12th April.

*Postea* (18th April).

The rule was made absolute.

[Applicants' Attorneys, Messrs. Sauer & Standen.]

VAN DER SPUY V. VAN DER SPUY.

This was an application for an order on respondent to pay over to applicant a certain sum of money, to enable her to institute proceedings for judicial separation.

The applicant, in her affidavit, stated that she was married to respondent in 1893, at the age of nineteen. There were two children of the marriage. She sought judicial separation on the grounds of the cruelty and ill-treatment to which she was subjected by her husband, and owing to the fact that by reason of his uncontrollable temper she and her children were in danger of their lives. Respondent lived on the farm Enkeldoorn, in the district of Wellington.

In an answering affidavit, the respondent absolutely denied that he had ever acted in a cruel way. He had always been kind to the applicant, and given her whatever she wanted. On the 6th inst., without any cause whatever, and without his knowledge she left the farm with the nurse and the two children. Respondent then consulted his attorney. He said that his temper was not more hasty than that of the applicant. It was applicant's duty to return to her home and do her duty. He was informed that it was not his wife's wish to take action, but that she was goaded into it by a certain member of the family who had a spite against him.

To this applicant had made an answering affidavit, stating that it was absolutely untrue that she had been goaded into taking action. The proceedings were entirely at her own wish. The only person who had goaded her was her husband.

Mr. Innes, Q.C., appeared for the applicant.

Mr. Graham, Q.C., for the respondent.

De Villiers, C.J., said there was an absence of detail. Some excitable women thought they were in danger of their life if their husbands talked loudly to them. He remembered a case of cruelty in England, where the husband had been found guilty of cruelty to his wife because he had beaten her dog.

Eventually Mr. Graham, for the respondent, agreed to the payment of £50, the applicant meanwhile to have the custody of the children.

HACKENBERG V. HACKENBERG.

Mr. Graham applied for a rule *nisi* calling on the respondent to show cause why he should not pay to applicant the sum of £25, to enable her to institute proceedings for divorce.

The petition alleged that the parties were married in Austria in 1863, and there were two children of the marriage, both majors. Ten years ago respondent deserted applicant, and left her without means. During that time applicant stated she had ascertained that he had been living in adultery with one Bertha Butler.

Rule *nisi* was granted.

KRAHE V. QUIN. { 1899.  
March 14th.

This was an appeal against a decision of the Resident Magistrate of Worcester, in an action in which the present respondent sued the appellant for £6 for two months' rent of a certain store. The defendant pleaded that the house did not belong to the plaintiff, but to one Heatlie, to whom the month's rent previous to that now sued for had been paid: that the rent for the months now sued for was demanded by Heatlie from the defendant, who refused to pay it on the ground that he did not owe the rent, he having only hired the premises for the month for which he had paid. He took exception also to the jurisdiction inasmuch as title to the premises was in dispute, involving future rights.

Judgment was given for the plaintiff.

Mr. Innes, Q.C., appeared for the appellant.

Mr. Graham, Q.C., for the respondent.

The appeal was dismissed with costs.

[Appellant's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

BOARD OF MANAGEMENT, { 1899.  
BREDASDORP V. ECKSTAEN. { March 14th.  
May 8th.

This was an appeal from a decision of the Resident Magistrate at Bredasdorp, in which the respondent was plaintiff, and sued the appellants for £11 9s. 1d., as and for a refund of moneys advanced by him on behalf of the defendants, less 9s. received by him on their account subsequently to making up their books, and £2 as salary for four months, and 10s. salary in lieu of notice. The summons alleged that he had acted as secretary and treasurer to the Board from September, 1895, to the end of November, 1898, and that during that period on several occasions when there were payments to be made there were no funds in hand, and that he had on such occasions advanced money to them, meaning *bona fide* to facilitate the business of the Board, and

meaning to refund to himself such moneys at such times as moneys due and belonging to the Board were received by him; that when making up the books in July, 1898, he discovered that the Board was indebted to him in £11 3s. 1d. for advances; that this would appear from an inspection of the books, and from a verbal explanation given by the plaintiff in regard to items appearing in the books at a time when the chairman of the Board signed the books; he alleged further that the defendants had neglected to give him one month's notice.

The defendants pleaded: (1) That the summons was premature inasmuch as the plaintiff was informed that his claim would be laid before the next meeting of the Board, at which meeting it was decided to ask the plaintiff to attend the next meeting of the Board to be holden on the 19th inst., in order that he might explain several items in the cash book and statement of the late Board; and that his agent was also informed thereof; (2) with reference to the claim for salary, that according to section 15 of Act 29 of 1881, the services of the secretary expired at the expiration of the old Board; (3) non-liability; (4) the general issue.

The Magistrate gave judgment for the plaintiff for £11 3s. 1d. and £2. In his reasons he said that the books had been kept in rather a peculiar manner by the plaintiff, and did not show the transactions very clearly, but that he had examined them most carefully, and there could be no doubt that the Board was indebted to the plaintiff for the full amount of his claim of £11 3s. 1d.

The defendants appealed.

Mr. McGregor for the appellants: The plaintiff's case was so meagre that in law there was no evidence at all of his claim. As to the Board's power to borrow money, see Act 29 of 1881. *Brice on Ultra Vires*.

Mr. Buchanan, for the respondents, relied upon the reasons given by the Magistrate.

The matter was ordered to stand over for inspection of the books of the Village Board.

*Postea* (May 8th).

De Villiers, C.J., said: The Court has had great difficulty in deciding this case, not having had the books of accounts before them. We have since had an opportunity of inspecting them, and it appears that on the one side of the ledger certain amounts appeared as having been paid by plaintiff, and on the other side as having been paid to

him. Naturally the Village Board refused to pay until they had had an explanation of these entries. The plaintiff was the only person who could properly have explained the books. Accordingly they refused to pay until he had given satisfactory explanation of the books, and there was some delay in holding a meeting. At last a meeting of the Board was held, and the secretary was asked to appear at the meeting to give an explanation, but instead of appearing he met their request with a summons for the amount. In the absence of explanation by the plaintiff as to why these amounts were entered, I am of opinion that the Magistrate was wrong, and should have given absolution from the instance.

Maasdorp, J., concurred.

The appeal was allowed with costs in this Court except as to the claim for £2 10s., and judgment altered to one of absolution from the instance. Defendant to pay costs in the Court below.

[Appellants' Attorneys, Messrs. Dampers & Van Ryneveld; Respondent's Attorney, P. de Villiers.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

BILLINGHAM AND CO. V. { 1899.  
MOSENTHAL AND CO. { March 15th.  
May 8th.

Sale — Quality of articles sold —  
Expert evidence.

*Where the soundness of certain wagon naves was in question, and a Magistrate gave judgment contrary to the evidence of experts who had been called, his judgment was altered on appeal.*

This was an appeal from a decision of the Resident Magistrate of East London in an action in which the appellants were plaintiffs and sued the respondents for £3 ls., the purchase price of certain ten wagon naves. These had been ordered by



the respondents, and the order was carried out, but the respondents returned them as being unsound. The appellants then sued respondents for payment, and the Magistrate gave judgment for respondents. The plaintiffs now appealed.

The Magistrate found that the sale originated in an order to plaintiffs from the defendants' broker, the broker afterwards passing a broker's note in the following terms: "Sold on account of Messrs. Billingham & Co. to Messrs. Mosenthal & Co. in good, sound, and merchantable condition ten naves." Plaintiffs in compliance with the order forwarded to the defendants' store ten naves with a delivery note as follows: "Please recover from Billingham & Co. in good order and condition the undermentioned goods" (ten naves). The delivery of these naves was at once declined and endorsement written: "These naves won't do, we would like sound naves—returned per boy," the delivery having been refused forthwith. The condition of the naves themselves is admitted by all to be cracked. the tradesmen produced by plaintiffs assert that the naves would work up into good wheels. Defendant states he is not a wagon builder, and he appears to have bought for a shop-keeper. He was dissatisfied, seeing some naves with large cracks and comparing them with previous wood sold to the firm by plaintiffs and declined to take any of them as in sound and merchantable condition (two of the naves inspected by the Court were severely cracked, some cracks wide and extending into the centre of the nave.) Owing to the tendency (known to plaintiff better perhaps than to defendant) of yellow wood to warp and crack plaintiff might have protected himself as vendor, but he sold "in good, sound, and merchantable condition" while the naves were visibly unsound.

Mr. McGregor, for the appellants, quoted *Ferguson v. Wood Brothers* (4 Juta, p. 111); *Jones v. Just* (L.R., 3 Q.B., p. 197); *Randall v. Newsome* (2 Q.B.D., p. 259); *Moyle's Law of Sale* (p. 195); *Pothier Contract of Sale* (p. 132); *Hall v. Kearns* (10 Juta, p. 132); *Schorer's Note to Grotius* (3, 15, 7).

Mr. Innes, Q.C., for the respondents.

The Court decided that it would be more satisfactory if the naves in question were sent up to the Court for inspection, provided they had been retained in the Magistrate's Court, or that both parties to the suit were satisfied as to the identity of the naves. If they were not forthcoming, the Court would give judgment.

*Postea* (May 8th).

De Villiers, C.J., said: It appears that the goods sold were certain wagon naves, and a contract was entered into by means of a letter sent to the brokers of the defendants in the following terms: "Send to Mosenthal, sharp, three wagon naves, 3 inches by 12 inches, and two pair Scotch cart naves." Subsequently the broker's note was delivered to the parties, and was as follows: "In good, sound, merchantable condition." When the naves were sent to Mosenthal, a note was sent, "Please receive in good order and condition ten naves." On the counterfoil of this note was written, "These naves are broken. We like sound naves." The point to decide is whether the naves were sound or not, and this depends upon expert evidence. There were some witnesses who swore that these naves would not do for carriage work but it was the opinion of every expert who gave evidence that so far as wagons were concerned, these naves were really fit for use. The plaintiff himself was sworn, and he called wagon-makers of several years' experience. The Magistrate seems to have been greatly influenced in giving his opinion by the naves he saw, and to have pitted his own opinion against that of these experts. The Court has expressed a desire to see the naves, and certain naves have been sent down, which defendant, however, denies to be the naves in question. Therefore the Court cannot attach any weight to them. Upon the nature of the evidence, I am of opinion that the Magistrate should have given more weight to the almost overwhelming evidence of the experts. Judgment should be altered to one for the plaintiffs, with costs in this Court and the Court below.

[Appellants' Attorneys, Messrs. Findlay & Tait; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

HALL V. ZIETSMAN. { 1899.  
March 15th.

Libel—Publication—Letters.

*A summons in a Magistrate's Court alleged libel upon the plaintiff contained in a letter written by the defendant to the firm of attorneys of which plaintiff was a member. Exception was taken on the ground that the summons did not allege publication of the letter. An amendment was al-*

*lowed which alleged publication to the bookkeeper of the firm, and the exception was disallowed.*

*Held, on appeal, that inasmuch as the amendment did not allege that the defendant was responsible for the publication to the bookkeeper, the exception should be allowed.*

*Where a summons complains of libel contained in certain letters it is a good exception that the letters are not annexed, and the exact words not set forth.*

This was an appeal from a decision of the Resident Magistrate of Kokstad, in an action in which the appellant was sued by the respondent, who was a member of the firm of Zietsman & Le Roux, attorneys, for the sum of £5,000 damages for libel and slander. The summons alleged that during defendant's absence in England, Messrs. Zietsman & Le Roux were appointed by Mr. Hall to hold his power of attorney to transact certain business in South Africa. On Mr. Hall's return from England he wrote a letter to Zietsman & Le Roux, which it was contended by the respondent was libellous. The letter was set out in paragraph 6, but there was no allegation as to its publication. It complained, in various respects, of the maladministration by the firm of the appellant's property while he was in England. It stated that he was advised that in regard to his claim for rents, allowed through their want of diligence and proper attention to business to have fallen into arrears, he had a claim in law against them. He further alleged in his letter that they had exceeded their rights in granting option to purchase to one Castle and one Champion of the Ogden Estates. The letter continued, "I feel there has been a great want of straightforward dealing with me during my absence from Kokstad. . . I do not like undue liberties being taken with me or my property." The respondent held that this letter "meant to convey that he had been guilty of wilful neglect, that he was not trustworthy, and was devoid of integrity." It was further alleged in the summons that appellant had publicly said: "Zietsman and his firm have grossly mismanaged my affairs while away in England," or words to that effect, and, "I am going to sue him for

damages for losses sustained in consequence of his mismanagement," meaning to convey that respondent had wilfully mismanaged his affairs while he was absent in England. It was further stated that appellant had, in the course of conversation in reply to a question, "Do you consider them (meaning the respondent) to be rogues?" said, "I don't say so, but facts are stubborn things," meaning to convey by innuendo that as business people they were dishonest and untrustworthy. In paragraph 9 other alleged libels were alleged contained in letters written to various people specified, the letters not however being put in, but a summary of their contents being given.

To this summons the defendant excepted:

1. That it was vague and indefinite, and disclosed no cause of action; if any cause of action were disclosed, it was for slander and libel upon the firm of Zietsman & Le Roux.

2. With regard to paragraph 6, that the letter therein referred to was a privileged communication, and that there was no allegation of its publication.

3. That the paragraphs alleging the slander were vague and indefinite.

4. That the letters referred to in paragraph 9 should be annexed to the summons, and the words complained of set out.

The plaintiff replied to the second exception that the letter was published to Alexander Edward Barker, bookkeeper and clerk in the employ of Zietsman and Le Roux, and applied that those words be inserted.

The plaintiff objected to the application for amendment.

The Magistrate allowed the amendments applied for and disallowed the other exceptions.

The defendant appealed.

Mr. Graham, Q.C., appeared for the appellant.

Mr. Innes, Q.C., for the respondent: The publication to the bookkeeper who opened the respondent's letters may amount to a publication in law. *De la Croix v. Therrnot* (2 Stark, p. 63); *Folkard on Slander and Libel* (p. 49, Fourth Edition)

[Maasdorp, J.: There is no allegation that the publication to the bookkeeper was by the defendant.]

The paragraph does not expressly say so, but it is sufficiently alleged.

Mr. Graham in reply.

De Villiers, C.J., said: There were several exceptions taken in the Court below, but the only one that the Court need consider now

in the second, which maintained that the letter referred to in paragraph 6 of the summons was privileged, and at the same time excepted to the paragraph, inasmuch as there was no allegation as to the publication of the letter. Dealing with the latter part of the exception first, it appears that this long letter was written by the appellant to his attorneys. He had given a power of attorney to plaintiff in the Court below, Zietsman, with power of substitution, and plaintiff had substituted the firm of Zietsman & Le Roux as attorneys for defendant. This letter contains several complaints against plaintiff for the manner in which his duties had been carried out, but the fact that there are defamatory statements in this letter can not expose defendant to an action for libel: It is essential to such an action that there should be some allegation of publication before plaintiff could succeed. In consequence of this exception being taken an amendment was allowed; that was to insert after the word "words" in the summons, the words "and which were published to Albert Edward Barker, bookkeeper in employ of Zietsman." But there is nothing in the amendment to show that the defendant was responsible for the opening of the letter by Barker, or that he knew that it would be opened by respondent's clerk, and therefore the essential fact as to the publication of the letter is still wanting, and the exception must still remain a good one. In my opinion, therefore, the appeal ought to be allowed in regard to this second exception as to the latter part. In regard to the ninth paragraph of the summons, I do not see how it would be possible for the plaintiff to succeed. The Court will allow the appeal with regard to that section, and the appeal will be allowed with costs.

[Appellant's Attorneys, Messrs. Sauer & Standen; Respondent's Attorney, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

VAN DER SPUY AND CO. V. { 1899.  
TRUTER'S TRUSTEE. { March 16th.  
" 21st,

Insolvency—Sale—Ordinance 6 of 1843, sections 77, 98.

*Interdict granted restraining the trustees of an insolvent estate from selling landed property belonging to the estate, until after they had received instructions as to such sale at the third meeting of creditors.*

This was an application by certain creditors in Truter's insolvent estate at Malmesbury to restrain the sale advertised by the trustees for the following Saturday. The creditors, Messrs. Van der Spuy & Co., who were holders of a first mortgage bond on the property advertised, contended that the sale was not in accordance with the law, inasmuch as the trustees had not obtained the consent of the majority in number and value of the creditors, and that the third meeting had not yet been held. They said that the trustees had not complied with sections 77 and 98 of the Insolvent Ordinances. They had protested by letter against the sale, but it was to be proceeded with nevertheless. They now prayed for an interdict restraining the trustees from disposing of the property until they had been instructed by the creditors at the third meeting in the estate as to its disposal, and for costs *de bonis propriis*.

Mr. Searle, Q.C., for the applicant, referred to *Bernstein v. Bernstein's Trustee* (7 Sheil, p. 169); *Keyser v. Van Rensburg's Trustee* (7 Juta, p. 292).

De Villiers, C.J.: Has notice been given?

Mr. Searle: No notice has been given, and in view of that I cannot press the part of the application which referred to the costs, but merely for an interdict restraining the sale.

The Court granted a rule *nisi* calling upon the trustees to show cause on Tuesday next in Chambers why they should not be restrained from selling the property in question until

after they had received instructions as to the sale of the property at the third meeting of the creditors, and why the costs of the application should not be paid by the estate.

De Villiers, C.J., added that if the trustees saw they were not justified in going on with the sale they would probably communicate their intention, and it might not be necessary to incur any further costs.

*Postea* (March 21st).

On the application of Mr. Close, the rule was made absolute.

[Applicants' Attorney, D. Tennant.]

MITCHELL V. COHEN. { 1899.  
March 16th.

This was an appeal from a judgment of the Resident Magistrate of Cape Town in an action in which the present appellant was defendant and the respondent plaintiff, and the summons was for £12, which was stated to be due by appellant in respect of occupation by him of certain premises, from 10th October to 10th November, 1898, and also for a decree of ejectment. Certain exceptions were taken, the principal one being to the jurisdiction, on the ground that there was a lease of the property for three years, which was of the value of more than £40. Another exception raised was that a claim for rent and for ejectment could not be combined in one summons. Respondent denied the existence of the lease and the Magistrate came to the conclusion that there was none, and gave judgment not only for rent, but also for a decree of ejectment, holding that he could do so, because the value of the premises was not £40, whereas if there was a lease the value would have been over £40.

Mr. Searle, Q.C., appeared for the appellant; Mr. Benjamin for the respondent.

After argument,

De Villiers, C.J., said: This appeal has proceeded mainly upon the question of the jurisdiction. The contention for defendant is that the Magistrate had no jurisdiction, inasmuch as defendant had a three years' lease, which was to him of the value of more than £40. The Magistrate allowed evidence to be given as to the existence of the three years' lease. In my opinion the defendant has wholly failed to prove the existence of the three years' lease. It is said that he gave some vague promise, but such a vague promise does not show that there was a lease, and it is only an actual contract which would justify the Magis-

trate in holding that he had no jurisdiction. In my opinion the Magistrate very rightly overruled the exception. A further technical point has been raised as to the form of summons. It is certainly very loosely drawn, and if the defendant had raised the objection that he was summoned to appear on the 8th November, and that there was a claim for ejectment on the 8th November, he being entitled to remain until the 10th November, he might have succeeded. But that was not the defence raised at all, and this technical fault in the summons ought not to affect the question. The appeal will be dismissed with costs.

Maasdorp, J., concurred.

[Appellant's Attorney, A. P. Kenealey; Respondent's Attorneys, Messrs. Innes & Hutton.]

OVERTON V. SCHLINDER. { 1899.  
March 16th.

Magistrate's jurisdiction—Counter-claim.

*The plaintiff sued the defendant in the Magistrate's Court for £45, under an agreement for the sale of a cart, harness and horses. The defendant admitted the agreement, but put in a counter-claim for £67, which included charges for the care of the horses, and the value of one of them which had died. The Magistrate dismissed the case on the ground that he had no jurisdiction.*

*Held, on appeal, that the Magistrate should have heard the case.*

This was an appeal from a decision of the Resident Magistrate of Stellenbosch in an action in which the appellant sued respondent for £45 under an agreement for the purchase of a village cart and harness and two horses. The defendant admitted the agreement but he excepted to the Magistrate's jurisdiction, inasmuch as he had a counter-claim for £67, for charges and damages, which included, among other items, charges for care of horses, embrocation for the horses, £15 damages for loss of one of them, and damages for assault and slander in the public streets. The Magistrate allowed

the exception on the ground that there was a connection between the counter-claim and the original claim.

The plaintiff appealed.

Mr. Searle, Q.C., for the appellant:

The counter-claim being for unliquidated damages, the Magistrate was in error. *Dale v. Winskip* (J. 9, p. 509). In *Jooste v. Pretz* (11 S.C.R., p. 60), it was held that the Magistrate could separate the items of the counter-claim, and decide on any of them if they were capable of being pleaded in compensation. *Colonial Government v. Stevens and Hollingsworth* (J. 10, p. 140); *Kerdell v. Bam* (12 S.C.R., p. 13); *Smith v. Ramsbottom* (1878, p. 98); *Brett v. Seliman* (J. 4, p. 6).

De Villiers, C.J., said: In looking at the counter-claim I find that the greater part of it consists of unliquidated damages, which would be quite incapable of compensation as against plaintiff's claim for purchase. In my opinion, such unliquidated claims should not oust the jurisdiction. The Magistrate therefore ought to have heard the case. If the defendant had raised the defence that the contract should be cancelled by reason of breach of contract, or that he was entitled to damages by reason of breach of warranty, then the Magistrate could have heard the case as far as he had jurisdiction in respect of such damages. But he has dismissed the case altogether. He was wrong in holding that he had no jurisdiction, and the appeal must be allowed, with costs, and the case remitted to the Magistrate to try on its merits.

[Appellant's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

IN THE ESTATE OF THE LATE FREDERICK SIMON BERNING MASKEW.

Mr. Upington applied for an order authorising the purchase by the executors of certain property.

Order granted.

Re METROPOLITAN AND SUBURBAN RAILWAY, IN LIQUIDATION.

Mr. Innes, Q.C., presented the first report of the liquidators.

The usual order for inspection was made.

IN THE ESTATE OF THE LATE JOHANNA MARGARETHA JOUBERT.

Mr. Buchanan applied for leave to mortgage certain property.

Order granted.

KORLER V. KORLER.

Mr. Close applied for leave to sue for restitution of conjugal rights by edictal citation.

Petitioner was married at Port Nolloth, there being one child of the marriage. Her husband at that time carried on business as a trader in Namaqualand. Shortly after the marriage defendant gave way to intemperate habits, and subjected plaintiff to ill-treatment. He promised reform, and the parties went to live on a farm at Clanwilliam. Shortly after this, however, he left for Namaqualand, and after writing a few letters to her discontinued all communications. She was told he had been seen in Cape Town lately, and had advertised for him. She had been obliged to keep a boarding-house in self-support. She now prayed for leave to sue by edictal citation, the order to be returnable by May 1.

The Court granted the order, returnable on May 15, personal service if possible, failing which publication in the "Government Gazette" and in "Ons Land."

HOOLE V. BAKER.

Mr. Buchanan applied for leave to attach certain property to found jurisdiction, and to sue by edictal citation.

Leave was granted, personal service to be effected, and the citation to be returnable on the 12th April.

IN THE MATTER OF THE PETITION OF GEORGE MILLER AND HIS WIFE, ANNIE MARTHA BROWN.

Mr. Buchanan applied for leave to register a contract entered into by the parties with one another before their marriage.

The order was granted.

IN THE ESTATE OF THE LATE JOHANNES NICOLAAS WILHELM BARKHUIZEN AND ELEANOR GRETHERIDA BARKHUIZEN.

Mr. Buchanan applied for leave to mortgage certain property.

The order was granted.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAANDORP.]

**BALLEY V. THE WHITTLESEA ( 1899.  
HALL SYNDICATE, LIMITED. ( March 17th.**

Mr. Close applied for an order for the winding up of the said syndicate.

The application was made under sub-section 2 of section 136 of the Companies Act of 1892.

The Court granted a rule calling on respondents to show cause why the order should not be granted, returnable on April 12.

**CAPE TOWN COUNCIL V. LAZARUS.**

Mr. Innes, Q.C., applied for an award of arbitrators, whereby £1,200 was awarded to Lazarus for certain property which had been expropriated. A consent paper was filed.

Order granted, subject to the production of a certain power of attorney.

**CROYWAGEN V. RESIDENT  
MAGISTRATE OF WORCES- 1899.  
TER AND MEYER. } March 17th.**

**Magistrate's Court—Irregularity—  
Absence of Jurisdiction—Rule  
of Court 190—Act 20 of 1856,  
schedule B, section 29.**

*C. who had resided for many years at Stellenbosch, entered into a contract at Worcester with M. for the performance of certain work at Worcester. For a few months while the work was proceeding C. lived at a boarding-house in Worcester. He then returned to Stellenbosch. Subsequently, while on a visit to Worcester, he received a letter of demand for money due to M. under the contract. Not satisfying the demand a summons was issued against him out of the Magistrate's Court of Worcester, and service was effected by leaving a copy at the boarding-house at which he had previously lodged.*

*Failing to appear, provisional judgment was given against him in the Magistrate's Court of Worcester. He satisfied the writ under protest, and applied to the Supreme Court by motion for a rescission of the judgment on the ground of gross irregularity, and for a refund of the money paid in satisfaction of the judgment.*

*Held, that he should have made application under the 190th Rule of Court, and that under all the circumstances the application should not be entertained.*

This was an application for an order setting aside a certain judgment given by the Resident Magistrate of Worcester in a case in which applicant was sued by the respondent Meyer for the sum of £9 13s. 6d.

The applicant stated on affidavit that he was a contractor residing at Stellenbosch, and had resided there for thirty-six years. Towards the end of the year 1897, he entered into a contract for the erection of a public school at Worcester, and started work there in November. The respondent Meyer undertook to do certain painting work there. The applicant superintended the work, and in May and part of June, 1898, boarded and lodged at the boarding house of Mrs. Villet in Worcester; after that he only paid short periodical visits. On the 30th July, while present at the opening of the school, the respondent presented an account which he refused to pay; that same evening a letter of demand was served upon him, but he told the respondent, that if he wished to proceed against him he could take steps at Stellenbosch. On the 8th February, 1899, the messenger of the Magistrate's Court at Stellenbosch came to him to execute a writ for £11 13s. 4d., capital and costs, by virtue of an alleged provisional judgment obtained in the Magistrate's Court at Worcester on the 4th August; this the applicant satisfied under protest and requested the Magistrate to retain the money pending further proceedings. Upon inquiry it appeared that a summons had issued returnable on the 2nd August, and this had been served at Mrs. Villet's boarding-house, where a copy had been left.

The respondent filed an answering affidavit to the effect that from the time the

applicant commenced work on the school building, he had resided with his family at Worcester in a house on the school premises, and that in the week in which the respondent commenced work, the applicant removed to Mrs. Villet's boarding-house, where he several times paid the respondent amounts on account of work done. The respondent alleged further that he was a poor man and could not place his agent in possession of the required funds to proceed with the writ before February.

The prayer was for the rescission of the judgment of the Magistrate's Court on the grounds of the gross irregularity of the proceedings; also that the money paid by appellant to satisfy the judgment should be refunded, and that the respondent Meyer should pay the costs of the present suit.

Mr. Innes, Q.C., appeared for the applicant.

Mr. Molteno, who appeared for the respondents, objected to the proceedings on the ground that it was not competent for the applicant to bring this matter before the Court except by way of appeal or review.

De Villiers, C.J. (to Mr. Innes): Why did you not appear by way of summons?

Mr. Innes: The ordinary procedure is by way of re-opening under Act 20 of 1856, schedule B, section 29. But that does not apply in this case because want of jurisdiction does not appear on the face of the documents. The other form of procedure is under Rule of Court 190; but that only applies where the parties are properly before the Magistrate. Here the summons had no effect at all: the Magistrate had no power to entertain the case. There is no precedent for this application, but as the Court has a general power to supervise the proceedings of inferior Courts, I submit that it is the proper course.

Mr. Molteno: The applicant should have applied to the Magistrate under Act 20 of 1856, schedule B, sections 23 and 29.

De Villiers, C.J.: The Court might try this as a motion under the 190th rule of Court. I think there is nothing to prevent persons from coming to the Court and applying for the process under the 190th rule of Court.

Mr. Molteno: In all cases it has been held by the Court that it was quite competent to go to the Registrar.

De Villiers, C.J.: It has been held that it is competent to go to the Court as well.

Eventually the Court decided to hear the affidavits, and consider, if necessary, whether there should be a process under the 190th rule of Court before giving judgment.

The affidavits were then read.

Mr. Innes: The applicant here could never have come within the jurisdiction.

[De Villiers, C.J.: Could he not have been sued at Worcester before he left? The Court has always given a very liberal meaning to "residing."]

*Beidle v. Bowley* (12 S.C.R., p. 401); *Scott v. Clarke & Co.* (13 S.C.R., p. 15). In *Ooshuizen v. Pienaar* (7 Sheil, p. 405), it was held that as the defendant had lived in Colesberg for six weeks, he was an inhabitant, but here the applicant has lived at Stellenbosch for 36 years and only went to Worcester for two months. He finally went there for a day, and then received the letter of demand.

Mr. Molteno: Considering that the contract was entered into in Worcester, payments made there, and that the applicant lived there for a long time, the Court will not look too nicely into the question of jurisdiction.

Mr. Innes in reply referred to *Kaffoor v. Katar* (8 Sheil, p. 202); *Cronje v. Hals* and *Hudman* (1869, p. 170).

De Villiers, C.J.: The proper course for the applicant would have been to have proceeded under the 190th rule of Court. If there had been this excess of jurisdiction on the part of the Magistrate, and the plaintiff was entitled to set aside the proceedings, his proper course was to proceed under the 190th rule. In saying this, however, I do not wish to lay down as a hard and fast rule that the Court would refuse to assist parties even when they apply by motion, if it is satisfied that there has been a real failure of justice, because that being the case, it is a matter of form whether the proceedings should be by motion or under Rule 190. That is a pure matter of procedure. But the Court does not depart from the course indicated by the Rule of Court unless it is satisfied that it is necessary for the due administration of justice that the Court should give assistance. In the present case it is by no means clear that there has been a failure of justice. The plaintiff in the Court below was an artisan, apparently in a small way, residing at Worcester. The respondent was a contractor, apparently on a large scale, living at Stellenbosch. He entered into a contract for building a large school at Worcester, and had lived there for a certain time while the

contract was being executed. Now, if he had been sued while the contract was going on, and while he was living at Worcester for the purpose of supervising the contract. I think that the Court might have held that the Magistrate had jurisdiction to entertain the case, so long, at all events, as he was residing at Worcester. In the present case the defendant left Worcester before the contract was completed, but on the day on which the school was opened he returned to Worcester, and on that day received a letter of demand from the plaintiff for an account claimed. The summons was served at a boarding-house at Worcester after the appellant had left Worcester for Stellenbosch, and technically I am inclined to agree with Mr. Innes that he might insist upon the suit being heard at Stellenbosch, but for all substantial purposes I think that it was only right that the case should have been heard at Worcester, as the plaintiff in the Court below was the poorer man, and all the witnesses in the case were resident at Worcester. Now if the defendant had had no opportunity of re-opening the case at all the Court would say there had been substantial injustice. But the defendant had this opportunity under the 29th section of schedule B of Act 20 of 1856, but he preferred to stand upon his strict rights. At the same time the Court may consider all the circumstances when a novel application of this kind is made and if it holds that it would be more in accordance with substantial justice that the case should have been heard at Worcester, it will not strain the 190th rule for the purpose of assisting the applicant, who now seeks to set aside the judgment of the Worcester Magistrate. For this reason I am of opinion that the application be not entertained. If the applicant chooses to make a further application under the rule of Court, I wish to make no decision upon that point.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Respondent's Attorney, V. A. van der Byl.]

#### MOLTENO V. FULLER.

Mr. Jones applied for leave to withdraw the Tembuland election petition. The affidavit of Mr. Vincent A. van der Byl, petitioner's attorney, was read, stating that the petitioners were desirous of withdrawing the petition, and an affidavit of notice to the respondent's attorneys was put in,

A rule *nisi* was granted, to be published once in the "Umtata Herald," and returnable on the 12th April.

*Postea* (April 18th).

On the application of Mr. Currey, the rule was made absolute.

#### DUMEYER V. PRIESTLY.

Mr. Uppington moved that the rule *nisi* granted on the 25th February, calling upon appellant to show cause why he shall not pay the costs of a certain application, be made absolute.

Granted.

#### MILLIGAN V. MILLIGAN.

Mr. Jones applied for leave to Mrs. Milligan to sue for restitution of conjugal rights by edictal citation.

The petition showed that the petitioner was married on September 5, 1881, at New Brighton, near Liverpool, and there were three children of the marriage. The parties had lived together in Glasgow till 1891, when the husband left for the Cape, promising her to remit her funds to join him. Petitioner's married life had, owing to her husband's intemperate habits, been a most unhappy one. She also stated that respondent had been admitted as an attorney of the Circuit Courts, but was subsequently convicted of fraud, and had been struck off the rolls. He had subsequently promised to reform, and believing him she had come out to this country at his request, but on her arrival she found that he had left for Johannesburg, and since then she had only received £3 from him in support. She was informed that he was still resident in the Transvaal.

Leave was granted to sue by edictal citation, personal service to be effected, interdict and notice of trial to be served at the same time, and citation returnable on May 15.

#### IN THE MATTER OF ISAAC JOHANNES DE JAGER.

Prodigal—Provisional curator.

Mr. Benjamin applied for the appointment of a *curator ad litem*.

This was a petition by Mrs. De Jager, resident at Riversdale, who stated that the said Isaac Johannes de Jager was a confirmed drunkard, and was not in a fit state to manage his own affairs. He was a dipsaq-



maniac. A doctor's certificate to this effect was attached. Petitioner prayed that Isaac Johannes de Jager, sen., be appointed *curator ad litem*.

The Court granted a rule *nisi* calling upon respondent to show cause at the ensuing Circuit Court at Riversdale why he should not be declared a prodigal; his father, De Jager, sen., to be appointed provisional curator in the meanwhile.

IN THE MATTER OF THE MINOR WINIFRED MAUD BUTLER.

Mr. Buchanan applied for an order authorising the payment of a certain sum for the minor's education out of the profits of a certain life policy.

The order was granted.

IN THE MATTER OF THE WESTERN PROVINCE EXPLOSION SYNDICATE IN LIQUIDATION.

Mr. Buchanan presented the liquidators' report and asked that it be confirmed, and that the list of contributories be settled; also for an order authorising calls to be made upon shares that had not been fully paid up. No notice had been given to the contributories.

The Court granted a rule *nisi* calling on the contributories to show cause why their names should not be placed upon the list of contributors, and why they should not pay up unpaid calls on shares, service to be by registered letter; the rule returnable by April 12.

IN THE MATTER OF THE MINOR HOWSE.

This was an application for leave to raise the sum of £200 on a mortgage to enable the applicant, a minor, to travel to England and learn the business of farming. Applicant's father and mother had died when he was three months old, since when he had lived with his grandfather.

Mr. Buchanan appeared for the applicant.

The Court granted leave.

*Ex parte* THE EXECUTORS OF THE LATE FANNY ADA WADDELL.

This was an application for leave to raise the sum of £6,000 upon mortgage of certain property. The petition set out that one of the petitioners, Richard Waddell, was married in community of property to the deceased, and that on the 9th April, 1891, they executed a joint will stipulating

that upon the death of the survivor the residue of their estate should be equally divided between all their children then living, the survivor, however, to "enjoy the full benefit of all profits, rents, or the usufruct of their said estate and effects during the whole term of his or her life, and their estate shall not be divided or distributed until the death of such survivor." That the said Fanny Waddell died on the 10th June, 1894, leaving two minor children, a third son having predeceased her on the 1st August, 1891. That at the time of her death there were two pieces of ground with buildings thereon belonging to the joint estate, one situated at Kenilworth and one at Wynberg.

That Richard Waddell employed an agent to file the will, and did not file an account in his wife's estate, as he was told it was not necessary. He was also advised that he was entitled to the full administration of the property, and had administered it ever since.

That in June, 1895, he married one Ida Wied out of community of property.

That under the belief that he had full control of the assets of the joint estate of himself and predeceased wife, he entered into a contract for the erection of a house and premises on the Kenilworth property for £5,500.

That building operations were forthwith commenced, the said Richard Waddell paying for the works, &c., to the extent of £2,000. There being an existing bond of £1,300 upon the properties, a loan of £2,500 on mortgage was obtained.

That upon the said bond for £2,500 being lodged for registration at the Deeds Office it was found that it could not be registered in consequence of the aforesaid will.

That in consequence the said Richard Waddell had been put to great expense and delay, and would now require £6,000 to complete the buildings, pay off the existing bond, and legal and other expenses.

That it would be to the advantage of the minors that the application be granted.

The Master reported that it would simplify matters if the petitioner transferred to the minors as their share the property at Wynberg, and kept as his share the property at Kenilworth, and the minors would be amply secured if a trustee were appointed to receive and apply the rents, and to see that the building was properly insured. He suggested this course if it met with the approval of the Court.

Mr. Searle, Q.C., appeared for the petitioners.

An order was granted in terms of the Master's report, and Mr. W. Currey appointed trustee.

EDISON BELL CONSOLIDATED PHONO-  
GRAPHIC COMPANY V. PEROT AND  
DOYLE.

This was an application for an order restraining the respondents, pending the result of an action, from selling or dealing in instruments for recording and reproducing sounds, containing parts which infringe the applicants' patent rights, and for an account showing all respondents' transactions in such articles.

Mr. Innes, Q.C., appeared for the applicants.

Mr. Jones, for the respondents, consented to the application.

The application was granted as prayed.

*Ex parte* CROSS. { 1899.  
March 17th.

This was an application for leave to surrender a policy of insurance in the Mutual Life Assurance Society of the Cape of Good Hope, on the life of the petitioner, Mary Elizabeth Cross. The petitioner resided in Bulawayo, and the policy had been ceded to one Munro in trust for the petitioner's minor children.

The High Court of Southern Rhodesia had granted leave to the trustee to surrender the policy, and ordered him to pay the proceeds to the petitioner by way of first mortgage specially hypothecating certain landed property in Rhodesia, the bond to be made in favour of the Master of the High Court of Southern Rhodesia. The Mutual Life Assurance Society, however, refused to act without an order of the Supreme Court.

The trustee consented to the application.

Mr. Benjamin appeared for the applicant.

The Court granted an order authorising the trustee to surrender the policy and advance the proceeds to the petitioner.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

MAGISTRATES' CASES RE- { 1899.  
VIEWED. { April 12th

Maasdorp, J., referred to certain cases which had come before him as judge of the week. Arthur Ross and Charles were charged before the Acting Assistant Magistrate of Cape Town with contravening section 17 of the railway bye-laws. Both pleaded guilty, and were sentenced, Ross to fifteen cuts with the cane and Charles to a fine of 5s. or three days' imprisonment. There was no provision in the railway bye-laws for the punishment of imprisonment as an alternative to a fine, and consequently the imprisonment must be expunged from the sentence. Then there was the case of John Kaffir, from the Paarl. He was charged with contravention of section 29 of Act 23 of 1888, in escaping from the custody of a constable whilst being escorted to gaol. He pleaded guilty, and was sentenced to two months' imprisonment with hard labour. It appeared from the Act that the term "prisoner" was defined by the interpretation clause as "any person, whether convicted or not, under detention in any prison or lock-up." The accused in the present case had only just been arrested, and the conviction and sentence must therefore be quashed. In a similar case at the Paarl, in respect of Arend Fortuin, who was found guilty and sentenced to one month's imprisonment, the conviction must also be quashed.

A similar case, which had been passed by his lordship some time ago, had also now been quashed by him, but no prejudice had been done to the prisoner, inasmuch as he was at the same time in prison on another charge.

### ADMISSION.

Mr. Buchanan applied for the admission of Mr. John Brebner Elliott Cormack as an attorney and notary.

The application was granted.

### REHABILITATIONS.

Mr. Benjamin applied for the rehabilitation of Izaak Adrian Loftus.  
Granted.

Mr. Maskew applied for the rehabilitation of Willem Hendrik Albertyn.  
Granted.

PROVISIONAL ROLL.

GOODISON V. ROWE.

Mr. Close applied for provisional OTHERS v' upon a promissory note for £130.  
The application was granted.

SMITH V. VAN BERGEN.

Mr. Benjamin applied for provisional sentence on two promissory notes for the sums of £223 10s. and £77 10s.  
The application was granted.

J. G. STEYTLER AND CO. AND OTHERS V ISAACS.

Mr. Jones applied for the final adjudication of the defendant's estate as insolvent.  
The application was granted.

KARK V. BURGER.

Mr. Benjamin applied for provisional sentence for the interest on a mortgage bond for the sum of £500 from July 1, 1898, to December 31, at 6 per cent., and on a bond for £500 from January 1, 1889, at 6 per cent., and that the property hypothecated be declared executable.

The Court granted the order as prayed, subject to the production of an affidavit that due notice was given calling up the bond.

VOS V. MARSH. { 1899.  
April 1<sup>st</sup>

*Provisional sentence granted upon an acknowledgment of debt payable at the office of the Resident Magistrate of Prieska or any other Resident Magistrate, the document having been presented at the office of the Resident Magistrate of Cape Town.*

Mr. Buchanan applied for provisional sentence upon two acknowledgments of debt for £50 and £1 5s. respectively. The first was made payable at the office of the Resident Magistrate of Prieska or any other Resident Magistrate. The document had been presented at the office of the Resident

Magistrate of Cape Town, and not met. The other document was headed I O U, but was payable to the plaintiff or his order.

Provisional sentence was granted upon both documents.

ARDEENE AND CO. V. LE ROT.

Mr. Benjamin applied for provisional sentence on a mortgage bond, with interest at 5 per cent. from January 1, 1898, and that the property hypothecated be declared executable.

The application was granted.

MARSH V. COLYN.

Mr. Maskew applied for provisional sentence on two mortgage bonds for £250 and £50, with interest from September 1, 1897, and that the property hypothecated be declared executable.

The application was granted.

WHITE V. WARD.

Mr. Buchanan applied for provisional sentence for the sum of £4,000 upon a certain indenture.

The application was granted.

THE TRUSTEES OF THE DIOCESE OF CAPE TOWN V. PALM.

Mr. Maskew applied for provisional sentence for the sum of £37 6s. 8d., being the interest on two mortgage bonds and costs.

The application was granted.

CADDINGWARRA GOLD MINES V. WARD.

Mr. Close applied for provisional sentence for the sum of £2,500 on an acknowledgment of debt.

The application was granted.

AFRICAN BANKING CORPORATION V. MAYNIER.

Mr. Currey applied for provisional sentence for the sum of £542 9s. 6d., together with interest from the 31st January, 1898, at 7 per cent., being the balance due on a mortgage bond, and that the property hypothecated be declared executable.

The application was granted.

HANAU V. STEMMET.

Mr. Jones applied for provisional sentence on a mortgage bond for £200, with interest from 1st July, 1898, and insurance premium advanced.

The application was granted.

## ILLIQUID ROLL.

## ROBERTSON V. SULLIVAN.

Mr. Searle, Q.C., applied for judgment in default of plea for £33 3s. 9d. in respect of school fees.

The application was granted.

## COLONIAL GOVERNMENT V. BROWN.

Mr. Sheil, Q.C., applied for judgment under Rule 319 for £674 in respect of licence money due on sixty-one claims in the Leicester Prospect, from 21st March, 1897, to 11th February, 1899.

The application was granted.

## ASSIGNEES OF ROBERTSON AND BAIN V. SALIE.

Mr. Buchanan applied for judgment under Rule 329 for the sum of £89 11s. 4d., with interest and costs.

The application was granted.

## HEPWORTHS LIMITED V. ROSS.

Mr. Benjamin applied for judgment under Rule 329 for the sum of £11 3s. 4d. for goods supplied, with interest and costs of suit.

The application was granted.

## FREEMAN AND CO. V. RASMUSSEN.

Mr. Maskew applied for judgment under Rule 329 for the sum of £11 10s., goods sold and delivered.

The application was granted.

## FREEMAN AND CO. V. POOL.

Mr. Maskew applied for judgment for the costs of a summons for £45 9s. 7d., goods sold and delivered. The capital having been paid, the Court granted judgment for the costs.

## PURCELL, YALLOP AND EVERETT V. FICK.

Mr. Buchanan applied for judgment under Rule 329 for £20 1s. 11d., goods sold and delivered, with interest and costs of suit.

The application was granted.

## JUTA AND CO. V. ABBOTT.

Mr. Close applied for judgment under Rule 329 for the sum of £10.

The application was granted.

## BEER V. THE FRESH FISH AND FRUIT SUPPLY COMPANY.

Mr. Buchanan applied for judgment in default of plea for the sum of £30, salary for two months, and costs of suit.

The Court gave judgment for £15 and costs.

## COMBRINCK AND CO. V. BEYERS.

Mr. Benjamin applied for judgment for the repayment of £172 13s., which had been handed over by the plaintiffs to the defendant.

The application was granted.

## GENERAL MOTIONS.

## EDISON BELL CONSOLIDATED PHONOGRAPHIC COMPANY V. PEROT AND DOYLE.

Mr. Innes, Q.C., moved that the interdict granted against the respondents on the 13th March last be made perpetual. The respondents had filed a consent paper.

The application was granted in terms of the consent paper.

## THE EXECUTORS TESTAMENTARY OF THE ESTATE OF THE LATE ALEXANDER NICHOLAS BLACK V. THE COLONIAL GOVERNMENT.

Mr. Innes, Q.C., applied that a certain award be made a rule of Court.

Mr. Sheil, Q.C., appeared on behalf of the Government to consent.

The application was granted.

## STEGMAN V. THE COLONIAL GOVERNMENT.

Mr. Close applied that a certain award be made a rule of Court.

Mr. Sheil, Q.C., on behalf of the Government, appeared to consent.

The application was granted.

## DIAMOND V. STRASBURGER.

Mr. Benjamin, on behalf of the defendant, applied for leave to sign judgment against the plaintiff for not proceeding with his action.

The application was granted.

## WINTERBACH V. THE WORCESTER MUNICIPALITY AND FREDERIC LINDENBERG.

This was an application for an interdict restraining the Worcester Council from continuing to employ the second-named

respondent as secretary or otherwise as valuator. The applicant stated that he was a Commissioner of the Municipality of Worcester, and the second-named defendant was the secretary. It appeared that tenders were called for for the valuation of the property of the town, and the secretary was the successful tenderer, his tender being £15. Applicant objected to his appointment, but it was nevertheless made. It was to restrain the Council from continuing to employ Lindenberg as secretary and valuator that the present action was brought.

Mr. Innes, Q.C., appeared for the applicant; Mr. Searle, Q.C., for the defendants.

After argument,

De Villiers, C.J., stated that as the case was one of far-reaching consequences, and the matter was a grave one for the respondent, he considered that it would be better that the further hearing of the case should be deferred, in order that the matter might come before the full Bench. The case would be postponed until the first day of next term.

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## SUPREME COURT

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[Before the Hon. Mr. Justice MAARDORP.]

D. ISAACS AND CO. V. LYLE { 1899,  
April 13th.

This was an application for the final adjudication of the defendant's estate as insolvent. A provisional order had been granted by Mr. Justice Maardorp.

Affidavits by Sidney Isaacs, of the firm of D. Isaacs & Co., alleged that defendant, who it appeared was now in prison, had purchased furniture to the amount of £53. Defendant, when asked for payment, had not disputed the debt, and the firm had dealt with him in the belief that he was the principal, and not an agent for others. It was only when about to institute proceedings that the plaintiffs learned that defendant's name was James and not Martin Lyle.

Mr. Morgan, in the employ of Messrs. Isaacs & Co., also made an affidavit to the same effect.

David G. Fullerton, partner in the firm of G. Findlay & Co., made an affidavit that defendant had dealt with his firm as a principal and not as an agent.

There were further allegations as to defendant attempting to disguise his identity and escape.

The defendant put in an answering affidavit, in which he stated that the business was carried on by his wife, M. Lyle, and that the debts would be found in applicant's books under the name M. Lyle, and not in the name of defendant. Further, defendant denied that he was insolvent, or that he had shaved himself to avoid identification.

Mr. Currey appeared for the plaintiffs; Mr. Buchanan for the defendant.

Maardorp, J., said: The application is opposed on two grounds, first that the defendant is not indebted to applicants at all, but that the indebtedness is really that of his wife. That statement, however, is entirely based upon the defendant's affidavit. On the part of the applicants there are several witnesses who had personal interviews with defendant at the time he purchased these goods for himself, when he stated that he required them for his furnishing business in Cape Town. Defendant is not supported by any other witness, and surely his wife could have made an affidavit if the allegation was true that the business belonged to her and not to him. Under these circumstances, I think I must take it as true that the debts alleged to be due under applicants' petition are due. The next defence is that even if these debts are due respondent's insolvency has not been proved. Acts of insolvency, which amount to the defendant having used various devices in order to escape his creditors and defeat them in recovering payments, have been alleged by several witnesses. On that point also we have only got the statement of the respondent himself to the contrary, and he also stated that he was not able to pay his debts. It has therefore been proved to my satisfaction that respondent has been attempting to evade payment of his creditors, and that he owes these debts. The provisional order must be confirmed.

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IN THE ESTATE OF THE LATE CORNELIA  
SUSANNA ODENDAAL.

This was an application for an order on the Master to recognise a certain document

as the last will and testament of the deceased. Petitioner stated that he was the husband of the deceased. He was married in 1889, and there were five children of the marriage. On 12th July, 1893, he and his wife made a joint will, appointing the survivor sole heir. About 16th October, 1898, his wife died. It appeared that deceased before her death had suffered from puerperal fever, during which she was frequently out of her senses, and would wander about the house destroying articles. Three months before her death applicant found that her will, by which she bequeathed all her property to applicant, and which had been duly signed by her prior to her illness, had been removed from the bottom of a certain box in which it was kept, and a pencil mark had been drawn through the deceased's signature, cutting through the paper. Applicant had not mentioned it to his wife, owing to her illness, and she died three months later. The will had been laid before the Master upon her death, but he had expressed dissatisfaction with it owing to the erasure of the deceased's signature. Applicant now asked for an order of the Master to recognise the document as the last will and testament of the deceased.

His Lordship appointed Mr. Searle, Q.C., *curator ad litem* to the minors, and ordered that notice should be served upon Mr. Searle as curator of this application, with all such further affidavits as could be obtained. The curator would then consider what course should be taken, the curator to have power to appoint an attorney to investigate the matter, the notice to be returnable on May 11.

*Postea* (May 12th).

An affidavit was read from the doctor who attended deceased in her last illness, certifying to the fact that she was suffering from mania, an after consequence of the puerperal fever, and that the accident to the will was very characteristic of the disease as being designed to injure her husband, with whom she had always lived on terms of affection.

Mr. Searle, Q.C., who had been appointed *curator ad litem* to the minor children, said he had caused inquiries to be made by an independent person, and the result of those had been that he felt it impossible to controvert any of the facts stated for the applicant. It was not clear when the signature was erased, but that might be inferred from the act itself. *Seraby and Finch v. Fordham* (1 Addams' Rep., p. 74) at p. 89. In *Harris*

*v. Herrall* (1 Swab. and Trist., p. 153) it was held that the onus was upon the person seeking to have the will revoked.

The Court made the order as prayed.

De Villiers, C.J., said: There is no clear proof in this case that the erasure of the testatrix's name was effected by the testatrix herself, and of course if the erasure was effected by a stranger, then it would not affect the will. But assuming that the erasure was made by the testatrix, the question arose as to when it was done. The petitioner in his first affidavit indicated that it had been done after she became insane, and according to the doctor's evidence she suffered from hopeless mania, and seems to have had no lucid intervals. Under all the circumstances, I think the Court may fairly assume, especially after the inquiries made by the *curator ad litem*, that the erasure, if made by the testatrix, was made by her while she was in that state of insanity. That being so, of course the will stands. The application will therefore be granted, costs to come out of the estate.

#### IN THE MATTER OF THE METROPOLITAN AND SUBURBAN RAILWAY, IN LIQUIDATION.

Mr. Innes applied for an order confirming the liquidators' report announcing an offer on the part of the Sea Point Railway Company to take over the applicant's line at £20,000.

Granted.

#### IN THE MATTER OF THE WESTERN PROVINCE EXPLORATION SYNDICATE.

Mr. Buchanan asked for an extension of the return day for the rule for the confirmation of the list of contributories of the company till May 1.

Granted.

#### HOOLE V. BAKER.

Mr. Buchanan asked for a rule for substituted service. Personal service had been ordered last term, but could not be effected.

An order was granted giving leave to sue by edictal citation, one publication to be made in the "Government Gazette" and one in the "Johannesburg Star," returnable on May 31.

#### TRUTER V. KRYNAUW.

Mr. Searle moved for the appointment of a commissioner to examine witnesses. The parties in this case were very poor, and it

was suggested that the Resident Magistrate of Britstown be appointed joint commissioner to take evidence on both sides.

Mr. Innes, who appeared for respondent, consented, and leave was granted.—The Resident Magistrate of Britstown was appointed commissioner.

IN THE MATTER OF THE MINORS SNYMAN.

Mr. Benjamin applied for leave to sell certain properties in which the minors were interested. Applicant was father of the minors and the petition set forth that he was anxious to sell a certain farm, Rietvlei, at Oudtshoorn in order to purchase on behalf of the minors a property in Bechuanaland.

The petition was supported by affidavits stating that the purchase of the Bechuanaland property and the sale of the farm Rietvlei would be advantageous to the minors.

The application was granted, with the condition that the property be apportioned in proportion to the holdings of the several minors in the farm Rietvlei.

IN THE MATTER OF THE MINOR FREDERICK W. M. WEGEWARTH.

Mr. Benjamin applied on behalf of the minor's father for leave to mortgage certain property. Petitioner desired to sell to the minor a certain farm on the Cape Flats, near the German Church, for £325, and it would be necessary to borrow £175 on first mortgage. The Master's report on the matter was that the sale appeared to him to be for the benefit of the minor, the farm having been valued at £350. The father proposed to sell it to his son for £325.

Leave was granted to the petitioner to mortgage the property for £175.

DEAN V. PEPLER.

This was an application for an interdict restraining respondent from interfering with applicant while removing certain timber.

It appeared that the former owner of the farm Vankop, at Stellenbosch, had made over to applicant's father the right to cut down certain trees, firs and poplars, on the farm. At his death, applicant's father made over to applicant his rights to the timber on the farm, which, however, had in the meanwhile been sold to the respondent. The original owner, one Kuhlsonn, in selling the

farm to respondent had, it was stated, remarked that it would be reasonable on his part to allow applicant to remove his timber from the farm. Applicant stated that respondent had ordered him to leave the farm and take away his men and wagons that he had been employing in removing the timber by March 23. Applicant now asked for leave to continue to remove the timber.

Respondent made certain affidavits in which he said that the applicant's employes on the farm engaged in the removal of the timber had wasted their time, and had done serious damage to his property. They were constantly brawling, and were frequently intoxicated. Respondent was, however, willing to give applicant thirty days in which to remove the timber, on condition that he was bound down to see that no further damage was done to respondent's property.

Respondent's affidavit was supported by two affidavits stating that respondent had suffered considerable damage owing to the acts of applicant in this matter.

Mr. Buchanan appeared for the applicant.

Mr. Innes, Q.C., for the respondent.

Maasdorp J., said: In this case the applicant claims that he is entitled to certain rights as against respondent. The question is not so much whether he is actually entitled to those rights, as whether he had taken the right course. It may be that he would have been successful if he had proceeded by way of action in maintaining his rights, but where an interdict is asked for, certain circumstances must be proved to exist. Amongst other things, a clear right must be proved on the part of the applicant, and also it must be shown that if an interdict be not granted damage will be suffered in the meantime by the applicant. It is alleged that on this property there are still trees growing which had been bought by applicant from the former owner of the farm, and that there is timber lying upon the ground that had been cut down by applicant. It is clear that respondent was not aware at the time of the purchase of the right to cut down timber granted to applicant by the former owner of the property. All that was brought to respondent's notice was that there was certain timber lying on the property which applicant was entitled to remove. So far as the affidavits show there is no clear right to the applicant to go on cutting down timber. It may of course hereafter be proved that he had such a right, but the affidavits do not show it.

Then as to the trees that are lying upon the ground, the question is whether he had the right to go upon the ground in the manner that he had. If the offer that had been made to him by respondent was a favourable one, that he might go upon the ground under certain circumstances and remove the timber in a certain way, then he had not a clear right to remove it in any other way. There is some evidence to show that the way in which he had removed the timber was causing damage to respondent. The present circumstances are these. The applicant's men have left the property. It is not as if they were now upon the ground. There may be certain trees upon the property and certain timber belonging to him, only it is not at present proved, and there is no proof that he will suffer irreparable damage if he fails in the application. Consequently the application will be refused with costs.

#### QUEEN V. SCOTT.

Mr. Currey applied for a date to be fixed for this appeal from the Special Court at Kimberley.

The appeal was set down for May 11.

*Ex parte* A. B. W. VAN NIEKERK.

Mr. Jones applied for the rehabilitation of this insolvent.

The order was granted.

#### MENDELSONN V. DAVIDS.

This was an application for a decree of civil imprisonment against the respondent upon an unsatisfied order for costs of an appeal from the Resident Magistrate's Court.

Mr. Jones appeared for the applicant.

The respondent appeared in person, and gave evidence upon oath to the effect that she had not the means to pay the debt. She alleged that she had a large family, and her husband earned only 30s. a week.

No order was made.

#### HACKENBERG V. HACKENBERG.

Mr. Close moved that the rule *nisi* restraining the alienation of certain property be made absolute.

The order was granted.

*Ex parte* LAMBRECHTS.

Mr. Jones applied for the rehabilitation of this insolvent.

The order was granted.

## SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP].

QUEEN V. KOOS. { 1899.  
April 14th.

Criminal procedure—Plea of guilty.

*A prisoner cannot be convicted upon his own confession unsupported.*

Maasdorp, J., said: This case has come before me for review as judge of the week. Accused was charged before the Resident Magistrate of Willowmore with stealing 15 lb. weight of mohair. He pleaded guilty, and was found guilty and sentenced to six months' hard labour. Under section 29 of the Ordinance 72 of 1830, an accused person can be convicted upon his own confession, provided the crime is proved by other evidence to have been committed. In this case the only evidence other than that of the accused was given by a police-constable, and this evidence was only hearsay evidence. The conviction and sentence must therefore be quashed.

#### QUEEN V. NAUDE.

Maasdorp, J., said: This case was disposed of by the Assistant Resident Magistrate of Kenhardt. The case was one of theft, and had been remitted by the Attorney-General. Accused was charged with stealing three sheep, pleaded guilty, and was sentenced to imprisonment, with hard labour, for eighteen months. Under Act 42 of 1885, under which the case was remitted, the jurisdiction of the Magistrate was limited to the sentence of twelve months' imprisonment with hard labour. The case was remitted to the Assistant Resident Magistrate as one specific offence, and on the day of trial only one charge was made against the prisoner. The sentence must therefore be reduced to one of twelve months' hard labour. The Magistrate, however, pointed out that the error arose through his having treated the case as three separate offences, whereas the prisoner was charged with one specific offence. The sentence must be reduced accordingly.



IN THE MATTER OF THE MINOR VAN DER HAW.

Mr. Buchanan applied for an order authorising the Master to pay out to the minor Susanna Jacoba van der Haw £50 out of funds belonging to her in his hands. The Court granted the order.

In re KIRBY. { 1889.  
April 14th.  
May 5th.

Presumption of death—Appointment of executor dative.

*Where K. had not been heard of for several years, and when last heard of was in very bad health, Held, that his death should be presumed, and an executor dative appointed to administer property in the Colony which had fallen to him by way of inheritance during the interval.*

This was the petition of William Jesse Kirby, Joseph Andrew Kirby, Mary Kirby, and Elizabeth Turner (born Kirby), who set out as follows:

1. That an uncle of the petitioners, one Charles Kirby, died in or about January, 1886, at Claremont, near Cape Town, a widower and intestate, leaving certain landed and other property.

2. Thereafter, in or about March, 1886, letters of administration were granted by the Master of the Supreme Court to one H. K. Tredgold, as executor dative to administer the estate.

3. That the said executor thereupon realised the assets of the estate, and in September, 1886, and November, 1887, filed accounts of his administration.

4. According to the said accounts there was a balance of £1,355 2s. available for distribution, which the executor dative paid into the Guardian Fund to the credit of the unknown heirs of the said Charles Kirby.

5. Thereafter your petitioners made a claim to the said amount on behalf of themselves and their half-brother, one Charles Kirby.

6. Your petitioner proved to the satisfaction of the Master that they and their half-brother, as the nephews and nieces of the said Charles Kirby, were entitled to the payment of the said amount, and they

annex hereto a genealogical tree showing the basis upon which they establish their claim to the said amount.

7. Your petitioners have each received the sum of £263 14s. 1d. from the Master of the Supreme Court, but there still remains a balance in his hands of £263 14s. 1d. awarded to the half-brother Charles Kirby.

8. The said Charles Kirby, the younger, who was born on the 18th September, 1811, served in the British Army and was present in the campaigns of Zululand, Afghanistan, and the Transvaal, in which latter he was wounded, and was last seen in or about July and August, 1881, when he had just returned with his regiment from abroad, and paid a visit to his step-mother and your petitioners at Hartwell, near Aylesbury, where your petitioners then resided.

9. At that time the said Charles Kirby the younger was in very feeble health and suffered severely from asthma and rapid consumption. Even since that date your petitioners have been unable to gain any information with regard to his movements, although he stated that he was about to proceed to London to join a corps of commissionaires and promised to communicate again with them, and let them know what he was doing. The said Charles Kirby has never, to the best of your petitioners' knowledge and belief, married.

10. Your petitioners caused advertisements to be inserted in several papers, and made inquiries at such places as they thought they would be likely to obtain information at, but without result, and no tidings have been had of the said Charles Kirby since that date. Your petitioners are satisfied that he must have died shortly after the visit referred to, as to all appearances consumption had taken a very strong hold of him, he suffered from hemorrhage, and was very feeble.

The Master of the Supreme Court has duly advertised the amount to the credit of the said Charles Kirby ever since 1887, but the said Kirby has made no claim thereto.

Your petitioners are all owners of landed property in England, and are prepared, should your lordships deem it desirable, to enter into a bond of security to the Master of the Supreme Court.

The prayer was for an order authorising the Master to pay to them in equal shares the amount standing to the credit of Charles Kirby in the Guardian Fund.

Several affidavits in support of the allegations of the petition were annexed. One of

the deponents alleged that he had last seen Charles Kirby seventeen years ago looking very ill, and tramping about England, sleeping in the open air. Kirby asked for money for drink, saying that but for drink he would have been dead long since.

Mr. Searle, Q.C., for the petitioners: This case is not exactly similar to any other decided case. The matter was discussed in *In re Booysen* (F., p. 187); *Voet* (10, 2, 20).

[Maasdorp, J.: Charles Kirby cannot be presumed to have been dead in 1886; the presumption is, therefore, that the property vested in him; if so, then the proper steps should be taken for distributing his estate even if it be held that he is now dead.]

It is difficult to see how an executor dative could be appointed here, inasmuch as he was never domiciled here. In the case of *In re Nelson* (1876, p. 130), the Court handed over the property to the wife. In *Dormehl v. Morrison's Executors* (7 Juta, p. 152) the Master was ordered to pay the amount to the heirs of the deceased. *In re Kunne Meyer* (7 Juta, p. 322).

[The Master in reply to the Court intimated that an executor dative could be appointed if a deceased person left property in the Colony, although he were domiciled elsewhere.]

*Postea* (5th May).

Maasdorp, J., said that, taking all the circumstances into consideration, he had come to the conclusion that Charles Kirby, jun., should be presumed to be dead, and granted an order directing the Master to take the necessary steps for the appointment of an executor dative. Costs to come out of the estate.

[Petitioners' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

#### WOOLF V. SIERADZKI.

This was an application for an award of arbitrators to be made a rule of Court.

Mr. McGregor for the applicant.

Mr. Innes, Q.C., for the respondent, objected to the matter being heard on the ground of the insufficiency of notice.

Maasdorp, J., said: The respondent is entitled to forty-eight hours' notice, which have not been given. It is claimed that the application is urgent, but that has not been proved. The application must be dismissed with costs. Fresh notice will have to be given if the applicant wishes to proceed.

#### IN THE MATTER OF THE PETITION OF BAREND FREDRIK ANDRIES BESTER.

This was an application for the cancellation of a certain mortgage bond.

Mr. Buchanan appeared for the applicant.

The Court granted a rule *nisi*, returnable upon the first day of term, calling upon all persons interested to show cause why the bond should not be cancelled, the rule to be returnable on the first day of term, the order to be advertised in some newspaper circulating at Malmesbury.

#### HEYMAN V. HEYMAN.

This was an application for leave to sue for restitution of conjugal rights by edictal citation.

Mr. Jones appeared for the applicant. The petitioner, Mrs. Heyman, stated that she was married to the respondent before the Resident Magistrate of Cape Town on March 15, 1894. During the succeeding year she and her husband resided at Cape Town, and subsequently at Kimberley. Afterwards they proceeded to England, but eventually they returned to South Africa, Applicant was an actress by profession, and at that time her husband formed a theatrical company with which to tour the Colony. Their venture did not prove to be a success, and applicant and her husband eventually found themselves stranded at Port Elizabeth. They next returned to Cape Town, and defendant was unsuccessful in getting employment. In 1898 defendant proceeded to Bulawayo, leaving applicant in Cape Town. He still resided there, and refused to send applicant funds. The married life of the parties had been an unhappy one.

The Court granted the order returnable on the 11th May.

#### IN THE MATTER OF THE PETITION OF WILLEM TOBIAS OOSTHUIZEN AND OTHERS.

Mr. Searle, Q.C., applied that the rule for the transfer of certain property be made absolute.

The Court granted the order.

#### ABRAHAMS V. ABRAHAMS.

This was an application for a decree of divorce.

Mr. Buchanan appeared for the applicant.

The Court adjourned the case until May 1, as there was no proof that the notice had been advertised in one of the Natal newspapers as ordered.

IN THE MATTER OF THE MINORS GUEST.

This was an application for an order authorising the Master to pay out certain moneys belonging to the minors for the purpose of investment.

Mr. Buchanan appeared for the applicants.

The Court granted an order in terms of the Master's report.

DEACONS' COURT OF NATIVE CONGREGATION.  
LOVEDALE V. MZIMBA AND OTHERS.

This was an application for the rule *nisi* granted on the 28th February, calling upon the respondents Elijah Myimbane, Mbena, Gwabini, and Mawaan to show cause why they should not pay over to the applicants certain moneys, to be made absolute. The rule had been granted upon the hearing of the action between the present applicants as plaintiffs and Mzimba and others as defendants.

The defendants had pleaded, and alleged that the moneys in question were in the hands of the present respondents, four men who were not parties to the action, and the Court thereupon granted the rule *nisi*. The respondents and some of the original defendants now filed affidavits denying the allegations.

Mr. Innes, Q.C., appeared for the applicants, and Mr. Benjamin for the respondents.

The Court discharged the rule, but granted a rule *nisi* calling upon the defendants in the action to show cause on the first day of term why they should not be ordered to pay the costs of the application, the question of costs as between the parties to stand over until then.

*Postea* (May 1st).

The rule was made absolute with costs, and plaintiffs ordered to pay the costs of Myimbane and others.

ARDEENE AND CO. V. EGAN } 1899.  
AND POWER. } April 14th.

Partnership—Service of summons.

*Judgment refused against one partner where the summons had been issued against the partnership, but the partnership had been dissolved and the other partner could not be found and was said to have left the Colony.*

Mr. Benjamin applied for judgment under Rule 329, upon an account for goods sold

and delivered, against James Egan and Michael James Power, trading as Egan and Power.

The return on the summons stated that the deputy sheriff was unable to find James Egan, and was informed that he had left Cape Town.

The plaintiffs' attorney filed an affidavit setting out that the sheriff's assistant who was entrusted with the service found that the firm had no place of business any longer: he thereupon served the summons upon Power at the residence of the latter.

The affidavit of Patrick Comerford alleged that Egan had left the country.

Mr. Benjamin: We only ask for judgment against the partner who has had the summons served upon him. *Pienaar v. Ruttray* (12 S.C.R., p. 35); *Liquidators of Frontier Commercial Bank v. Adams* (2 R., p. 79); *Lindley in Partnership* (p. 266, Library Edition).

Maasdorp, J.: The question raised in this case is not one as to the liability of the partners for the partnership debt, but it is one of practice. The action is brought against a partnership and there is service only upon one partner. Now the rule is that to be effectual the service should be upon the partnership at the place of business. The sheriff's officer says that he is unable to find any place of business. If this business were still a going concern, it might be said that there are some grounds for serving upon one partner. But where the business has been dissolved I do not think that one partner can be regarded as an agent for the other. Then as to the question whether judgment can be given against one partner only, there is authority for saying that judgment cannot be given against one individual partner. If the plaintiff is unable to find the absent partner he can proceed by summons against the partner who is in the country. The present application must be dismissed.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

## APPENDIX.

## WESTERN CIRCUIT, MOSSEL BAY.

[Before BUCHANAN, J.]

REGINA V. ANDERSON. } 1899.  
 } April 1st.  
 Food adulteration—Act 5 of 1890,  
 section 6—Mustard.

*The sale of an adulterated article of food is a contravention of Act 5 of 1890, section 6, unless the defendant can prove to the satisfaction of the Court that the matter or ingredient used in the adulteration is not injurious to health and was required for the production or preparation of the article as an article of food.*

*A mixture of one part of flour coloured with turmeric to every four parts of mustard, is an adulterated article of food.*

*Semle: To obtain a conviction under section 6 of the Act, it is not necessary to allege fraud in the summons.*

This was an appeal from the conviction of the appellant by the Resident Magistrate of Mossel Bay.

The appellant, a shopkeeper in the town of Mossel Bay, had been charged with contravening section 6 of the Act, in having sold mustard which was found on analysis to contain a mixture of one part of flour coloured with turmeric to every four parts of mustard. It was found that the shopkeeper had bought the mustard in tins from a wholesale house and had retailed it in the same condition as that in which he had bought it.

The findings of fact were not disputed, and the arguments were directed mainly to the construction of the Act.

Mr. McGregor for the appellant, contended that as "mustard" had been asked for, and not "pure mustard," what was known in commerce as mustard was intended to be bought and sold, and that there had been no prejudice to the buyer, and that there had been no attempt to defraud. Also, that as the entry in defendant's pass-book showed

that the wholesale dealer had sold him "mustard," there was a sufficient warranty to exempt the shopkeeper.

Mr. Joubert, for the Crown, maintained that when asking for an article of food a pure article was intended to be bought, without any special request being necessary. It was specially provided in the Act that articles bought for analysis should be considered as bought to the prejudice of the purchaser, and under section 6 no fraudulent intent was necessary.

Buchanan, J.: Under section 6 of the Act, the selling of an adulterated article of food is itself an offence, unless the accused proves to the satisfaction of the Court that the admixture of a foreign substance was required for the production or preparation thereof as an article of commerce and was not injurious to health. In this case mustard was asked for, and a compound of mustard and flour delivered. There was no evidence to show that it was necessary to add flour to mustard to make it an article of food. When a compounded article is sold, the dealer can protect himself by giving due notice of such compound to the purchaser in the way provided by the Act. Ignorance of the components of an article does not exempt from liability. A warranty should be obtained by a shopkeeper buying from a wholesale house as to the nature, substance, or quality of an article if such shopkeeper wishes for the protection of the 29th section. A mere entry in a pass-book, which was equivalent more to a bill or account, as has been given in this case, does not amount to such a warranty. When the fact of an article having been sold in a mixed state is proved by the prosecution, the burden is thrown upon the defendant to prove that he has availed himself of any of the exceptions or provisions of the Act which he may desire to rely upon for his defence. The Crown here has proved its case, and the defendant has failed to prove the existence of any exemption. The conviction can not, therefore, be disturbed, and the appeal must be dismissed.

APRIL CRIMINAL SESSIONS.

[Before BUCHANAN, J.]

REGINA V. VIVIAN. { 1899.  
April 20th.

Bail-bond — Application to estreat refused—Rule of Court 73.

*V. a prisoner awaiting trial on a charge of forgery, entered into a bail-bond together with another person, each in the sum of £200. The bond provided that service of the indictment and notice of trial would be accepted at S.'s office. The Sheriff's officer served the indictment and notice of trial on V.'s landlady and subsequently saw V., who admitted that he had received process.*

*On the case being called at the Criminal Sessions V. failed to appear, and application was then made to estreat the bond.*

*Buchanan, J., refused the application on the ground that service of process had not been effected in terms of the bond or personally as required by Rule 73.*

*Compare Kunu v. Attorney-General (9 Juta, 54).*

At the Criminal Sessions before the Hon. Mr. Justice Buchanan and a jury. the case of Arthur Sydney Crespigny Vivian was called, but the accused, who had been admitted to bail, failed to surrender. The bail bond was entered into by the prisoner and another person each in the sum of £200. The accused, who was described as a produce dealer residing in Cape Town, was charged with forgery and uttering a forged instrument knowing it to be forged, in that on or about May 9, he forged a promissory note for £49 15s. made payable at the Standard Bank to himself and signed "Hugo Bingen & Co." and in that upon

May 12, he uttered the said note to Frank Graham, an importer residing in Cape Town.

Mr. Sheil, Q.C., who prosecuted on behalf of the Crown, moved that the bond be estreated.

Buchanan, J.: Service of the indictment and notice of trial has not been effected in terms of the bond.

There is available evidence to show that the accused received the indictment, and notice of trial: That is sufficient personal service within the meaning of Rule 73.

Buchanan, J.: You can lead evidence on the point of service.

The following evidence was then taken.

Charles Samuel Ince, Deputy Sheriff's Officer, stated that he had served the indictment and notice of trial on accused's landlady, at his last known address. He saw accused on the following day at the address, Carlton Villa, Mowbray, and asked him if he had received notice of trial and the indictment, and accused answered that he had, and that they were all in order.

Mr. Shiel then put in a letter written by the accused to the Attorney-General asking that his case might be taken as late in the Sessions as possible as he was expecting important letters from England in connection with his case.

The application was refused.

Buchanan, J.: The bail bond entered into by accused and Warren was executed before the Assistant Resident Magistrate of Cape Town on March 29. It is a penal obligation, and can only be enforced upon the performance of the conditions which it contains. One of the conditions is that the accused agrees to accept the service at the office of Mr. W. B. Shaw, Church-street, Cape Town. The 73rd Rule of Court provides that the copy of the indictment and notice of trial may either be served personally on the defendant or left at the place specified in the bond. In this case service has not been effected at the place agreed upon, and personal service has not been effected. Therefore the application that bail be estreated must be refused. The bail bond is available for six months, and will consequently remain in force until next sessions.



# "Cape Times" Law Reports

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN  
and the Hon. Mr. Justice MAASDORP.]

ADMISSION. } 1899.  
                  } May 1st.

Mr. Innes, Q.C., applied for the admission of Henry Richings Bousfield as an advocate, the oaths to be administered before the Supreme Court of Natal.

Granted.

### PROVISIONAL ROLL.

SELLAR BROTHERS V. O'REILLY

Mr. Buchanan applied for an order for the final adjudication of the defendant's estate.

Granted.

PURCELL, YALLOP AND EVERETT V.

PETERSEN.

Mr. Buchanan applied for the final adjudication of the defendant's estate.

Granted.

MOSKOP AND GARLAND V. J. B. EAYES.

Mr. Buchanan applied for an order for the final adjudication of the defendant's estate.

Granted.

BOSMAN, POWIS AND CO. V. STEPHAN.

Mr. Upington applied for provisional sentence upon a promissory note for £20.

Granted.

MAXWELL BROS. V. WM. TARR.

Mr. Buchanan applied for confirmation of the writ of arrest granted against defendant for £46 10s. 7d., £12 12s. being due to plaintiffs directly, and the balance due to plaintiffs by reason of a cession from Tregidga Bros.

Mr. Benjamin appeared for the defendant, and admitted the debt.

The Court granted final judgment for the unsatisfied debt and discharged the writ.

HARTZENBERG V. MORITZ.

Mr. Upington applied for provisional sentence upon a promissory note for £120.

Granted.

HAILEY V. GRANGE.

Mr. P. Jones applied for the discharge of a provisional order of sequestration.

Granted.

CHAMBERLAIN V. TAYLOR.

Mr. Molteno applied for judgment upon a mortgage bond for £325, less £23 6s. 6d. paid on account, and that the property specially hypothecated be declared executable.

Granted.

HYDE V. LABUSCHAGNE.

Mr. Upington applied for provisional sentence upon a Magistrate's Court judgment for £35 3s. 11d., and that certain immovable property be declared executable.

Granted.

PURCELL, YALLOP AND EVERETT V.

RAMMUSSEN.

Mr. Buchanan applied for provisional sentence upon two promissory notes; one

for £35, and the other for £35 10s. 9d., and for judgment under Rule 329 for £17 19s. 6d. for goods sold and delivered.  
Granted.

#### BATHFELDER V. SOLLIE.

Mr. Joubert applied for provisional sentence for £38 interest upon a mortgage bond, less £34 paid on account.  
Granted.

#### VAN DER MERWE V. STARCK.

Mr. De Waal applied for the final adjudication of the defendant's estate.  
Granted.

#### ILLIQUID ROLL.

#### NIAY AND CO. V. FRESH FISH AND FRUIT SUPPLY CO., LIMITED.

Mr. Upington applied for judgment under Rule 329D for £179 15s. for goods sold and delivered.  
Granted.

#### WENTZEL V. BATHGATE.

Mr. Benjamin applied for judgment under Rule 329D for £41 10s., less £20 paid on account.  
Granted.

#### ARDERNE AND CO. V. POWER.

Mr. Benjamin applied for judgment under Rule 329D for £276 18s. 7d.  
Granted.

#### STURK AND CO. V. VAN NIEKERK.

Mr. Gardiner applied for judgment under Rule 329D for £31 4s. for goods sold and delivered.  
Granted.

#### REHABILITATIONS.

Mr. Close applied for the rehabilitation of Marks Simenhoff.  
Granted.

Mr. Benjamin applied for the rehabilitation of C. H. J. Welken.  
Granted.

Mr. Joubert applied for the rehabilitation of I. J. Gouws.  
Granted.

GREIG V. GREIG. { 1899.  
May 1st.

This was an action for restitution of conjugal rights, failing which a decree of divorce.

Mr. Gardiner appeared for the plaintiff. The defendant was in default.

J. H. le Sueur, a clerk in the Marriage Registry Office, proved the marriage of the parties.

Mary Ann Greig said she was married to defendant on April 4, 1894. She entered into no contract with defendant before her marriage. She had at that time no property other than furniture. Defendant had contributed very little to her support. She had a boarding-house, and supported defendant. On December 3, 1897, defendant left her, as a result of a quarrel. He deserted her of his own free will. He could have remained with her if he had liked to do so. He had not since offered to return to her, nor had he sent her any money. He had written two letters to her from Johannesburg. If defendant returned she would receive him, and if he asked her to go to him she would go to him, if he would provide for her. She had no children by her second marriage, but four by her first. She did not know where defendant now resided. The trouble arose from financial matters. Plaintiff had to keep him. Although defendant was in receipt of a good salary from Messrs. Robertson's, in Plein-street, he declined to give her anything.

The Court granted an order for restitution of conjugal rights, defendant to receive or return to plaintiff on or before June 15, failing which, to show cause on July 12 why a decree of divorce should not be granted with costs, defendant to forfeit all benefits of the community of property of the marriage.

[Plaintiff's Attorneys, Messrs. Van Zyl & Bussinne.]

JOSE V. JOSE. { 1899.  
May 1st.

This was an action for a decree of restitution of conjugal rights, failing which a decree of divorce.

Mr. Buchanan appeared for the plaintiff.

The defendant was in default.

Melinda Jose (born Reynolds) said she was married to defendant, W. A. Jose, on April 1, 1890, in London. In October, 1895, defendant came out to South Africa,



Defendant was a draper's salesman, and found employment at Garlick's. Plaintiff followed defendant out, accompanied by one child. There were now two surviving children of the marriage. Plaintiff arrived here in 1896, and until August 20, 1897, they lived together. On August 20 of that year defendant did not come home, and plaintiff had not seen him since. Defendant left her 13s. Defendant was in difficulties at the time. Six weeks later she received a letter from defendant stating that he was in England. Defendant had not contributed to her support since he deserted her. Plaintiff supported herself by dressmaking.

The Court granted a decree of restitution of conjugal rights, defendant to return to or receive plaintiff by July 15, failing which defendant to show cause on August 1 why a decree of divorce should not be granted with costs, plaintiff to have the custody of the children.

[Plaintiff's Attorney, A. P. Kenealy.]

THUYNEMA V. THUYNEMA. { 1899.  
May 1st.

This was an action for a decree of divorce by reason of the adultery of the defendant.

Mr. Uppington appeared for the plaintiff. The defendant was in default.

Francis Henry le Sueur proved the marriage of the parties.

The plaintiff, Dora Thuynema, said defendant was her second husband. The marriage took place on May 11, 1897. She identified the photograph produced as that of her husband. Defendant and she were married by ante-nuptial contract. Plaintiff then owned three houses and an hotel. Defendant settled some property upon her, but subsequently took it back. Their married life was very unhappy. A month after the marriage she heard something about him, but continued to live with him until she found that defendant took money from her bar. Defendant left her, and proceeded to Johannesburg thirteen months ago. Plaintiff went up to Johannesburg a month later, and started a tea-room there. She then saw defendant, and as she refused to build a house for him, he said he would live with a woman of ill fame, Mrs. Speck, who would provide him with money. Defendant admitted the adultery with this woman, and at present he resided with her in Kimberley.

Abram Mossall, a coloured mason, said he was formerly a cabdriver. On one occasion he took a letter from defendant to Mrs. Speck, who then resided in Francis-street. Subsequently witness drove defendant to Mrs. Speck's room, and defendant asked witness not to tell plaintiff about it. Defendant had then two black eyes, which he said had been administered to him by Mrs. Speck's husband.

Mrs. Catherine Dibben, residing in Cape Town, said she knew defendant and Mrs. Speck. In October of last year she saw them in bed together in Francis-street. On another occasion she found defendant in Mrs. Speck's bedroom, when Mrs. Speck's husband struck him.

The Court granted a decree of divorce, with costs.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret.]

IN THE ESTATE OF THE LATE DENNIS KINSLEY.

Mr. P. Jones applied for the confirmation of the sale of certain property in which minors were interested.

Granted.

IN THE INSOLVENT ESTATE OF { 1899.  
JAN VIJJOEN COETZEE. { May 1st.

Sequestration by High Court—Confirmation of trustee's appointment by Supreme Court.

Mr. Close applied for an order confirming the appointment by the High Court of Griqualand of the trustee in the insolvent estate. Certain landed property belonging to the estate was outside the jurisdiction of the High Court, and the order was prayed for in order that the trustee might pass transfer of the said property.

Mr. Close referred to *In re O'Connell* (10 Juta, p. 62).

Granted.

PARKER V. THE STAR LIFE { 1899.  
ASSURANCE SOCIETY. { May 1st.

Lost Policy—Practice.

This was an application for an order authorising respondents to pay certain two life policies, the originals of which had been mislaid.

The applicant, Ada Annie Baxter Parker, stated on affidavit that she was married in 1893 to Joseph Charles Parker after entering into an ante-nuptial contract excluding community of property; that after marriage she and her husband lived at Johannesburg, and while there and for her benefit two policies of £1,000 each were taken out in the respondent society upon her husband's life; the premiums had been paid and she annexed the receipts to her affidavit. Her husband died in November, 1898, and by his will she was appointed sole executor and received letters of administration. She had searched his papers and her own but could not find the policies. She alleged that she had never pledged or assigned either of them. The respondent company filed an affidavit alleging that they did not consider it safe to pay the amount of the policies without production of the original documents or satisfactory indemnity, or an order of Court.

Mr. Innes, Q.C., for the applicant: The company is amply protected by Act 13 of 1891, section 27. There has been no notice to the company of any assignment, and the section referred to makes any *bona fide* advances made before notice valid payments. The only difficulty is whether the order asked for can be made on motion. In England there is an Act providing that in case of disputes money should be paid into court or that the claimants should interplead. *England v. Lord Tredegar* (L.R., 1 Eq, p. 314).

Mr. Searle, Q.C., for the respondent: The company does not object to the matter being heard on motion. I would suggest the issue of a rule *nisi*.

Buchanan, J.: There is no statutory provision in this country providing for a case of this kind, and in the ordinary course of procedure, the applicant should have brought an action for the recovery of the amount of these policies. No objection, however, has been taken to the present form of proceeding. In giving assistance to the applicant we must take care that all parties are fully protected. The Court will therefore order a rule *nisi* to be issued calling upon all persons interested to show cause why the amount assured should not be paid to the applicant as executrix testamentary; advertisements to be inserted three times in the "Star," Johannesburg, once in the "Government Gazette" of Cape Colony, and once in the "Cape Times."

*Postea* (August 1st).

The rule was made absolute.

#### 'CASE V. CASE.

This was an application for leave to sue for divorce by edictal citation.

Mr. Close appeared for the applicant.

The Court granted the order, the rule to be made returnable on May 25.

#### IN THE MATTER OF THE FIRM OF JOHN COLLINS AND CO.

This was an application for an order to dissolve the said firm.

Mr. Benjamin appeared for the applicant.

The Court granted a rule *nisi*, returnable on August 1, to be published once in a New South Wales paper circulating in Newcastle, New South Wales; Mr. Smith in the meantime to proceed with the realisation of the business.

#### HACKENBERG V. HACKENBERG.

This was an application for a rule *nisi* restraining respondent from parting with certain property to be made absolute.

Mr. Close appeared for the applicant.

The Court granted the application, costs to be costs in the cause.

#### ALBERTYN V. COLONIAL GOVERNMENT.

Mr. Molteno applied for leave to defendant, to sign judgment against the plaintiff for not proceeding with his action.

Granted.

#### IN THE MATTER OF THE PETITION OF CHRISTIAN WEYER.

Mr. Buchanan applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

#### IN THE MATTER OF THE PETITION OF THE REV. JOHANNES HENOCH NEETHLING.

Mr. McGregor applied for an extension of the return day of the rule *nisi* granted under the Derelict Lands Act.

Granted.

#### IN THE MATTER OF THE PETITION OF BAREND FREDRIK ANDRIES BESTER.

Mr. Buchanan applied for the rule *nisi* for the cancellation of a certain mortgage bond to be made absolute.

Granted.

ABRAHAMS V. ABRAHAMS.

Mr. Buchanan applied for a decree of divorce, with costs.  
Granted.

IN THE MATTER OF THE WESTERN PROVINCE EXPLOATION SYNDICATE. IN LIQUIDATION.

Mr. Buchanan applied that the rule granted on the 13th April calling on all persons upon the list of contributories to show cause why the list should not be settled accordingly be made absolute.

The Court granted the application.

IN THE ESTATES OF THE LATE HERMANUS GERHARDUS VAN NIEKERK AND MARIA JOHANNA VAN NIEKERK.

This was an application by the executor of the joint estate of the testators for an order authorising him to distribute the estate in such a way as to award to the descendants by representation of Elizabeth Maré, one of their daughters, a certain portion of the estate to which they were not entitled under the testators' will.

The Master reported upon the application as follows:

The testators, after having made provision for their children by the bequest of a farm to each, directed that on the death of the surviving spouse their executors shall realise the residue of the estate and divide the proceeds equally among their three children, but the will omits to state that in the event of the death of their daughter, Elizabeth Maré (born Van Niekerk) and their son, Johannes Albertus van Niekerk, their shares shall devolve on their children.

Elizabeth Maré (born Van Niekerk), predeceased the testators and left children. Her children would therefore have no claim on the estate of their grandparents.

With the consent of all those interested, it is now the desire to divide the residue of the estate into three equal portions so as to give the children of Elizabeth Maré an equal share with the children of Anna Maria Ferreira and Johannes Albertus van Niekerk.

It was no doubt the intention of the testators that their estate should be equally divided among all their children or their descendants.

Mr. Benjamin appeared for the applicant.

The Court granted an order in terms of the compromise arrived at between those concerned.

IN THE ESTATE OF THE LATE ABDOL GAHIEM ARIEFDIEN.

Mr. Joubert applied for leave to sell certain property.

The Court granted the order, the sale in all respects to be conducted to the approval of the Master.

COENRADIE'S EXECUTRIX V. COENRADIE'S EXECUTOR DATIVE.

Mr. P. Jones applied for an order authorising the taxation of the bill of costs of the plaintiff's local agent at Murraysburg, there being no attorney practising at that place.

The Court granted the order, the amount to be subject to the approval of the Taxing Master.

OLIVIER AND OTHERS V. FOURIE AND OTHERS

Mr. Searle, Q.C. (with whom were Sir Henry Juta, Q.C., and Mr. McGregor), applied for a commission to examine a witness at Oudtshoorn.

Mr. Innes, Q.C., appeared for the respondents.

The Court granted the application, the Magistrate, or the person acting as such for the time being, to constitute the commission, costs to be costs in the cause.

WOOLF V. SIERADSKI.

Mr. McGregor applied for an award of arbitrators to be made a rule of Court.

The Court granted the application with costs.

SHEAR V. WEINSTOCK. { 1899.  
May 1st.

Summons — Annexure—Stock-list—  
Act 20 of 1856, Schedule B.  
Rule 10.

*The plaintiff alleged in his summons that the defendant had received certain sums of money from him, and was indebted to him in that amount; he further said that this amount was due under a certain stock-list drawn up and agreed upon between him and the defendant.*

*Held, that the omission to annex the stock-list to the summons or to deliver a copy thereof to the defendant did not prejudice him in his defence.*

The applicant, Ada Annie Baxter Parker, stated on affidavit that she was married in 1893 to Joseph Charles Parker after entering into an ante-nuptial contract excluding community of property; that after marriage she and her husband lived at Johannesburg, and while there and for her benefit two policies of £1,000 each were taken out in the respondent society upon her husband's life; the premiums had been paid and she annexed the receipts to her affidavit. Her husband died in November, 1898, and by his will she was appointed sole executor and received letters of administration. She had searched his papers and her own but could not find the policies. She alleged that she had never pledged or assigned either of them. The respondent company filed an affidavit alleging that they did not consider it safe to pay the amount of the policies without production of the original documents or satisfactory indemnity, or an order of Court.

Mr. Innes, Q.C., for the applicant: The company is amply protected by Act 13 of 1891, section 27. There has been no notice to the company of any assignment, and the section referred to makes any *bona fide* advances made before notice valid payments. The only difficulty is whether the order asked for can be made on motion. In England there is an Act providing that in case of disputes money should be paid into court or that the claimants should interplead. *England v. Lord Tredegar* (L.R., 1 Eq. p. 314).

Mr. Searle, Q.C., for the respondent: The company does not object to the matter being heard on motion. I would suggest the issue of a rule *nisi*.

Buchanan, J.: There is no statutory provision in this country providing for a case of this kind, and in the ordinary course of procedure, the applicant should have brought an action for the recovery of the amount of these policies. No objection, however, has been taken to the present form of proceeding. In giving assistance to the applicant we must take care that all parties are fully protected. The Court will therefore order a rule *nisi* to be issued calling upon all persons interested to show cause why the amount assured should not be paid to the applicant as executrix testamentary; advertisements to be inserted three times in the "Star," Johannesburg, once in the "Government Gazette" of Cape Colony, and once in the "Cape Times."

*Postea* (August 1st).

The rule was made absolute.

#### 'CASE V. CASE.

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The Court granted the order, the rule to be made returnable on May 25.

#### IN THE MATTER OF THE FIRM OF JOHN COLLINS AND CO.

This was an application for an order to dissolve the said firm.

Mr. Benjamin appeared for the applicant.

The Court granted a rule *nisi*, returnable on August 1, to be published once in a New South Wales paper circulating in Newcastle. New South Wales; Mr. Smith in the meantime to proceed with the realisation of the business.

#### HACKENBERG V. HACKENBERG.

This was an application for a rule *nisi* restraining respondent from parting with certain property to be made absolute.

Mr. Close appeared for the applicant.

The Court granted the application, costs to be costs in the cause.

#### ALBERTYN V. COLONIAL GOVERNMENT.

Mr. Molteno applied for leave to defendant to sign judgment against the plaintiff for not proceeding with his action.

Granted.

#### IN THE MATTER OF THE PETITION OF CHRISTIAN WEYER.

Mr. Buchanan applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

#### IN THE MATTER OF THE PETITION OF THE REV. JOHANNES HENOCH NEETHLING.

Mr. McGregor applied for an extension of the return day of the rule *nisi* granted under the Derelict Lands Act.

Granted.

#### IN THE MATTER OF THE PETITION OF BAREND FREDRIK ANDRIES BESTER.

Mr. Buchanan applied for the rule *nisi* for the cancellation of a certain mortgage bond to be made absolute.

Granted.

ABRAHAMS V. ABRAHAMS.

Mr. Buchanan applied for a decree of divorce, with costs.  
Granted.

IN THE MATTER OF THE WESTERN PROVINCE EXPLORATION SYNDICATE, IN LIQUIDATION.

Mr. Buchanan applied that the rule granted on the 13th April calling on all persons upon the list of contributories to show cause why the list should not be settled accordingly be made absolute.

The Court granted the application.

IN THE ESTATES OF THE LATE HERMANUS GERHARDUS VAN NIEKERK AND MARIA JOHANNA VAN NIEKERK.

This was an application by the executor of the joint estate of the testators for an order authorising him to distribute the estate in such a way as to award to the descendants by representation of Elizabeth Maré, one of their daughters, a certain portion of the estate to which they were not entitled under the testators' will.

The Master reported upon the application as follows:

The testators, after having made provision for their children by the bequest of a farm to each, directed that on the death of the surviving spouse their executors shall realise the residue of the estate and divide the proceeds equally among their three children, but the will omits to state that in the event of the death of their daughter, Elizabeth Maré (born Van Niekerk) and their son, Johannes Albertus van Niekerk, their shares shall devolve on their children.

Elizabeth Maré (born Van Niekerk), predeceased the testators and left children. Her children would therefore have no claim on the estate of their grandparents.

With the consent of all those interested, it is now the desire to divide the residue of the estate into three equal portions so as to give the children of Elizabeth Maré an equal share with the children of Anna Maria Ferreira and Johannes Albertus van Niekerk.

It was no doubt the intention of the testators that their estate should be equally divided among all their children or their descendants.

Mr. Benjamin appeared for the applicant. The Court granted an order in terms of the compromise arrived at between those concerned.

IN THE ESTATE OF THE LATE ABDOL GAHIEM ABIEFDIEN.

Mr. Joubert applied for leave to sell certain property.

The Court granted the order, the sale in all respects to be conducted to the approval of the Master.

COENRADIE'S EXECUTRIX V. COENRADIE'S EXECUTOR DATIVE.

Mr. P. Jones applied for an order authorising the taxation of the bill of costs of the plaintiff's local agent at Murraysburg, there being no attorney practising at that place.

The Court granted the order, the amount to be subject to the approval of the Taxing Master.

OLIVIER AND OTHERS V. FOURIE AND OTHERS

Mr. Searle, Q.C. (with whom were Sir Henry Juta, Q.C., and Mr. McGregor), applied for a commission to examine a witness at Oudtshoorn.

Mr. Innes, Q.C., appeared for the respondents.

The Court granted the application, the Magistrate, or the person acting as such for the time being, to constitute the commission, costs to be costs in the cause.

WOOLF V. SIERADSKI.

Mr. McGregor applied for an award of arbitrators to be made a rule of Court.

The Court granted the application with costs.

SHEAR V. WEINSTOCK. { 1899.  
{ May 1st.

Summons—Annexure—Stock-list—  
Act 20 of 1856, Schedule B,  
Rule 10.

*The plaintiff alleged in his summons that the defendant had received certain sums of money from him, and was indebted to him in that amount; he further said that this amount was due under a certain stock-list drawn up and agreed upon between him and the defendant.*

*Held, that the omission to annex the stock-list to the summons or to deliver a copy thereof to the defendant did not prejudice him in his defence.*

This was an appeal from a decision of the Resident Magistrate of Uniondale, in an action in which the appellant was the plaintiff, and sued the respondent for £2 13s., money advanced, and also for £13 which it was alleged that the defendant had taken out of the plaintiff's business. The defendant had been the manager of the plaintiff's retail business at Rietvlei; the plaintiff decided, however, to discontinue the business, and it was alleged that the £13 had been taken by the defendant to pay for butcher's, baker's and general dealer's licences in his own name after the plaintiff had discontinued the business. The summons alleged further that the amount was due under a certain stock-list which had been drawn up and agreed to between the plaintiff and defendant.

The defendant excepted to the summons on the ground that the original stock-list relied upon, had not been annexed to the summons nor a copy served upon him, and that the summons disclosed no cause of action as no date was therein given when the amount claimed accrued.

The Magistrate sustained the first exception.

The plaintiff appealed.

Mr. McGregor, for the appellant: The stock-list referred to is not such a document as is contemplated in Act 20 of 1856, Schedule B, Rule 10. The summons is for money had and received. the stock-list is merely evidence: if there had been no stock-list the *causa teliti* would have been there all the same. *Basson v. Van Zyl* (11 S.C.R., p. 24); *Shear v. Rademeyer* (7 Sheil, p. 46); *Munby v. Williams* (C.L.J. 4, p. 284); *Steytler v. Britts* (7 E.D.C., p. 151).

Mr. Gardiner, for the respondent: The stock-list is of the essence of the claim. *Kriel v. Kriel* (8 Sheil, p. 231). The Magistrate has a wide discretion and has exercised it in a judicial manner.

The Court allowed the appeal with costs, and ordered the case to be remitted to the Magistrate's Court on its merits.

Buchanan, J., said there appeared to be no prejudice to the defendant in the form in which the summons had been drawn, as the defendant knew what he had to meet.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorney, P. M. Brink.]

BACON V. HARTSHORN. { 1899.  
May 1st.

Lease—Repudiation—Form of action.

*Where a lessee repudiates the lease after it has been finally agreed upon the lessor can sue for the rent or for damages for breach of contract.*

This was an appeal from a decision of the Resident Magistrate of Wynberg.

The plaintiff let a house to the defendant on December 15 last, at a rent of £5 per month to be paid monthly. Shortly after the agreement had been drawn up, the defendant told the plaintiff that he did not require the house. The plaintiff, however, replied that defendant must abide by the terms of the agreement. An action was then brought in the Resident Magistrate's Court for one month's rent, £5. The defendant put in a special plea claiming that the action had been improperly brought, and that the claim should have been brought as a claim for damages for breach of contract. The Magistrate gave judgment for the defendant.

The plaintiff appealed.

Mr. Ward, for the appellant: Two courses were open to the plaintiff, either to treat the contract as being at an end and sue for damages—*Hockster v. De La Tour* (2 E. & B., p. 678)—or to treat it as being valid and still existing. He was not bound to accept the renunciation of the defendant.

Mr. Benjamin, for the respondent: The judgment practically amounted to absolution from the instance; the evidence shows that there was a repudiation of the lease: there was practically a cancellation, and all that the plaintiff could sue for was damages.

The Court allowed the appeal with costs, and ordered the case to be remitted to the Magistrate's Court to be decided upon its merits.

Buchanan, J., said: It is a clear principle of law that when two persons enter into an agreement, one person alone cannot withdraw from the agreement. If one of the parties repudiates the agreement the other party has it open to him to act upon that repudiation and sue for damages, but he can also sue upon the contract. It is purely a question of form. In this case the Magistrate was wrong in dismissing the case, which should have been decided upon its merits.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorney, A. P. Kenealy.]

# SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN  
and the Hon. Mr. Justice MAASDORP.]

REGINA V. SINCLAIR { 1899.  
May 2nd.

Indictment—Error in date—Prejudice.

*Accused was charged in a Resident Magistrate's Court with committing an assault upon the 25th December. The evidence showed he had committed two assaults, one on the 25th December, outside the limits of the jurisdiction of the Magistrate, and one on the 26th January within such limits. He was convicted of the later assault. Held, on appeal, that as accused was not prejudiced the conviction should not be set aside.*

This was an appeal from a conviction by the Resident Magistrate of Uniondale.

The appellant was charged with assaulting a native servant with intent to do him grievous bodily harm on December 25. He was found guilty, and fined £15, or three months' imprisonment with hard labour. The appellant, it was alleged, kicked the complainant, inflicting serious injuries, and also assaulted complainant on a second occasion. The appeal was made on two grounds: (1) That the Magistrate of Uniondale had no jurisdiction, the assault having been committed outside Uniondale; (2) that the evidence adduced for the prosecution did not warrant a conviction, as conflicting dates were given.

Mr. Graham, Q.C., for the appellant, and Mr. McGregor for the Crown.

After argument,

The Court referred the case back to the Magistrate for him to state on which of the two assaults he convicted the prisoner, and if for the assault of the 25th of December, whether the locality of such assault was within his jurisdiction; and if for the assault on January 26, whether the defendant was prejudiced by an error in the charge-sheet.

*Postea* (June 1st).

Judgment was given dismissing the appeal.

Buchanan, J., said: Accused was charged with an assault with intent to do grievous bodily harm on December 25. He pleaded not guilty, but after the evidence had been heard he was convicted and fined £15, or three months' imprisonment. The notice of appeal lodged showed that the grounds on which the conviction was objected to were firstly, that the Magistrate had no jurisdiction as regarded the assault, in respect of the fact that if the assault took place, it was not committed within the Magistrate's jurisdiction. It appears from the evidence that two assaults were committed by the accused, one on December 25, which was not within the jurisdiction of the Magistrate, and one on January 26, which was within his jurisdiction. In order to clear up the case, the Magistrate was asked of which assault he convicted the accused, and he has replied that he convicted the accused of the assault committed on January 26. The argument in favour of the appeal is that if the assault was committed on December 25, it was committed outside the jurisdiction of the Magistrate, but if it was committed on January 26 an *alibi* has been proved. It is also objected that the conviction was not supported by the evidence, but on reading the evidence there is ample proof that an assault of a most serious character had been committed. The Magistrate stated that the only defence was that the assault on January 26 was of no consequence, and that the accused had provocation; but looking over the evidence it is clear that though the complainant himself, who appeared to be somewhat under the influence of liquor, did not give a very clear account, the evidence of the others showed that the assault was committed by the accused. The Magistrate was of opinion that there was no prejudice to the accused in his defence by reason of the confusion in the dates of the assaults, and looking at all the facts of the case, I am of opinion that the grounds of appeal cannot be supported. The Magistrate had jurisdiction and could convict, and there was ample evidence to justify conviction. Under those circumstances the appeal must be dismissed.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn.]

MALIE MARIA JOHANNA VAN DER SPUY  
V. MARTINUS JOHANNES VAN DER SPUY.

Mr. Innes, Q.C., applied on behalf of the plaintiff, who had instituted an action

against the defendant, her husband, for judicial separation, and to whom she was married out of community of property, to restrain him from selling on the 3rd instant, at his farm Klein Eikenboom, Hermon Station, any furniture or other property belonging to plaintiff.

The Court granted a rule *nisi*, returnable on the 12th instant, to operate in the meantime as an interdict, calling upon defendant to show cause why he should not be restrained from selling any furniture or other property settled upon or belonging to plaintiff. Rule to be served upon the auctioneers, Messrs. J. S. Marais & Co., as well as upon the defendant. Question of costs to stand over.

REGINA V. JACOBSON. { 1899.  
  { May 2nd.

#### Indictment—Fraudulent insolvency.

*The accused was convicted upon a count in an indictment charging him with fraudulent insolvency, in that he had fraudulently contracted certain debts. The indictment set forth the total amount of such debts but not the persons alleged to have been defrauded nor the amount in respect of which each creditor was defrauded.*

*Held, that the conviction must be set aside.*

*The accused was charged in a Magistrate's Court with fraudulent insolvency in having fraudulently removed certain goods. He applied to the Magistrate to postpone the trial until he had had an opportunity of applying to the Supreme Court to set aside the sequestration of his estate. The Magistrate refused the application.*

*The Court upon appeal refused to interfere with the Magistrate's decision.*

This was an appeal from the conviction of the appellant by the Assistant Resident Magistrate of Cape Town upon two counts charging him with fraudulent insolvency: (1) In having fraudulently contracted certain debts with divers parties between

1st April and 23rd November, 1898, to the amount of £60 16s. 11d., and (2) in having fraudulently removed goods to the value of £171 15s. He was found guilty on both counts, and a sentence of nine months' imprisonment was passed. From this conviction the appeal was brought on the ground that the indictment did not set forth the persons alleged to have been defrauded nor the amounts to the extent of which it had been alleged they were defrauded, and that the Magistrate refused to postpone the case in order to give the accused an opportunity to apply to the Supreme Court for an annulment of the sequestration proceedings.

Mr. Benjamin, for the appellant: Names must be mentioned in an indictment in all cases except those coming under section 7 of Act 3 of 1861: in those cases it is not a material allegation, but in this case it is. The prisoner could not know what cases were going to be made against him. Moreover the Magistrate should have postponed the case to allow an application to be made to have the insolvency proceedings annulled. The Court can set aside a final sequestration upon equitable grounds, if, for instance, as was the case here, the defendant had no notice of the sequestration proceedings.

Mr. McGregor, for the Crown: The accused was not prejudiced, because all the facts were brought out at the preparatory examination and were known to him; the indictment is only a short statement of those facts.

The Court allowed the appeal on the first count of the indictment, and dismissed the appeal upon the second count.

Buchanan, J., said: The first count of the indictment is very vague and insufficient, and objection was taken at the trial to its vagueness. In my opinion the accused was distinctly prejudiced by the vagueness of the indictment. He had a number of creditors, whose claims amounted to a considerably larger sum than the amount mentioned in the first count of the indictment, and he was not aware what claims he had to meet. The Magistrate ought to have had the first count amended so that the accused could have known what charge he had to meet. On the first count therefore the conviction must be set aside. Then as to the second count it is clear that a removal of goods did take place, and that some of the goods were found upon the accused. The conviction therefore upon the second count was amply supported. But it is said that upon this



count the accused was prejudiced, because there was no postponement of the case which would have given the accused an opportunity of appealing to the Supreme Court to set aside the sequestration proceedings. Up to the time of the trial, and up to the present time no action has been taken in the Supreme Court, but even if the insolvent had intended to appeal it would not have affected the second count. The Court is, of course, not aware what sentence the Magistrate would have passed if he had found the accused guilty upon the second count only, and the judgment of the Court will be: Appeal allowed on the first count, and the conviction confirmed upon the second count, the case to be remitted to the Magistrate to pass such sentence as in his discretion he might deem proper upon the second count of the indictment.

[Appellant's Attorneys, Messrs. Innes & Hutton.]

LAND V. WODEHOUSE ) 1899.  
LICENSING COURT. ) May 2nd.

Liquor licence—Condition—*Ultra Vires*—Registered voter—Act 38 of 1887—Act 28 of 1898—Total prohibition.

*Act 28 of 1898 does not repeal Act 39 of 1887, and a native registered voter is not therefore subject to the operation of the former Act.*

*A condition imposed upon a licence to the effect "That within the A. Municipality, liquor shall be sold to aboriginal natives only in reasonable quantities, and upon the production of a permit from an inspector of native locations, or other officer duly authorised by the Resident Magistrate, stating the quantity to be purchased, to be granted by such inspector or officer, only upon production to him of a certificate under Act 39 of 1887, such liquor to be consumed only on the premises of the licensed dealer."*

*Held to be ultra vires, inasmuch as it amounted to total prohibition.*

This was an application upon a summons calling upon the respondents to show cause

why the decision of the Licensing Court, held at Dordrecht on March 1, 1899, should not be reviewed and corrected, and the licences granted to the holders thereof amended by expunging therefrom the following conditions, viz: "That within the Indwe Municipality liquor shall be sold to aboriginal natives only in reasonable quantities, and upon the production of a permit from an inspector of native locations, or other officer duly authorised by the Resident Magistrate, stating the quantity to be purchased, to be granted by such inspector or officer only upon production to him of a certificate under Act 39 of 1887, such liquor to be consumed only on the premises of the licensed dealer," in that such condition is *ultra vires* of the powers of the Court and illegal, and the insertion thereof a gross irregularity. The respondents were further called on to show cause why they should not pay the cost of the application *de bonis propriis*. The certificate referred to was to the effect that the person named therein was registered as a parliamentary voter.

Mr. Searle, Q.C., for the applicants: Act 28 of 1898, sections 1 and 2 give the Licensing Court discretionary power to impose restrictions upon licences short of total prohibition. This application is made upon two grounds, viz.: (1) that the condition imposed is in effect a total prohibition; (2) that it is a prohibition affecting a particular class and therefore illegal. Act 39 of 1887 places every native who is a voter upon the same footing as a registered European voter for the purposes of certain Acts, amongst which is the Liquor Licensing Act 28 of 1883. Act 28 of 1883 has been amended by Act 43 of 1885, Act 25 of 1891 and Act 28 of 1898, and they are all to be read as one Act. Act 28 of 1898 consequently in dealing with restrictions did not contemplate persons already protected by Act 39 of 1887. The effect of this condition therefore is to except from the prohibition only persons already excepted by law. The Licensing Court by thus prohibiting all natives who could legally be prohibited, imposed in effect a total prohibition, and that is illegal. Act 28 of 1898 contains no repeal of Act 39 of 1887, and see *Maxwell on Interpretation of Statutes*, p. 255, as to implied repeal of former statute by a later one. No class distinctions can be made by a Licensing Court—*Regina v. Roberts* (9 Juta, p. 299); but the Licensing Court in this instance have picked out the non-registered voter and prohibited him. The clause as to

reasonable quantity is too vague; it is going a long way to ask the holder of a retail licence to decide what is a reasonable quantity of liquor. One man can stand more liquor than another, and what is one man's meat is another man's poison.

Mr. Graham: Act 39 of 1887 only exempted natives with respect to statutes already passed, and not those to be passed in the future. The condition imposed does not amount to the total prohibition of a particular class: the exclusion of a particular class moreover does not amount to total prohibition and the Licensing Court has power of restriction short of total prohibition.

The Court granted the application.

Buchanan, J., said: This application raises a question of very considerable importance, not only to the Licensing Courts, but to the natives upon whom certain privileges have been conferred by special Act of Parliament, and the first question to decide is whether Act 28 of 1898, better known as the Innes Liquor Act, has repealed the privileges conferred by Parliament on native registered voters by Act 39 of 1887. The first section of that Act provides that no native, no matter what his nationality or tribe or colour, shall in any way or to any greater extent be subject to the operation of any laws (including certain laws mentioned in the Schedule) than any registered voter of European nationality or extraction may or might be. Does the Innes Liquor Act repeal that privilege? If it was intended that this privilege which had been conferred upon native registered voters was to be taken away, it must appear clearly in legislation passed subsequently to the Act of 1887. But there are no repeal clauses in the Innes Liquor Act at all. It simply provides that this Act shall be read with the Liquor Law Amendment Act of 1883. If we look at the Act of 1883 we find that it is one of the Acts specially referred to in the Hofmeyr Exemption Act, under which native voters are relieved. On that point alone, therefore, I think that the Innes Act does not repeal the Native Voters' Exemption Act, and that any registered voter, no matter whether he be a native or otherwise, is not subject to the operation of the Innes Liquor Act as being a native. Then comes the second point. Does the condition passed by the Licensing Court of Wodehouse amount to total prohibition? Licensing Courts can under the first section of the Act, pass any condition upon which a licence should be renewed, provided that it does not

amount to total prohibition, but the Licensing Court of Wodehouse has provided that no liquor should be sold to natives, including natives who can claim exemption under the Hofmeyr Act. Licensing Courts have not the power to legislate for those natives who are exempted by the Hofmeyr Act. As to other natives, they have the power to restrict the sale of liquor to them in terms as well as effect, and to distinctly prohibit the sale of liquor to any such native within a municipality. The Indwe Municipality is not a proclaimed area or a native location, so that it is not subject to the other provisions of the Act. In the present case they might have introduced any condition which they chose so long as it did not amount to total prohibition, but they have gone further than they were entitled, and their action amounts to total prohibition for the area. The action of the Licensing Court is *ultra vires*. Under these circumstances the application must be granted. Perhaps the Court in considering the question may put in other conditions. At present the Court cannot alter the licence, which must be left to the Licensing Court.

Mr. Searle: With costs!

Buchanan, J.: This is a case of considerable importance, and I think it is a case in which costs may be given *ex officio*, not individually, against the Court. The condition upon which the licence was granted is declared *ultra vires*.

Mr. Graham: Would the Court strike out the condition?

Buchanan, J.: That must be left for the Licensing Court to do. We only deal with the condition as it stands. I only throw out the insertion of other conditions as a suggestion to the Licensing Court.

[Appellants' Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

REGINA V. BLANCKENBERG. { 1899.  
May 2nd.

Theft of stock—Act 35 of 1893—

Evidence of possession of stolen property.

*B. was convicted of contravening Act 35 of 1893.*

*The evidence for the prosecution showed that a white horse belonging to one S. had been killed and the skin stolen, and on the day upon which the horse was killed*

*B. was seen in possession of the skin of a white horse, and was observed coming from the direction in which the carcass was subsequently found.*

*After B.'s arrest the skin could not be found, and consequently it could not be identified as stolen property.*

*Held, on appeal, that the evidence was sufficient to justify the conviction.*

This was an appeal from the conviction and sentence of the appellant by the Resident Magistrate of Wynberg.

The appellant was charged under Act 35 of 1893, with the crime of theft of stock in that upon or about the 18th March, 1899, and at or near Retreat in the district of Wynberg, the said Joseph Blanckenberg did wrongfully and unlawfully steal the hide from the carcass of a certain horse, the property of one Franz Schilder there residing.

The appellant was found guilty and sentenced to nine months' imprisonment with hard labour.

From this sentence the appeal was now brought on the ground that the evidence was insufficient to justify the conviction.

The following evidence was given for the prosecution :

Franz Schilder, sworn, stated : I reside at Retreat. I know the accused. During the present month (March) I let a white gelding horse of mine run on the veld at Retreat. On the 20th March, I sold the horse running in the veld to one Martinus Absolom. He knew the horse and I told him he could fetch it. The next day he told me that he had found the horse dead in the veld. We went together and I found the carcass of the horse skinned lying there. I knew the horse was my horse by the head and ear mark, a slit in left ear. I also noticed the new shoe I had put on on one hoof. I could see that the horse's throat had been cut, there was blood lying close to his head, the blood was dry. The horse was running in the vley at Princess Vley on ground I leased, and it was there I found the carcass of the horse skinned.

Cross-examined : The horse was in good condition when I loosed him to run in the veld. I tried to discover the skin at the different tanneries but failed.

Adonis Sylvester, sworn, stated : I am a labourer in last witness's employment. On Saturday, 18th March, I saw my master's grey gelding grazing on the veld at Princess Vley ; the horse seemed all right then.

Martinus Absolom, sworn, stated : I reside at Retreat. I don't know accused. On the 20th March, I bought a grey horse for £4 10s. from Schilder. I knew the horse. Schilder told me I could fetch the horse from Princess Vley. I went to fetch the horse on the 23rd March, and I found the horse dead with its throat cut and the skin taken off. I knew the horse by a slit in the ear. I saw on Saturday (1st March) that the horse had been newly shod. I told Schilder, and the next morning we went together to the spot.

Goliath Jacobs, sworn, stated : I reside at Princess Vley. I know accused. On Sunday last (19th March) I saw accused at his brother-in-law's place at Princess Vley. His brother-in-law John Johnson was there as well as myself. Accused came there with a bag behind his back, he put the bag with contents down, I looked into the bag and there found a horse-skin. Accused did not see me look into the bag. The skin was that of a white horse, and was one which had just been skinned. This was about eight in the morning. Accused came from the direction of the veld and left in the boat over the vley ; his brother-in-law went with him. I went round the veld that afternoon and found the carcass of a horse newly skinned ; the head showed that it was a white horse. This carcass was lying in the direction from which the accused had come that morning. I saw that the horse had been skinned.

Cross-examined : Johnson and his wife and his brother were there. When I got there accused was not there ; he came about five minutes after me. The others saw him coming also ; they did see the bag. Accused placed the bag down outside the door ; he went to the pig-stye. I passed the bag, and in doing so looked into the bag and then went over to them at the pig-stye. I did not examine the skin thoroughly. I could see it was a horse-skin, it was not the skin of an ox nor that of a young heifer. I subsequently told Schilder.

Several other witnesses were called who corroborated Goliath Jacobs to this extent, that they saw accused on the morning in question at Johnson's house at the vley and that he had a bag with something in it which looked like a hide or game, as blood was running out of it.

For the defence, the accused and others swore that he was at Johnson's house on the morning of the 19th March, and that he had a bag with him but that the bag was empty.

Mr. McGregor was heard in support of the appeal.

Mr. Joubert for the Crown was not called upon.

The Court held that the evidence adduced by the Crown was sufficient to warrant a conviction and dismissed the appeal.

[Appellant's Attorney, C. W. Herold.]

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN  
and the Hon. Mr. Justice MAASDORP.]

FRYER V. FRYER. { 1899.  
May 3rd.

This was an action brought by the wife for restitution of conjugal rights, failing which, a decree of divorce.

Mr. Buchanan appeared for the plaintiff. The defendant was in default.

Francis Henry le Sueur, a clerk in the Colonial Office, produced a copy of the marriage register of the parties.

The plaintiff, Mrs. Elsie Johanna Fryer, said she was married to defendant on August 16, 1892, at Calvinia, under an antenuptial contract. No settlement was made under the contract. There were two surviving children of the marriage, both girls, aged respectively three years and eight months. The children resided with defendant's parents. After the marriage the parties lived at Calvinia for some time, and subsequently at Clanwilliam. Then they left for Namaqualand, and afterwards they proceeded to Touw's River. Defendant deserted her in March of this year, and said he would not return to her. He had not supported her since March. Their married life had been very unhappy, and they were always quarrelling. Defendant had left her on previous occasions, but complainant had returned. The quarrels arose from the fact that defendant was not faithful to her. Plaintiff

now supported herself as a draper's assistant in Wale-street, Cape Town. Defendant's parents were willing to maintain the children of the marriage, but plaintiff desired to have the custody of them.

By the Court: Defendant did not leave plaintiff with her consent, and she was willing to receive him.

The Court granted a decree of restitution of conjugal rights, with costs, defendant to return to or receive the plaintiff on or before May 31, failing which a rule nisi to be issued calling upon the defendant to show cause on the 12th of June why a decree of divorce should not be granted to the plaintiff, with costs, the plaintiff to have the custody of the children of the marriage.

[Plaintiff's Attorney, Gus Trollip.]

WHYTE V. AURET. { 1899.  
May 3rd.

This was an appeal from a decision of the Resident Magistrate of Simon's Town. The plaintiff alleged that the defendant had entered into an agreement with him to erect a certain bathing-house, which had been blown away, and that through his negligence in not erecting it, it was washed out to sea. He claimed £20 as damages. The defendant denied the debt; he said he had received a letter from the plaintiff asking him to erect the bathing-house. He did not answer it but went to one Johnson who agreed to erect it, and he put it in its proper place. A week after it was wrecked by a storm and smashed. He went again to Johnson and asked him to put it up. Defendant never agreed to put it up.

The Magistrate granted absolution from the instance, with costs, on the ground that it had not been shown satisfactorily that any specific agreement had been entered into; and, further, that if there was a verbal agreement, the agreement was misunderstood, as the defendant denied that he was a contractor. Against the decision of the Magistrate the plaintiff in the Court below now appealed.

Mr. Benjamin appeared for the appellant, and Mr. Graham, Q.C., for the respondent.

The Court held that there was no contract and that the Magistrate was justified in giving absolution from the instance. The appeal would be dismissed with costs.

[Appellant's Attorney, D. Tennant; Respondent's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

FFUHL BROS. AND CRUICKSHANK ( 1899.  
V. BRUTON. ( May 3rd

Appeal from a judgment of the Resident Magistrate of Simon's Town.

Plaintiffs obtained provisional judgment against the defendant for £11 5s. 9d. for goods sold and delivered, the defendant being in default. Subsequently the case was reopened and the defendant put in a counter-claim for £4 16s. 6d. for storage of goods for sixty-one days at 1s. 6d. per day. The defendant was the proprietor of a hotel, and one Pattison, a traveller in the employment of the plaintiffs, obtained accommodation at the hotel, and brought samples of goods belonging to the plaintiffs. He then left. Subsequently other samples were sent by Pattison to defendant's address, and were laid out in Pattison's room awaiting his arrival, which never occurred. Of these goods the Magistrate found that the defendant had only taken eight yards of print, which had been ordered by his wife and the value of which was 5s. 4d. The other parcels were untouched, but on two occasions the plaintiffs sent demands for their delivery which were refused: on the first occasion, the man sent for them had no written order, and on the second occasion the demand was by letter. As the goods were not fetched by the plaintiffs, the defendant sent an account for storage and the amount so charged the Magistrate held was reasonable. He therefore gave judgment for plaintiff for 5s. 4d. out of the £11 5s. 9d., and gave judgment for the defendant for the full amount of his claim, £4 16s. 6d., and made no order as to costs. Against this decision the plaintiffs appealed.

Mr. Benjamin appeared for the appellants, and Mr. Buchanan for the respondent.

The Court dismissed the appeal with costs. [Appellants' Attorney, D. Tennant: Respondent's Attorney, G. O'Reilly.]

COLONIAL GOVERNMENT V. } 1899.  
NATIONAL MUTUAL LIFE } May 3rd.  
ASSURANCE SOCIETY. } .. 8th.

Licence—Life Insurance Company—  
(Carrying on business—Act 38 of  
1887, section 11.

*The N. Assurance Society, after having carried on the usual business of an Insurance Company in this colony for some years, at the end of the year 1896 discontinued the issue of any new policies, but*

*employed an agent in the Colony, who merely collected the renewal premiums when they became due and paid them into a bank to the credit of the society; when claims arose upon Colonial issued policies they were sent to England by him for instructions.*

*Held, that the society carried on business in the Colony so as to be liable for the payment of licence money under section 11 of Act 38 of 1887.*

This was a special case stated for the opinion of the Court in the following terms:

1. The plaintiff is the Assistant Treasurer of the Colony and Receiver-General of Revenue, and as such is entitled to sue in the present action.

The defendant is the agent in South Africa of the National Mutual Life Assurance Society.

2. In or about the year 1892, a society called the National Life Assurance Society commenced to do business in this colony, and thereafter for each and every year up to and including the year ending on the 31st December, 1896, took out the annual licence required by section 11 of Act No. 33 of 1887, and also deposited the security required by paragraph 14 of the said Act.

3. In or about the month of July, 1896, the said society was by an Act of the Imperial Parliament (59, 60 Vict. C. 43) amalgamated and united with another society theretofore called the Mutual Life Assurance Society. The amalgamated society thus formed, which was called the National Mutual Life Assurance Society, and as the agent of which the defendant is sued in the present action; succeeded to all the property, assets, and business of the National Life Assurance Society in this colony: and until the 31st December, 1896, it continued to do all the business of the Insurance Company in this colony. It is hereafter alluded to as the said society.

4. The said society has discontinued from the 31st December, 1896, the issue of any new policies. Since the said date the following are the duties of the defendant:

(a) He collects renewal premiums when they become due, the receipts for which are made out in England and sent to him. Should the renewals be paid the amounts

received are paid into the society's credit at the African Banking Corporation, Cape Town.

(b) He has no other duty in connection with the society, who have never transacted fresh business since the amalgamation with the National Life Assurance Society.

(c) Should claims arise in colonial issued policies, all the papers presented to him would be sent to England for instructions.

The deposit made under section 14 of Act No. 38 of 1887, by the said National Life Assurance Society, and to the latter's rights in regard to which the said society has succeeded, has remained in the possession of the Colonial Government.

5. The fact that the said society has ceased to issue new policies, was in the month of February notified to the plaintiff, and a copy of the said Imperial Act was sent to him.

6. Section 11 of Act No. 38 of 1887 provides that "Every Insurance Company, society or association, not being such a joint stock company as is described in section 1 of tariff 17 of the Schedule to Act No. 3 of 1864, as amended by Act No. 20 of 1884, and not being such a Mutual Assurance Company as is referred to in section 10 of the said tariff, and not now existing and carrying on business in this colony, shall, before commencing business, take out a licence for the then current year ending the 31st day of December, on which licence the sum of £30 shall be payable, and each such company, society, or association, in respect of the second and every subsequent year during the whole or any part of which it shall carry on business, and also every such company, society, or association, which shall either now be in existence and carrying on business in this colony, or shall be in existence, but shall have ceased to carry on or discontinued business in this colony, in respect of every year after the 31st December, 1887, may commence, continue, or carry on such business as the case may be, upon taking out a licence on which there shall be payable the sum of sixpence for every pound sterling or fraction of a pound sterling on the premiums received in this colony, by such company, society, or association, during the preceding year ending the 31st day of December: Provided that, when the amount so calculated payable in respect of any such licence shall not amount to £30, the sum of £30 and not less shall be payable in respect of every second or subsequent year, or year after the 31st day of December, 1887, as the case may

be: and provided, further, that in no case shall a greater sum than £300 sterling be payable for the licence for any one year; and provided, further, that no such assurance company as is referred to in the 10th section of tariff 17 of the Schedule to Act No. 3 of 1864, shall in any case in any one year be bound or obliged to pay any sum, by way of licence, exceeding the sum of £500 sterling.

7. The National Life Assurance Society is not such a joint stock company as is described in section 1 of tariff 17 of the Schedule to Act No. 3 of 1864 as amended by Act No. 20 of 1884, and is not such a mutual assurance company as is referred to in section 10 of the said tariff.

The plaintiff contends that the said society is liable, under section 11 of Act No. 38 of 1887, for the sum of £60, being licence money at the rate of £30 per annum for the years 1897 and 1898.

The defendant contends that the said society is not liable for any licence money.

Wherefore the parties humbly pray the judgment of this Honourable Court upon their respective contentions.

Sir H. Juta, Q.C., for the plaintiff: The business of an insurance company simply is to receive premiums and pay out policies. It does not matter whether or not it issues new policies. The test applied in that section by which the licence is to be fixed is the amount of the premiums received in the previous year in the Colony. Section 12 shows what the Legislature considered was sufficient proof of carrying on business: the mere affixing of a door-plate is sufficient. The non-issue of new policies may be voluntary or it may be involuntary. The fact that the deposit required by section 14 to be made with the Government whilst business is being carried on is still in the hands of the Government is a tacit admission of the carrying on of business. Though the company does not issue new policies and does not create fresh business, yet the working out old policies, collecting premiums and making settlements is carrying on business. Act 43 of 1898 is *in pari materia* and Schedule 2, section 1, sub-section (b) shows what the Legislature considers "carrying on business" to be, although that Act does not apply to insurance companies.

Mr. Innes, Q.C., for the respondents: The object of the Legislature was to tax companies still actively prosecuting business, and not companies which have given up active business and are only winding up.

[Buchanan, J. : In the case of an ordinary mercantile business in liquidation, would you say that it could carry on its business without a licence ?]

In that case new contracts of sale would be entered into daily, but in this case the company are merely fulfilling contracts originally entered into, and entered into once for all.

[Buchanan, J. : These policies are renewed annually.]

But they are renewed under the original contract. The words "carrying on business" are capable of a wide construction, and of a narrower construction. This being a taxing measure the narrower sense, viz., that of carrying on a living business, is the one to be taken : it cannot be supposed that the Legislature intended to exact a £30 licence where less than £30 might be taken in premiums. A wide interpretation was given by Jessel, M.R., in *Smith v. Anderson* (15 Ch. D., p. 247, at p. 258), but that interpretation cannot have been intended here. Act 43 of 1898 was passed for the express purpose of giving a wider interpretation to these words than was given to them under Act 38 of 1887. In *Colonial Government v. British South Africa Company* (9 Juta, p. 240), there was an admission that the company carried on business in the Colony, but De Villiers, C.J., said (at p. 244) : " But for the unfortunate admission which states that the company carries on business in its Cape Town premises, I should have said that there was no doubt about it. But there is the admission. It probably was intended to signify no more than that the company does its clerical work there, but the language is unfortunate." A much narrower interpretation was placed on the words in that case than that given by Jessel, M.R., in *Anderson v. Smith*. Section 11 of Act 38 of 1887 is very difficult to construe : the words " shall be in existence but shall have ceased to carry on or discontinued business in this colony " refer to a company in the position of the defendants. We rely also on the 12th section : that gives an artificial method of proving that the company is carrying on business : all the tests there given are things appurtenant and necessary to a living business and not to a discontinued one. The intention of the Legislature was to tax foreign companies competing with Colonial companies. This company does not compete. A contract of life insurance is a single con-

tract entered into in the first year and not a contract from year to year. *Porter on Life Insurance* (2nd ed., p. 18).

Sir H. Juta in reply.

*Curia ad cult.*

*Porter* (May 8th).

Buchanan, J., said : The question raised in this special case is whether or not the defendant society is liable, under section 11 of Act No. 38, 1887, to pay licence money at the rate of £30 per annum for the years 1897 and 1898. The part of section 11 which affects this issue is as follows : " Every insurance company . . . shall, before commencing business, take out a licence for the then current year . . . and such company . . . in respect of the second and subsequent year during the whole or any part of which it shall carry on business may continue to carry on such business upon taking out a licence on which there shall be payable the sum of sixpence for every pound sterling . . . on the premiums received in this colony by such company during the preceding year ending December 31." Then follows a proviso that the sum payable in respect of such licence shall not be less than £30 in any one year. The National Life Assurance Society commenced to do business in this Colony in 1892, and took out the necessary licences and paid duty up to the end of 1895. In July, 1896, this company amalgamated with the Mutual Life Assurance Society, and the two became the National Mutual Life Assurance Society, and as such continued to do business in the Colony until the end of 1896. The defendant was and is the agent in this Colony of the said society, but since the end of 1896 the society undertook no new Colonial business, and did not issue any new policies here. All that the defendant has done since then has been to collect renewal premiums as they became due, and pay them into the bank to the credit of the society. All claims presented on Colonial policies would be sent by him to England for instructions. Defendant admits that if the society can be held to carry on business in the Colony, it comes under the provisions of the section, but contends that what is done does not amount to such carrying on of business as is intended to be taxed in the 11th section. It is urged that a restricted construction should be given to the words referred to, and that " carrying on business "

must be taken to mean carrying on fresh or new business, not merely continuing and liquidating the business previously acquired. It is argued that this view is supported by certain dicta in the judgment of Chief Justice De Villiers in the case of the *Colonial Government v. British South Africa Company* (9 Juta, 280); and by the proviso to the 12th section, which declares what shall be considered sufficient proof that business is being carried on by any manager or agent of a company. These acts are the affixing of a sign-board or door-plate at the place of business of the manager or agent, or the issue of any advertisement in a public print or of any prospectus advertising business, for such company. In the *British S.A. Company's* case, though the actual decision was based on the construction of the deed of settlement, the learned Chief Justice doubted if that company did carry on business in the Colony. It had an agent and offices in Cape Town, at which the business was almost entirely clerical. Contracts were made in the Colony for the benefit of the Company and purchases made, and goods received from England were forwarded, but no produce was sold in the Colony. The passage in the judgment that the company did not compete with any traders in the Colony was relied upon as the proper test of liability to taxation. But the whole sphere of action of the company was extra-Colonial. As to the proviso of the 12th section of the Act, that refers only to a question of evidence, and if it bears at all upon the point in dispute, it would rather be against a restrictive construction, for it makes slight matters sufficient proof that business is being carried on in the Colony. Regard must be had to the object for which the defendant society exists. The very business of an insurance company is the receipt of premiums against payment on certain contingencies of the amount assured. Out of these premiums the profits of the company are derived, and it is these premiums which it is the intention of the Act to tax. No distinction is drawn by the Legislature between premiums paid on contracts entered into in previous years and premiums on new contracts made during the year for which the licence is payable. That the defendant society chooses to confine its business to the receipt of premiums on insurance previously in existence is a matter of option; the tax is payable on all premiums received in the Colony during the

year. In our opinion the defendant's contention cannot be upheld, and judgment must be given for the plaintiff with costs.

Maasdorp, J., concurred.

[Plaintiffs Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Van Zyl & Ruissinné.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

COLLIER AND HILL AND OTHERS } 1899.  
v. ERICKSEN. } May 4th.

Mr. Buchanan applied for the provisional order of sequestration to be made final—Granted.

### SPINDLER V. MALAN.

Mr. Benjamin applied for provisional sentence upon an agreement of sale for £200.—Granted.

### RETIFF V. VAN NIEKERK.

Mr. Maskew applied for provisional sentence upon a mortgage bond for £2,750, the property specially hypothecated to be declared executable.—Granted.

### ILLIQUID ROLL.

#### WAINWRIGHT V. RUCK.

Mr. Buchanan applied for judgment for £50 17s. 6d., for work done and material supplied.—Granted.

### REHABILITATION.

On the motion of Mr. Benjamin, the estate of John Morrison was rehabilitated.



GENERAL MOTIONS.

HUGO V. COLONIAL GOVERNMENT.

Mr. Molteno applied for the arbitrators' award to be made a rule of Court.—Mr. Ward, who appeared for the Government, consented.—The Court granted the application

IN THE MATTER OF THE PETITION OF JACOBUS ABRAHAM DE KLERK. } 1899.  
May 4th.

Act 7 of 1865, section 57—Land beacons—Practice.

*Before granting a rule nisi under section 57 of the Land Beacons Act a prima facie case should be shown to the Court.*

This was an application for a rule nisi under Act 7 of 1865, section 57, calling upon one Petrus Francols Pienaar to show cause why the decision of a commission appointed by the Victoria West Divisional Council to adjust a dispute concerning the boundaries of certain two farms, shall not be set aside.

Sir H. Juta, Q.C., for the applicant referred to *Ex parte Thwaites* (1 Juta, p. 275). There a rule nisi was granted as of course.

[De Villiers, C.J.: There ought to be some *prima facie* case made before granting a rule.]

Counsel stated the effect of the evidence taken, from which it appeared that the evidence of the surveyor was in favour of the petitioner. The dispute has arisen over the position of a certain beacon. The petitioner put up a beacon in a certain place, and a neighbouring farmer knocked it down. Petitioner erected it again, and it was again knocked down. Then the parties went to court.

The Court granted a rule nisi to be served on all the respondents, and returnable on June 12.

[Applicant's Attorney, Gus Trollip.]

IN THE ESTATE OF THE LATE WILLIAM CLIFFORD KNIGHT.

Mr. H. Jones applied for an order authorising the transfer of certain property purchased by the executor.—The Court granted the order.

IN THE ESTATE OF THE LATE PETRUS BERNARDUS CILLIERS.

Mr. De Waal applied for leave to mortgage certain property.—The Court granted the order.

DALY AND DAY V. GIESLER. } 1899.  
May 4th.

Mechandise Marks—Act 12 of 1888—Bottles.

*Interdict granted restraining the respondent, a manufacturer of mineral waters, from using for the purpose of his business any bottles bearing the names or trade marks of the applicants.*

This was an application for an order restraining the respondent from using, for the purposes of his business, any bottles bearing the names or marks of the applicants.

The affidavit of A. J. O'Flaherty set forth:

That about March, 1898, an association called "The Cape Bottle Exchange Association" was formed by the leading aerated water manufacturers in Cape Town for the purpose of protecting themselves against trade irregularities perpetrated by persons in the same line of business and that deponent's firm of O'Flaherty, Grant & Co. were the secretaries and agents of the association.

That one of the chief irregularities complained of by members of the association was the habitual use made of their bottles, on which their respective trade marks were embossed or stamped, by persons engaged in the same line of business, for the purpose of vending aerated waters of their own manufacture.

That the purchase of bottles for the purpose of vending aerated waters was a considerable item in the expenditure of a manufacturer, and that owing to breakages and non-return of bottles the item was an increasing one.

That in order to prevent the irregular use of the bottles of the members the following notice was inserted in the "Cape Times" for two weeks: "In terms of the Trade Mark Act it is hereby notified that any person or persons who may be found unlawfully buying, selling, filling, or in any way dealing in bottles stamped with the names or trade marks of the undernoted firms will be pro-

secuted with the utmost rigour of the law.' (Here follow the names of members of the association.)

That notwithstanding the notice the irregularity was increasing.

That with a view to ascertaining the extent of the evil deponent caused aerated waters to be purchased of several manufacturers of aerated waters in Cape Town against whom suspicions existed, with the result that in each case such suspicions were fully confirmed.

That amongst others, one dozen bottles of lemonade and five dozen bottles of soda were purchased from the respondent, a maker of aerated waters.

That twenty-two of these bottles bore the name and trade mark of persons other than the respondent; these including six bottles belonging to the applicants.

That the bottles which contain lemonade have the respondent's label pasted on them, but those containing soda-water have no label and show only the original owner's name and mark.

The respondent stated on affidavit that he was as anxious as any member of the association to put a stop to the irregularity complained of, and was prepared to assist and join the association, if it were made general and not confined to a few only of the many manufacturers in Cape Town and suburbs.

That if the present application were granted it would cause him great damage and loss.

That for many years all the manufacturers in Cape Town and neighbourhood had been in the habit of using bottles belonging to others, and that he was convinced that the present applicants had at the time in their possession many bottles belonging to others.

That he had offered, and was willing to hand over to applicants, any bottles of theirs which he might have in exchange for unmarked bottles, provided they allowed him three months to work off the stock which he held contained in such bottles.

He denied that since the issue of the notice referred to he had purchased bottles bearing the trade marks of other manufacturers. What he had at present he had obtained from customers as empties in exchange for full bottles.

T. H. Pegram, a member of the association, alleged that he considered that respondent ought to be able to dispose of his stock in hand within a week.

Mr. Innes, Q.C., appeared for the applicant.

Mr. Benjamin for the respondent.

Mr. Innes: The acts of the respondent constitute an offence under the Merchandise Marks Act 12 of 1888, section 1, sub-section 1, clauses (b) and (d). Section 2, sub-section 3 provides that the application of a false name or false initials shall be deemed to be a false trade description, and section 4, sub-section 1, declares an application to the covering to be an application to the goods. "Covering" is defined in section 4, sub-section 2, and includes "bottles." If those acts are illegal the applicants are clearly entitled to an interdict.

Mr. Benjamin: There is no fraud upon the public or upon any individual; the bottles are mixed up by the customers; it is one of the exigencies of trade. The applicants and others have formed a Bottle Association for the distribution of bottles belonging to the members, but the respondent is not a member of the association, and he may be closed off from the trade. The lemonade has his label; the soda is sold without label by the custom of the trade. The respondent only asks for a reasonable time within which to get rid of his present stock of bottles. In *Martell v. Paarl Berg Wine, Brandy and Spirit Company* (12 S.C.R., p. 326) three months were allowed the respondents to get rid of a stock of bottles improperly labelled.

The Court granted an interdict, but suspended its operation until June 1.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

HAYES V. HAYES. } 1899.  
} May 4th.

This was an application made by Mrs. Eleanor Hayes for an order on respondent (her husband George Alfred Hayes) to pay to her the sum of £30, to enable her to proceed with an action instituted against him for judicial separation.

The petition set forth that the parties were married on September 25, 1883. A deed of separation was executed on December 9, 1898. Applicant desired to proceed with an action for judicial separation on account of the neglect and failure of the respondent to pay his share of the debts of the joint estate, the failure of the respondent to maintain and support her, and a desire to free herself from all liability borne by the respondent. The applicant further set forth that respondent was in the employ of Mr. Hermann Michaelis, of Cape Town, and was drawing a monthly salary of £20. She was herself without means to proceed with the action.

Respondent, in his affidavit, denied that he had failed to pay his share of the debts of the joint estate. After signing the deed of separation he did not promise to support applicant, but he promised her that if she would abstain from her habits of intoxication, and would continue to live in a cottage in the Walmer-road, Woodstock, he would pay the rent. Since the deed of separation was executed, the applicant was frequently intoxicated, and had misconducted herself, and had left Walmer Cottage soon after the deed of separation had been executed. He denied that he was now employed by Mr. Hermann Michaelis, or that he had been in his employ during the past two months. He had been living on money received from England, and was at present out of employment. Respondent further alleged that he was about to bring an action for divorce against the applicant on the ground of her alleged adultery.

The applicant, in a further affidavit, denied that she had ever been intoxicated, or that she had ever misconducted herself. She denied that she had ever committed adultery, and she was surprised to hear that respondent proposed to bring an action for divorce against her.

The affidavit of a boarder, who formerly resided in applicant's house, stated that he had always known applicant to be perfectly sober and strictly moral. A nurse made an affidavit to a similar effect.

Mr. Close appeared for the applicant; Mr. Buchanan for the respondent.

After argument,

The Court ordered the respondent to pay £10 into the hands of the applicant's attorneys for the purposes of the action, the question of costs to stand over.

WINTERBACH V. WORCESTER { 1899.  
MUNICIPALITY AND { May 4th.  
LINDENBERG. { „ 5th.

Municipality — Municipal Officer —  
Valuer—Construction of 108th  
section of Act 45 of 1882.

*The 108th section of the Municipal Act of 1882 does not prohibit Municipal Councils from appointing any Municipal Secretary as valuer and paying him for his services as such valuer.*

This was an application on notice to the respondents calling on them to show cause why the first-named respondent should not

be interdicted and prohibited from continuing to employ the second-named respondent as secretary to the Municipality, or in the alternative why they should not be interdicted and prohibited from acting upon a certain contract.

The affidavit of the applicant set forth that he was a Commissioner of the Municipality Council of Worcester, and the second-named respondent was the secretary and salaried officer of the Municipality. It appeared that tenders were called for for the valuation of the property of the town, and the secretary was successful tenderer, his tender being 15 guineas. Applicant objected to his appointment, but it was nevertheless made.

He submitted that under Act 45 of 1882 Lindenberg had forfeited his office.

The respondent Lindenberg filed an affidavit which set out, that at the meeting of the Council prior to that at which the tenders were considered the Council offered to entrust the making of the valuation to him, but the applicant dissented and urged that tenders should be called for; that the applicant said that there was no objection to the clerk being employed as valuer, but that tenders should be called for and he could tender. The respondent accordingly declined the offer and made a tender. He alleged further that he had made the valuation and handed the roll to the Council, but had not drawn payment for the same.

The affidavit of Meiring, the Mayor of the Municipality, alleged that for the last twenty years it had been the custom in Worcester to appoint the secretary as valuer; that the question of the application of section 108 of Act 45 of 1882 was considered before the present proceedings were instituted, and counsel's opinion taken, and on the strength of this opinion the practice of employing the clerk in matters other than those prescribed as duties of his office was continued when it was considered to be in the interests of the Municipality.

The applicant denied the allegations in Lindenberg's affidavit, and alleged that the cash book contained an entry showing the payment of 15 guineas.

Mr. Innes, Q.C., for the applicant: This is not a contract which the secretary of a Municipality should have. The Council sits as a court of appeal from the decision of the valuator, sections 116, 123 of Act 45 of 1882. It should not sit in appeal upon decisions of the secretary. Sections 106, 107, 108 deal with the appointment, &c., of officers, including

for by him. He alleged that although on the 12th November he wrote to applicant informing him that the full number of 150 shares had been allotted to him, no objection or repudiation was made by applicant until the 24th December.

The prospectus attached to the applicant's affidavit stated that several notabilities, including His Excellency the Governor, Mr. Rhodes, and the Chief Justice, had written to the directors congratulating them upon their enterprise, and that in many cases they had applied for shares. It gave the names of fifty-two persons who had written such letters.

Mr. Graham, Q.C., appeared for the applicant, and Sir Henry Juta, Q.C., for the respondents.

Mr. Graham: The application is made under section 86 of Act 25 of 1892. The representation made was of a most material character. Out of the fifty-two names mentioned only four have taken shares and one of those was a foundation shareholder, and therefore did not apply. Two of the four are the last on the list. The word "many" must be construed in its ordinary sense and not as meaning simply "more than two." The section 35 of the English Act 25 and 26, Vict. c. 89, corresponds to section 86 of our Act. For decisions under that Act, see *Buckley* on the *Companies Acts* (6th ed., p. 103); *Henderson v. Lacom* (5 Eq. Ca., p. 249); *Directors of Central Railway Company of Venezuela v. Kisch* (2 E. and G., App. Ca., p. 99).

Sir H. Juta: The allegation is one of fraud; the applicant must prove therefore that the statement is untrue, that it was material, and that he was induced by it to take shares: but his own letters show that he was not induced by the statements.

[De Villiers, C.J.: "Many" is a comparative word. Can we say that four out of fifty-two is many? I should call it very few.]

It may be an exaggeration, but it is not false. It did not induce the applicant to take shares. It could have made no difference whether the people who took shares were distinguished or not; they were not financial people. This is a different case from those cases where the names of certain directors were put forward as having taken shares. The Act inflicts heavy penalties for fraudulent misrepresentation, and therefore it must be clearly proved.

Mr. Graham: The question is, did the applicant act on the representation? Not

did he act on the representation alone? *Buckley* (p. 129); *Edgington v. Fitz-Maurice* (29 Ch. D., p. 459). A smaller amount of misrepresentation would entitle shareholders to repudiate their shares than would entitle them to bring an action against the directors. *Buckley* (p. 125). As to what constitutes legal fraud: *Peck v. Derry* (37 Ch. D., p. 541); *Judgment of Cotton* (at pp. 567, 568).

De Villiers, C.J.: There is no question in this case as to the applicant's liability to contribute to the debts of the company. The question is entirely between the applicant and the company, which is a going concern. If there were proof that the prospectus contained material misrepresentations upon the faith of which the applicant was induced to take the shares, he would be entitled to have the contract rescinded, and his name removed from the register of shareholders. Fraud on the part of the directors inducing the contract or *justus error* on his part would entitle him to the relief of restitution. But the representations upon which he acted must be false, and they must be material. The representations in the present case were that several noted men, including the Governor and the Chief Justice, had written to the directors congratulating them on their enterprise in starting the cycle factory, and that in many cases they had applied for shares. The statement as to congratulatory letters having been sent is true, but the point relied on is that few of the notabilities had applied for shares. In fact, however, out of a capital of £10,000 shares for £7,000 had been subscribed for. It was not in strictness true that many of those who had written the congratulatory letters applied for shares, but the misrepresentation, even if it can really be regarded as such, was not in any way material, for if a large number of shares was really subscribed for, it was wholly immaterial whether those so subscribing had written congratulatory letters to the directors. The applicant's real grievance is that he received the full number of shares for which he had applied, but there was nothing in the prospectus to justify him in concluding that he would receive part only of the shares so applied for. The application must be refused with costs.

Buchanan and Maasdorp, J.J., concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

PALMER V. MOLTENO. } 1899.  
} May 4th.

Election petition — Amendment —  
Fresh charge.

*An amendment, including a fresh charge, allowed to be made in an election petition although more than six months had elapsed since the date of filing the petition.*

This was an application for leave to amend the schedules of particulars annexed to the election petition filed by the applicant on the 26th October, 1898, against the return of the respondent as a member of Parliament for the electoral division of Somerset East, and for the fixing of a date for the trial of the petition.

The affidavit of the petitioner, George Morrison Palmer, stated that in view of the decision of the Court in the election case *Crewe v. Batha* (8 Sheil, 424), where it was held that the votes of minors, aliens, criminals, and other persons against whom objections should have been taken before the Registration Court could not be disturbed upon an election petition to the Court, he had acted upon the suggestion of his legal adviser, and had abandoned his original application for a scrutiny of the votes recorded at the last election. He now asked that a day be fixed for the hearing of charges of bribery and corruption brought by him against the respondent, and for leave to amend his petition. He had deposited the sum of £300 as security, in accordance with the requirements of the law in that regard.

Attached to the affidavit, was an amended schedule of particulars, containing most of the particulars of bribery and treachery in the original schedule and one new charge, namely the charge of bribery of one Alfred Thomas Oliver by the respondent personally.

The affidavit of the respondent, James Fennant Molteno, stated that on August 23, 1898, the returning officer for the electoral division of Somerset East declared him one of the duly elected members for the division. On September 16, 1898, his name was published in the "Gazette" as that of one of the duly elected members for the division. On October 26, 1898, the petitioner first filed his petition against the return of the respondent, in which it was stated that by reason of the corrupt practices alleged to have been practised by the respondent, the respondent

should be declared not elected, and the petitioner declared elected. The respondent drew the attention of the Court to the decision of the Court during its special sitting to hear election petitions in respect of the case of *Crewe v. Batha*, and to the fact that during the special sitting of the Court no steps were taken by the petitioner to set his case down for trial, nor did he take any such steps during the ordinary term of the Court next ensuing. The respondent pointed out that as a long period of time had elapsed between the election and the date when it was sought again to bring forward the petition his defence would be seriously prejudiced, as several material witnesses were not available. He had understood that the petitioner did not intend to proceed with his case. As the petitioner had not proceeded with his petition at the proper time, the respondent asked that the petition be now dismissed with costs.

In an answering affidavit the petitioner said that the decision of the Court with respect to the *Crewe v. Batha* case was not pronounced until December last, and therefore he had not time to proceed with his case during the special sitting of the Court. The February term of the Court was a very full one. At no time had it been intimated that the petitioner did not intend to proceed with his case, but acting upon legal advice he had resolved to abandon the claim for a scrutiny and confine the petition to allegations of corrupt practices.

Sir Henry Juta, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the petitioner, and Mr. Searle, Q.C. (with whom was Mr. Currey), appeared for the respondent.

Sir H. Juta: No Rule of Court or Statute has been transgressed, the respondent should have known that an election petition could not be withdrawn without the leave of the Court. If he thought there had been undue delay, he could have made an application to have the petition dismissed. It was only in January when the question of appeal to the Privy Council was decided, that it became clear that petitioner could not proceed with the scrutiny.

Mr. Searle: There must be some limit to the time within which an election petition can be proceeded with. Six months have elapsed since the petition was filed, and there is no excuse for the delay. The abortive appeal to the Privy Council is not a good excuse. It is the essence of an election petition where there is generally a conflict

of evidence, and where it is often difficult to procure the witnesses that it should be speedily tried while facts are still fresh in men's minds. Act 9 of 1883, sections 15 and 16, gives the Court power to frame rules and regulations as to election petitions, and gives it wide powers until such rules are framed. In England election petitions are tried at once by judges *in rota*. This Court has barred appeals from Magistrates' Courts where they have not been prosecuted in reasonable time. The amendment proposed is a new and personal charge, the English judges have held that where an amendment is applied for, the party applying must give some reason for not having originally included the fresh allegations. *The Carrickfergus case* (1 O'M. and H., p. 263); *The Cheltenham case* (1 O'M. and H., p. 68). The delay in this case may be most injurious because material witnesses have left the district, and it is impossible to trace them. Act 21 of 1879, section 12, says that a charge of corrupt practice must be prosecuted within six months.

Sir H. Juta: An election petition should be treated exactly as an ordinary action, and in an ordinary action the Court would allow the amendment. There is nothing to show that defendant will be prejudiced by the lapse of time.

The Court allowed the application.

De Villiers, C.J.: The principle adopted by the Court in all these petitions has been to give the greatest possible facility for the investigation of each case, the only condition in the case being that the respondent should not be prejudiced in any way. Now, in the present case there is an allegation of prejudice, that the respondent has lost some witnesses who would have been available if the case had been brought on at an earlier date. All I can say about that is this, that if at the trial it is proved that witnesses who would have been available early in the year are not available now, that fact will be borne in mind by the Court; but that is not a sufficient reason for now refusing the election petition to be tried at all; at all events in regard to those charges in respect of which the witnesses have not disappeared. The only doubt which I had was as to whether any fresh charges ought to be allowed, but seeing that the only charge is a personal charge, in respect of which at all events there will be the evidence of the respondent himself, and that there is no allegation that other witnesses in regard to that charge

have disappeared, I think it would be better that that charge should also be heard before the Court. The Court will therefore allow the application and the amendment of the schedules, and allow the case to be tried, but it is impossible now to fix the date of the trial. The Court will, however, intimate at an early date the exact day, which will probably be some time in June, after the 12th of June.

Buchanan and Maasdorp, J.J., concurred.

Mr. Searle said he would like to know whether the petitioner still claimed the seat, in order that the respondent might have time to prepare counter charges.

Sir Henry Juta said the respondent would be informed on the point.

The Chief Justice said there would be plenty of time for the respondent to prepare his case.

Mr. Searle: In this application does the Court direct costs to be costs in the cause?

The Chief Justice: Yes.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissin  ; Respondent's Attorneys, V. A. van der Byl.]

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## SUPREME COURT

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[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.O.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

SKINNER V. SKINNER. { 1899  
May 5th.

Mr. Close applied on behalf of Mrs. Elizabeth Skinner for leave to sue her husband *in forma pauperis* for divorce, on the ground of his adultery. Counsel said that in these cases the Court usually demanded that the applicant should appear in person, but he submitted that in view of the special circumstances of this case that should not be insisted upon. These special circumstances were that the applicant lived in Kimberley, and it would be very expensive for her to come to Cape Town and apply in person. She had been married for fifteen years and had three children to support. Her husband had left her, and was now living with another woman.

The Chief Justice said it appeared to be a *bona fide* case, and the Court would therefore grant a rule *nisi*, returnable on May 18; personal service to be effected.

*Re* FEBRUARY'S ESTATE. { 1899.  
May 5th.

**Executor — Insanity — Transfer of property—Registrar of Deeds.**

F., her husband's sole heiress, and M. were appointed co-executors under the husband's will.

*M. subsequently became of unsound mind and incapable of carrying out his duties as co-executor.*

*The Court, on F.'s application, directed the Registrar of Deeds to pass transfer to F. of the landed property in the estate subject to the production of the order for M.'s detention in a lunatic asylum.*

This was an application by the widow and co-executor of the late Willem Carel February, who stated that she was the sole heiress of the estate of her late husband, the testator, and was desirous of having certain landed property in the estate transferred into her own name; that her co-executor, one J. G. Mader, was at present an inmate in Valkenberg Lunatic Asylum, and incapable of acting as executor. Wherefore she prayed for an order authorising the Registrar of Deeds to pass transfer to herself of the said landed property without the co-operation of the said co-executor.

**Mr. Close moved.**

The Court granted the order subject to the production to the Registrar of the order for the detention of J. G. Mader as a lunatic, or a certificate from Dr. Dodds that he is incapable of transacting any business.

KUNNE V. WOBBE { 1899.  
May 5th.

Act 29 of 1898, section 21—

### Appointment of special referee.

This was an action in which the plaintiff claimed £41 16s. 6d., being money paid by him to one Marais on behalf of the defendant, less £3 13s. 10d. due by the plaintiff to the defendant.

The defendant in his plea denied that he owed the money, and in reconvention claimed £85 8s. 8d. as the balance of account

**L 2**

owing to him upon certain purchase of livestock which he had made on the plaintiff's behalf under a certain agreement.

Plaintiff in his replication denied this agreement; he admitted, however, that the defendant had bought stock for him with cash supplied by him on credit notes furnished by him. He denied the debt of £85 8s. 8d., and said that the £3 13s. 10d. referred to in the declaration represented the whole balance of the stock transactions.

Mr. Benjamin appeared for the plaintiff; Mr. Graham, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

Arthur Kunne, the plaintiff, said that up to October 1 of last year he carried on business as a meat purveyor. He never entered into an agreement with the defendant for the latter to purchase stock for him. There were some transactions between them in 1896, witness buying cattle from defendant, or sometimes giving him money to buy cattle for him. When defendant did so the commission was 5s. per head for oxen. Witness had bought pigs from defendant. He bought by the carcase, so much per lb. Last year a demand was made upon witness by a man named Marais at the Paarl. The letter of demand was for some pigs bought by defendant in witness's name. Witness had not authorised Wobbe to buy those pigs. Before he received the letter of demand witness got an account, and upon that he sent for defendant, and asked for an explanation. The latter said he had not the cash when he bought the pigs, but he intended to pay. He did not do so, and later on witness got the lawyer's letter of demand. Witness then saw defendant, and afterwards, on Marais pressing, paid the money on account of defendant.

**De Villiers, C.J. : Who got the pigs ?**

The witness said that he had, but he had bought them from defendant at so much for the dead meat, and had paid defendant for them.

The examination being continued, plaintiff gave evidence as to the dispute between them with regard to accounts.

Mr. Graham contended that the whole matter being one of account, it ought to be referred to some competent person to go into the accounts, as provided by Act 29 of 1898.

After discussion, the Court referred the whole case to Mr. Maynard Nash, as special referee, in terms of the 21st section of the Act.

*Postea* (31st May).

The special referee reported in the following terms:

1. That the plaintiff has not sustained his claim against the defendant for the recovery of the sum of £41 16s. 6d., less £3 13s. 10d.

2. That the plaintiff still owes the defendant the sum of £15 14s. 10d.

3. I recommend that judgment be given for the defendant for £15 14s. 10d. with costs.

The Court ordered the special referee's report to be made a rule of Court with costs, including the fee of the special referee, amounting to twelve guineas.

[Plaintiff's Attorney, A. P. Kenealy; Defendant's Attorneys, Silberbauer, Wahl & Fuller.]

WOLFAARDT V. COLONIAL GOVERNMENT. { 1899.  
May 5th.

*Res judicata*—Form of action—Trespass—Use and occupation.

*The defence of res judicata is not defeated by the fact that the action differs in form from the previous action, if the matter in issue is the same.*

*The test as to what was the real matter in issue must be sought in the pleadings, and not in the evidence actually adduced in the previous action.*

Argument upon a plea of *res judicata* to the plaintiff's claim. See *Wolfaardt v. Colonial Government* (8 Sheil, 429).

The plaintiff's declaration was as follows:

1. The plaintiff is Christoffel Johannes Wolfaardt, a farmer residing at Miellicsfontein, in the district of Hanover; the defendant is Jacobus Wilhelmus Sauer, Commissioner of Public Works, who is sued in that capacity as representing the Colonial Government.

2. The plaintiff is the registered owner of the said farm, across which farm a certain line of railway, being portion of the line between Naauwport and De Aar, was in or about the year 1883 constructed by the Colonial Government, and has since that time been maintained and worked by the said Government.

3. In or about the year 1883, the said Government wrongfully and unlawfully entered upon certain land belonging to the

plaintiff, and being portion of his said farm, and unlawfully sunk a well upon the said land, and wrongfully and unlawfully used the water from the said well for the purposes of the said railway from the said year 1883 to the end of the year 1897; the said Government have had the beneficial use and occupation of the water of the said well continuously during the period above mentioned.

4. The value of the water so used by the Railway Department of the said Government for the thirteen years aforesaid is the sum of £1,300.

5. The said Government in or about the year 1883, and from time to time thereafter between that date and the year 1897, trespassed upon the said land belonging to the plaintiff, and erected certain buildings, and laid out certain gardens and plantations thereupon, without having first obtained the consent of the plaintiff thereto, and without having expropriated the same; portions of the land trespassed upon, built upon, used and occupied by the said Government are not, and have not been used, for the purposes of the construction and maintenance of the said railway, or of works in connection therewith.

6. The plaintiff has sustained damages in the sum of £500 by reason of the wrongful acts set forth in the preceding paragraph.

7. The plaintiff has called upon the said Government to pay him the value of the said water used as aforesaid, to wit, the sum of £1,300, and also to pay him the sum of £500 as and for damages sustained as aforesaid, but the said Government has refused to pay the said sum or any portion thereof.

The plaintiff claims:

(a) The sum of £1,300 for the use of the water taken as aforesaid.

(b) The sum of £500 as damages.

(c) Alternative relief.

(d) Costs of suit.

Defendant's plea:

1. The defendant admits the allegations in paragraphs 1 and 7 of the declaration.

2. With regard to the allegation in the other paragraphs in the said declaration, the defendant says that the alleged wrongful acts therein set forth, and upon which the plaintiff bases his claim for relief are *res judicata*, inasmuch as the said alleged wrongful acts were the subject of a previous action in this Honourable Court, in which judgment was given on the 18th day of November, 1898.



3. By reason of the premises the defendant submits that the plea of *res judicata* is a good plea to the prayers of the plaintiff's declaration in this suit.

Wherefore he prays that the plaintiff's claim may be dismissed with costs. And as an alternative plea in case this Honourable Court shall deem the foregoing plea insufficient in fact or law as to all or any of the allegations in the declaration, the defendant says as follows :

4. He craves leave to refer to the allegations in paragraph 1 hereof.

5. He denies each and every allegation in paragraphs 3 and 4 of the declaration. With special reference to the said paragraphs he says as follows :

(a) The plaintiff's farm Meliesfontein is a quitrent farm, and in or about the year 1. 83, the Colonial Government by virtue of the powers conferred upon it by Act 14 of 1881, and by Act 9 of 1883, and by the Proclamation of the 6th August, 1813, duly expropriated, for railway purposes, a portion of the farm Meliesfontein after due notice to the plaintiff ; the portion of the said farm so expropriated had not at the date of the expropriation been improved by cultivation, irrigation or otherwise, and the plaintiff was not entitled to any compensation in respect to the same.

(b) He admits that after the expropriation as aforesaid, the railway engineers of the Colonial Government sunk a well upon the expropriated portion of the said farm as they lawfully might, and the water in the said well has since been used for railway purposes.

(c) He denies that the value of the water used as aforesaid by the Railway Department of the Colonial Government from the date of the sinking of the well to the year 1897 is £1300.

6. As to paragraph 5 of the declaration, the defendant denies that the Colonial Government or any of its servants or agents have ever trespassed upon any part of the plaintiff's farm as alleged in that paragraph.

He specially says with regard to the said paragraph that the station known as Hanover-road Station, and certain other buildings required for railway purposes and other works in connection therewith, have been lawfully erected upon the expropriated portion of the plaintiff's farm, but he denies that buildings other than those required for railway purposes have been erected upon the plaintiff's farm.

He denies the other allegations in the said paragraph.

7. As to paragraph 6 of the declaration, he denies that the plaintiff has sustained damages in the sum of £500, or in any sum by any act of the Colonial Government or of its agents or servants.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

Plaintiff's replication :

For a replication to the first plea of the defendant, the plaintiff says that he denies the allegations and conclusions in the said plea, and he craves leave to refer to the pleadings and other documents filed of record in this Honourable Court in the suit referred to in the said plea, and to the pleadings in this suit, and he prays that the said plea be overruled, with costs.

And for a replication to the second plea of the defendant, the plaintiff says :

1. He admits that the plaintiff's farm is a quitrent farm, and he craves leave to refer to the title deed thereof, and he admits that the portions of the farm from time to time taken possession of and used by the defendant had not been improved by cultivation, irrigation, or otherwise by the plaintiff at the date when the same were taken possession of.

2. He specially denies that any notice was given him by the defendant as is required by law, that the land taken possession of and used by the defendant was to be expropriated, and says that no legal expropriation of any portion of the said land has ever taken place.

3. Save as above and save in so far as the said plea admits any of the allegations in the declaration, he denies all the singular the allegations of fact and conclusion of law in the said plea contained, and joins issue thereupon, and again prays for judgment, with costs of suit.

Mr. Searle, Q.C. (with him Mr. Close) : The judgment in the former case proceeded upon a different cause of action. See the pleadings. The ground of action there was the damage caused by the wrongful sinking of the well ; plaintiff's allegation was that by the defendants' use of the water the plaintiff's supply from his fountain was weakened ; the Court held there was no connection between the well and the fountain, and would not let the plaintiff go into the question of compensation for the use of the water. Now we say that the defendants having had the use of the water for all this time must pay for it. *Bertram*

*v. Wood* (J. 10, p. 177); *Pigott on Foreign Judgments* (pp. 47, 48, 49); *Hunter v. Stewart* (4 De G. F. and J., p. 168).

Mr. Graham was not called upon.

De Villiers, C.J.: The defence of *res judicata* has been raised to the whole action, but it can obviously only apply to that portion of the declaration which relates to the well. The claim is for £1,300, which is alleged to be the value to the Government of the use of the water from the well which is alleged to have been unlawfully sunk by the Government on the plaintiff's land. In the previous action there was a claim for damages for the unlawful sinking of the well, and under the declaration the plaintiff would have been entitled to produce evidence as to the value of the water to the Government. In actions for damages for trespass, considerable latitude must be allowed, so that it would not be permissible to exclude evidence as to the benefits obtained by the trespasser from his trespass. Thus, in one case, the Court allowed evidence to be given of the value of wild ostriches taken by a trespasser from the land of another, although under the law, as it then stood, the owner had no right of property in the ostriches. The plaintiff cannot, by now changing the form of action, make substantially the same claim as he made in the former action. The test as to what he claimed must be sought in the pleadings, and not in the evidence tendered by him in support of his declaration. It is his own fault if he failed to substantiate his case by sufficient evidence. It is now said that evidence was not produced because of an intimation from the Court that the evidence would not be admissible, but the members of the Court have no recollection of such an intimation, nor do the published reports of the case mention it. The first action was virtually an action for damages for trespass; and to prove damages, evidence was produced to show that the result of making this well was to abstract water from the plaintiff's spring. The Court held that such was not the effect, and that the plaintiff had sustained no damages which he could recover as compensation from the Government. The plaintiff now seeks to recover compensation in an action for the value of the water used by the Government. The form of the action, however, is immaterial if the matter in issue is the same. Under the Roman law a person might be entitled to have recourse either to the action *ex stipulatu* or *actio rerum*, but

if he elected the one, he could not subsequently claim under the other. As pointed out by Voet (41, 2, 4), the cause of action is the same wherever the same matter is in issue. In the same way a person might have a claim against another for damages for trespass, or he might claim his damages under an implied contract to pay for the use and occupation of his land, but if he elects to sue for the trespass, and is defeated on the ground that no compensation is payable, he cannot afterwards recover compensation under the guise of an action for use and occupation. The plea therefore of *res judicata* must be sustained in regard to the claim relating to the well.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorney, G. A. Trollip; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

LIND V. OUDTSHOORN MUNICIPALITY. 1899. { May 5th.

Sale—Transfer—Condition—Erven.

*The plaintiff sold all his right, title and interest in the remaining extent of a certain property to the defendant municipality, with the provision that upon the municipality taking transfer, it should retransfer certain ten morgen consisting of three blocks to him, such retransfer to be subject to the same conditions under which dry erven had from time to time been sold by the proprietors of the remaining extent.*

*One of the conditions referred to was that the lot sold should be used for building purposes only, and that the purchaser should erect or cause to be erected upon the erf a suitable building.*

*It was further agreed that the ten morgen were to be laid out in erven or blocks of erven, which blocks should be of the same size as certain other blocks in the town marked on the general plan. The plaintiff passed transfer to the municipality of the whole of his share, and the ten morgen were demarcated in three blocks, and*

*these the plaintiff took possession of, subdivided, erected several buildings upon and enclosed portion.*

*He claimed transfer but the municipality refused to pass transfer of these blocks, unless they were sub-divided into erven of the size at which land subject to the conditions referred to were ordinarily sold*

*Held, that the plaintiff was entitled to transfer of the three blocks not subdivided in the manner proposed by the municipality.*

Action for transfer and damages.

The plaintiff's declaration was in the following terms :

1. The plaintiff is an attorney of this Honourable Court, residing at Oudtshoorn ; the defendant municipality is duly incorporated under the Act 45 of 1882.

2. On the 30th September, 1895, a provisional agreement was entered into between the plaintiff and the Mayor of Oudtshoorn, as representing the defendant municipality, in terms of which the plaintiff agreed to sell and the defendant municipality agreed to buy all the right, title, and interest which he then had in the remaining extent of the farms Grobbelaars River and Hartebeest River, which form the commonage of the village of Oudtshoorn, save and except that the plaintiff should retain for himself a certain share of the said remaining extent equivalent to about ten morgen of land. Exact provision was made in the said agreement in respect to the situation and boundary of the said ten morgen.

3. The purchase price to be paid by the said defendant municipality to the said plaintiff was the sum of £1,200 ; and it was provided that the defendant municipality when it received transfer of the whole of the said share of the remaining extent from the plaintiff should at the same time retransfer to him the ten morgen of land reserved as aforesaid, such retransfer to be subject to the same conditions under which dry erven had from time to time been sold by the proprietors of the said remaining extent. The plaintiff annexes hereto—marked A—a copy of the said provisional agreement, omitting however those clauses which have no bearing upon the point at

issue in the present case ; he also annexes a copy marked B of the conditions upon which dry erven have ordinarily been sold as aforesaid, and he prays that the said annexures may be taken to form part of this declaration.

4. Thereafter on the 16th day of October, 1895, a further agreement was entered into between the plaintiff and the said Mayor, whereby the situation, boundary, and extent of the land retained by plaintiff were slightly varied, and subsequently the said provisional agreement subject to these modifications was confirmed and made final by both parties thereto. Plaintiff annexes hereto a plan marked C showing the situation and boundaries of the land as finally settled. Transfer of the whole of the plaintiff's share in the said remaining extent was given by him to the defendant municipality on the 24th December, 1895, and the price has been duly paid. On the 13th December, 1895, the said Mayor acting as aforesaid undertook and agreed to pass transfer of the ten morgen hereinbefore mentioned to the plaintiff within four months of the said date.

5. Thereafter the blocks of land constituting the said ten morgen which were to be retained to the plaintiff and retransferred to him were demarcated by the parties and duly surveyed. They consist of block AA, block BB, and block CC, all situate in the town of Oudtshoorn.

6. The plaintiff after the date of the said agreement duly took possession of and enclosed two of the three blocks of land referred to in the preceding paragraph, to wit, AA and BB. He has planted trees and made improvements thereon : he has erected three buildings on block AA and three buildings on block BB ; he has subdivided portion of block BB into building lots : he has sold 2-5 of block CC, and the purchaser has enclosed the part so sold, and a certain building has been erected on the part so sold. He has given away a further 2-5 of block CC, but this portion has neither been sold nor built upon. All the above have been done with the knowledge and consent of the Council of the defendant municipality.

7. The plaintiff has not used, and does not claim to use any portion of the said blocks, except for building purposes or in connection with houses built upon it.

8. The plaintiff has from time to time demanded transfer of the said blocks of land ; the defendant municipality has caused

each of the said blocks to be subdivided into erven, namely, block AA into ten erven, block BB into six erven, and block CC into five erven. And it has tendered transfer of the said blocks accompanied by diagrams showing the said sub-divisions marked thereon.

9. The lines of sub-division so marked in some cases intersect the buildings already erected upon the said blocks as aforesaid; and if the said sub-division is enforced it will cause great inconvenience and damage to the plaintiff.

10. The defendant municipality contends that the plaintiff is bound within a reasonable time to erect a building upon each one of the erven so marked upon the said diagrams, and that each of the said erven must be separately used for building purposes; and it insists upon such sub-divided diagrams for the purpose of giving effect to that contention.

11. The plaintiff contends that he is entitled to transfer of the said blocks without any such sub-division into erven as the defendants require; he is willing that the terms of the agreement of the 30th September, 1895, should be registered against the said transfer, and he says that the said blocks are being used for building purposes and for no other purposes.

12. By reason of the defendants' delay and refusal to pass due transfer of the said blocks the plaintiff has suffered damage in the sum of £500.

The plaintiff asks this Honourable Court to declare the rights of the parties in the premises, and he claims:

(a) An order compelling the defendants to pass transfer to him of the said blocks AA, BB, and CC, not sub-divided into erven in manner proposed by the defendant municipality; or

(b) An order declaring that if the said blocks are to be sub-divided into erven, that the plaintiff may duly effect such sub-division himself;

(c) An order declaring that he is not compelled to erect a building upon every erf into which the defendant municipality tenders to sub-divide the said blocks.

(d) £500 damages.

#### *Annexure A.*

Provisional agreement made final afterwards.

Memorandum of a provisional agreement of purchase and sale made and entered into on this 30th day of September, 1895, between Christian Michael Lind as seller of the one

part, and Herbert George Hicks, in his capacity as chairman of the Town Council of Oudtshoorn, as purchaser of the second part, under the following conditions:

1. The said Lind hereby sells to the said Council all his right, title and interest which he has in the remaining extent of the farms Grobbelaars River and Hartebeest River, now known as the commonage of the village of Oudtshoorn, or whatever share or shares he is at present entitled to, on the same conditions under which he now holds the same, save and except that he retains to himself a certain share equivalent to ten morgen of land—which share of ten morgen is to be a continuation of the block 239 to 243 inclusive, and shall be of the width of this block and of block V, W, and X, that is from Market-street to Church-street, and so on in blocks of erven of the same area between Market-street and Church-streets within a line drawn westwards from the western corner of the erf V, parallel to the Church-street boundary of lot 243, so as to give the seller erven equivalent in extent to ten morgen of land more or less, that is to say a few feet more or less than ten morgen, and having their boundaries parallel to the boundaries of the village erven as at present laid out on the general plan of the village. This is subject to the condition in case this block so reserved by the said Lind to himself shall fall to the share of the said Council in the sub-division of the remaining extent of the said farms. If this block does not fall to the share of said Council then the said Lind shall receive his block of erven elsewhere, but shall have the right to select the block at another place allotted to the Council in the sub-division if any.

The said share of ten morgen is to be laid out in erven or blocks of erven as aforesaid, which blocks shall be of the same size as blocks V, W, X, and 239 to 243 inclusive, marked on the general plan (a sketch showing how the said blocks are to be laid out is hereunto annexed marked A). It is understood that the ten morgen reserved to himself by the seller, shall be exclusive of the streets and watercourse. The said Council shall relay the said watercourse within a period of six months from date of signing of the final deed of sale, more to the west and as high as the water can possibly be taken over the land.

The said Council shall give the seller free transfer of the said erven equal to the ten morgen as per said sketch, at the same time as the said Council shall receive transfer from him the said seller (*simul et semel*)

The said Lind shall have to pay the transfer duty and transfer expenses, and the said Council the surveyor's expenses for surveying the said lots and framing diagrams thereof. Transfer of the said erven, to be conveyed to the said Lind, shall be passed subject to the same conditions under which dry erven have from time to time been sold by the proprietors of the said remaining extent.

9. The purchase price to be paid to the said Lind shall be the sum of £1,200, and shall be paid in cash within three months from the date of the confirmation of the sale, and on the said Lind signing a power or powers of attorney to transfer the said property hereby sold to the Council making of his declaration as seller, and on his delivering up his deed or deeds of transfer, and further promising and undertaking on his part, to do all and whatever shall be requisite and necessary in order to pass transfer or transfers from him the said Lind as seller to and in favour of the said Council as purchaser, the said Council to do everything necessary to complete, and make this sale final with as little delay as possible.

*Annexure B.*

Deed of sale made and entered into this . . . day of . . . between Gert Reitz, as agent for Gideon Johannes Hendricus Scheepers, sr., and his co-proprietors of the farms Hartebeest River and Grobelaars River of the one part and . . . of the other part.

The said Gert Reitz, as agent aforesaid, agrees to sell to the said . . . who agree to purchase certain piece of ground marked lot . . . being portion of the farm Hartebeest River, upon the following terms and conditions:

First: That the sum of . . . shall be the purchase money or price of the said property, to be paid by the purchaser to the seller in two instalments of . . . each payable . . . after the date hereof, with interest on the last instalment at the rate of six per cent. per annum, to be computed from the date hereof.

Second: That the said lot hereby sold shall be used for building purposes only, and that the said . . . shall erect, or cause to be erected upon the said erf a suitable building, and that the said . . . shall not have any right of grazing on the commonage of the village of Oudtshoorn.

Thirdly: That in case the said . . . shall use the said lot hereby sold for

purposes other than those for which a building lot is generally put, then and in that case he shall be liable to the said Gideon Johannes Hendricus Scheepers, sr., and his co-proprietors in the sum of fifty pounds (£50) sterling, as liquidated damages for such contravention, recoverable in any competent Court of law.

Fourthly: This prohibition against uses other than for building purposes is made in favour of all other erfholders of the two farms, and of the original proprietors of the same, and their heirs and successors in right and title.

The defendant municipality in their plea admitted the allegations as to the contract between the parties, but denied the accuracy of the plan. They denied that the enclosure building, &c, referred to in paragraph 6 were made with their knowledge, and said that they were contrary to the contract. As to paragraph 9, they said that the blocks had been sub-divided into erven or lots larger than the plaintiff was entitled to claim, that he had full knowledge as to the manner in which the blocks would be sub-divided before he erected any buildings thereon, and that he did not at any time request the defendants to sub-divide into erven or lots of any size, or that the lines of sub-division should run differently to those drawn by the defendants; that the plaintiff had claimed only that the entire blocks without any sub-division should be transferred to him, but that the defendants were willing to sub-divide in such manner as he might require, provided that the erven into which the blocks were to be sub-divided did not exceed in extent the size of the erven shown upon the diagram tendered.

They contended further that until the plaintiff used the erven in terms of the conditions in Annexure B, he was not entitled to enclose them.

As to paragraph 11, they denied plaintiff's right to transfer without any sub-division into erven, and denied that the blocks were being used for building purposes, &c.

In reconvention they prayed:

(a) For an order declaring that the plaintiff is not entitled to enclose, and that the plaintiff be restrained from enclosing any of the land aforesaid, unless and until he has complied with the conditions contained in Annexure B.

(b) That the defendants are entitled to sub-divide the said blocks into erven or lots of the size at which land subject to the conditions of Annexure B have ordinarily

been sold, and that the said conditions are binding upon each and every such lot or erf.

The replication joined issue.

In the plea to the claim in reconvention the plaintiff denied that he was bound in law to erect a building upon every portion into which the municipality might think fit to sub-divide the blocks.

Mr. Innes, Q.C., Mr. McGregor, and Mr. Gardiner appeared for the plaintiff.

Sir H. Juta, Q.C., Mr. Graham, Q.C., and Mr. Joubert for the defendants.

The evidence was taken before Mr. Justice Buchanan, in the Circuit Court at Oudtshoorn, and the case removed to the Supreme Court for argument.

Mr. Innes: There is no municipal regulation dealing with the cutting up of land into erven, and the size of those erven. The municipality moreover have no power under Act 45 of 1882 to make such a regulation. The effect of dividing the land according to the defendants' contention, will be that the plaintiff will have to build a house on each of twenty-one erven, and that he will not be able to sell a lot above a certain size. It appears that the erven in the town of Oudtshoorn are of various sizes, dry erven as well as water erven. The contention now put forward by the municipality is an afterthought. The original agreement was made in September, 1895, and ratified in October, 1895. In December the Mayor agreed to pass transfer within four months. He gave instructions for survey of the property and told the surveyor that he need not cut it up: the original intention of the defendants is shown by that. They laid by and allowed the plaintiff to deal with the property. In August, 1896, he had block BB divided into eighteen erven and offered publicly for sale: the plan was advertised, and no objections were made. He sold three of the sub-divisions and erected three houses in the middle of several of these erven. He divided block CC into three parts, gave away two-fifths and sold two-fifths; the purchaser of the latter portion built upon it. He has cut off portion of block AA for cottages, and has planted trees on the rest, and is building there a house for himself. The defendants made changes in the declarations of purchaser and seller after they were drawn up. The plaintiff's position is that he intends to use the lots for building purposes and is entitled to transfer in blocks.

Sir H. Juta: We are at one with regard to blocks BB and CC, but the

question of block AA is more important. The land was commonage and the condition of the original sale was that it should be let out in building lots; if the lots are not to be restricted in size, then there is nothing to prevent the land being let out in one or two building lots. The contract with Lind is to give him transfer of erven; in order to construe that we must refer to the servitude annexed to the property by the original vendors. The intention of that servitude was, that the commonage should be for the people, and that when the people began to build and required land for that purpose, they should obtain pieces of reasonable size. The conditions creating the servitude are reported in *Edmeades v. Scheepers* (J. 1, p. 334).

Judgment was given in favour of the plaintiff.

De Villiers, C.J.: I find nothing in the conditions making it compulsory for the blocks sold to the plaintiff to be sub-divided. And there is nothing in the conditions referring to the size of the erven, and the size of these not being fixed, they might extend to five or six morgen. Therefore the plaintiff is clearly entitled to succeed on the claim in convention. There is not sufficient evidence to justify the Court in holding that four morgen would be too much, nor is there evidence to show that four morgen would be a proper extent for the house which Mr. Lind intends to build. Upon the claim in reconvention, therefore, the Court will only give absolution from the instance, so that if there is any reason to believe that the plaintiff does not *bona fide* intend to use those four morgen the municipality can bring an action to restrain him from enclosing the same. The plaintiff is entitled to succeed upon his first prayer in the declaration, and the Court will grant an order compelling the defendants to pass transfer of lots AA, BB, and CC, not subdivided in the manner proposed by the defendant municipality. On the claim in reconvention there will be absolution from the instance with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PIENAAR V. VAN ZYL. { 1899.  
May 8th.

Servitude—Transfer—Notice—Consideration—Specific performance.

*In an action to compel the registration of a servitude in favour of the plaintiff's land upon the land of the defendant, on the ground that the defendant had bought his land from a third person with notice of and subject to an agreement for the creation of such a servitude, the plaintiff is not entitled to succeed without clear proof of an agreement binding upon such third person.*

This was an action in which the plaintiff, the owner of the farm Drooge Request, sued the defendant, the owner of Poplar Grove, the farm adjoining, for an order declaring that, as owner of the farm Drooge Request, he is entitled to have the water of the fountain on the defendant's farm Poplar Grove allowed to run freely for four days in each week on to plaintiff's farm Drooge Request; (2) for an order compelling defendant to take such action as would give effect to the terms registered in the title of the farm, to defray all expenses, and to pay £500 damages and the costs of the suit.

The plaintiff alleged in his declaration that a certain servitude had been conferred upon him by one Hopley, a former owner of the farm Poplar Grove. This servitude, it was alleged, provided for the plaintiff's receiving a free water supply from a fountain on defendant's property for four days a week, but though inadvertence it had not been registered against the title; thereafter Poplar Grove was sold and transferred to the defendant by Hopley. At the time that the servitude was agreed to it was alleged that defendant was aware of it, and was also notified of it at the time the property was sold to him, and that he had observed it until the year 1897; since then, however, he

had cut off the supply, causing damage to the plaintiff's property to the amount of £500.

The defendant in his plea denied any knowledge of the servitude at the time he bought the property from Mr. Hopley. He said that at the date of the sale Hopley informed him that prior to 1887 he had allowed the plaintiff to have water from Poplar Grove three days a week, and that plaintiff had allowed him to water his cattle at a spot called the Rietgat and to lead certain water from an "aar" or communicating with the Rietgat on to Poplar Grove, but that in or about 1887 it was discovered that the Rietgat was on Poplar Grove and not on the plaintiff's farm, and that therefore the agreement was cancelled and terminated. He used the water of the fountain free of any servitude and allowed any surplus water to flow down to plaintiff's property, but he denied that plaintiff had any legal right thereto. Owing to the drought of the last few years the water had not flowed down as far as plaintiff's property.

Mr. Innes, Q.C. (with whom was Mr. Molteno), appeared for the plaintiff, and Mr. Searle, Q.C. (with whom was Mr. McGregor), appeared for defendant.

Petrus Jacobus Pienaar, a farmer, residing at the farm Drooge Request, Colesberg, said he was aware of certain lands on the lower part of his farm, which had been there since his childhood. The only water supply on these lands was a spring on the farm Poplar Grove, defendant's farm. Formerly witness's father owned the three farms, Drooge Request, Poplar Grove, and another. Witness purchased the farm Drooge Request in 1879, and got transfer in that year of the piece on which the lands were; of the other portion of the land he got transfer in 1883. In 1886 he obtained another piece of land outside the lands now in dispute. In 1879 his brother John bought Poplar Grove farm from his father. During the time witness's brother owned that farm he watered his lands with his brother's consent from the fountain on Poplar Grove. Witness had the use of the furrow four days in every week. His brother became insolvent, and his father in 1883 took back Poplar Grove from the estate, and in 1885 sold the farm to Mr. Hopley. The fountain was a strong perennial fountain in the bed of a spruit. After Hopley had had the farm a couple of months something went wrong with the water, and witness and his

father went to Hopley at Poplar Grove. Hopley then refused to give the water for more than two days, but eventually consented to giving it for four days a week, and no one was to use it on Sunday. To witness's knowledge there was no agreement between his father and Hopley as to the water prior to the sale. Hopley and witness's father agreed that the latter should give witness the right to the water on condition that witness's father gave Hopley in consideration certain water from a "Rietgat" on the farm Groenfontein. Witness himself gave Hopley fifteen slaughter sheep as a further consideration, and the furrow was agreed upon which should be used from the Poplar Grove Fountain. Witness was to have the rights of cleaning the furrow and the fountain if necessary. Hopley's uncle Kotze was present at the time, and witness, his father, and Hopley went to Colesberg to the office of Mr. Von Bart to sign the agreement. Witness would not swear that the agreement was signed by his father, but it was signed by witness and Hopley. The paper was left with Mr. Von Bart, and was eventually lost.

By the Court: There was a good deal of water in the "Rietgat" which, however, would have to be opened up.

Examination continued: There was quite sufficient water in the Poplar Grove fountain to supply both farms. Mr. Hopley objected to the document being registered. Witness had a conversation with Mr. Van Zyl, and told him about the arrangement with Hopley. Defendant said he was very glad for witness's sake. In 1889 Mr. Hopley sold his farm to the defendant. Witness spoke to Hopley, and went to Colesberg, where they met defendant at Mr. Bottes' office. He believed Bottes was Hopley's lawyer. Subsequently they met again at Bottes' office and some conversation took place about the servitude, Mr. Badenhorst being present, and Van Zyl understood what the servitude was. Witness had specially asked Mr. Hopley to mention it to the defendant. After that defendant put one Geldenhuis in charge of the farm, and witness got his water from the farm as hitherto until 1896. Geldenhuis spoke to him about the water supply, and it was cut off by Van Zyl's orders. Witness had had some unpleasantness with defendant about a Divisional Council election. In 1897 witness frequently went up to the spring and turned it into his furrow, but it was invariably cut off again. Mr. Van Zyl's head man told

witness that he dare not allow the water to run. In 1897 and 1898 witness suffered very heavy damage owing to the water being cut off. There was a strong stream of water from the fountain all this time which was allowed by defendant to run away into the poplar bush, the water being simply wasted. Witness's lands only produced 300 or 400 bundles of forage, whereas the average crop would be 3,000 to 4,000 bundles. Witness lost stock owing to the absence of water on his land. In 1897 he lost 330 sheep, valued at about 14s. each. His orchards and fig trees suffered heavily, and for the last three years he had had no fruit. He had about 125 fig trees from which he got no fruit. He used to make £30 a year from selling his fruit.

Cross-examined by Mr. Searle: The property Drooge Request was part of the original farm Vergelegen, while Poplar Grove was part of Groenfontein. There was a pool called Karkul Krantz on Vergelegen, but witness had never known it dry up. It was in the Drooge Request portion of Vergelegen. Witness's water from the Poplar Grove fountain ran past this pool. There was always water in Karkul Krantz, unless the supply was cut off at the Poplar Grove fountain. Witness re-affirmed his statement that Hopley, in 1885, gave witness four days a week use of the water. No one had ever opened up the Rietgat. One Mr. Papenfus came and surveyed a year or two after this for Mr. Sluiter, who had bought Groenfontein, and Mr. Hopley had his farm fenced in according to Papenfus' survey. The fence had stood until quite recently, and witness believed that it still stood where it had originally been placed. The fence was 112 yards from the Rietgat, and there was no portion of it, except a vlei, which was touched by the fence. Sluiter got transfer of his ground from witness's father. Hopley never said that he did not consider that the agreement was binding because the Rietgat was cut off from Hopley's property. Witness absolutely denied that Hopley ever said the agreement was at an end. Geldenhuis was on the farm Poplar Grove for seven years. Witness never spoke to him about the terms of water until 1896, when witness went on just as before. Witness had seven dams on his farm, but there was no water in them in 1897. In that year his sheep were in a very poor condition, but they were not suffering from wire-worm. Witness took away the sheep in 1898. 1897 was a very bad year.



There were heavy losses in other districts, but not in Colesberg district. If the water had been turned on in 1897 it would have come down to his property. It was not dried up. He was quite content that the deed of agreement between him and Hopley should not be registered, relying on Mr. Von Bart's opinion on that point. Witness sent the sheep, under the agreement, to Mr. Hopley a few days after the agreement was signed. There were no actual turns all the time he was getting the water. It just came down to him every day.

By the Court: Up till 1896 defendant always allowed him to use the water.

Cross-examination continued: Witness never wrote to defendant about the water, but early in 1897 he talked to Van Zyl about it. Van Zyl then said, "You have no right to the water," and walked away. Witness never spoke to him again about it. The only letter he had written was that drawn up by his attorneys. Up to the time of the action witness had never referred to the question of damages, except to his attorneys. Van Zyl had lately told him that he was quite willing to allow him to have the water for three days a week. Witness said he would take eight days to consider the question, but when he saw Van Zyl again the latter withdrew his offer.

Mr. Innes objected to cross-examination as to this conversation, on the ground that it was without prejudice as shown by notes of the interview between plaintiff and defendant.

Re-examined by Mr. Innes: When Geldenhuis was at Poplar Grove witness took the water just when he wanted.

Edward von Bart, now resident in Johannesburg, said he was at Colesberg in 1886, where he was a notary and lawyer. Witness remembered Messrs. Pienaar, senior and junior, and Hopley coming to his office and signing an agreement as to the water rights. Hopley and at least one of the Pienaars signed. It was impossible to say what had become of the document. When witness left Colesberg, he handed over to Mr. Sluiter all documents that belonged to his clients. Mr. Sluiter was attorney for plaintiff. In the natural course of events the paper would have been placed with the Groenfontein papers.

Mr. Searle stated that he would object to any question as to the contents of the document, as there was no proof of its loss.

The Court ruled that Mr. Innes might have the right of recalling the witness.

Cross-examined by Mr. Searle: Mr. Davis was not Mr. Sluiter's manager when he handed over the documents to Mr. Sluiter.

William Ernest Gordon Davis, an attorney practising at Colesberg, said he had been with Mr. Sluiter since 1889. There were still some documents of Mr. Van Bart's in the office. Witness had made the most careful search several times, and had been unable to find any traces of the document in question.

William Musgrove Hopley, a farmer near Burghersdorp, said he bought Poplar Grove farm in 1885 from Mr. Pienaar, sen. He bought the place without any servitude. He used the water as freely as he wished. There were lands on the lower farm which were irrigated from his fountain. After witness had been at Poplar Grove some time Pienaar, sen., came to see him about the fountain; old Mr. Kotzé was present. Pienaar, sen., said he had forgotten to keep out an equal right in the fountain that he had promised his son, and asked witness to allow the right. Witness refused, but after discussion with old Mr. Kotzé, and in consideration of the use of the upper fountain, Rietgat, he consented to plaintiff having three days a week use of the fountain. In his time the fountain was a very strong and permanent one. Witness was to receive a number of sheep from the plaintiff, but could not recollect receiving them. Witness remembered signing a document at Colesberg containing the agreement.

By the Court: The final agreement arrived at was that witness should give old Mr. Pienaar three days' water for his son, in consideration of a servitude on the pool Rietgat, which was not to be sold.

Examination continued: He never opened up the Rietgat. Half of it was on witness's side of the fence towards Poplar Grove. If witness had opened up this fountain he might have been able to make lands higher up than the Poplar Grove fountain. Witness sold his farm in 1889, when he told Van Zyl the purchaser, on several occasions that there was an agreement giving Pienaar three days' water on the farm. Witness said he thought he had been humbugged by the old gentleman, Mr. Pienaar. Defendant replied that he had given away his own horse in return for his own. At the time the contract of sale between witness and defendant was signed the servitude on the fountain was mentioned, and the document was immediately afterwards signed. Defendant fully understood about the servitude.

Cross-examined by Mr. Searle: The negotiations as to the water supply were between witness and old Mr. Pienaar. Witness was certain that only three days' water supply was to be given. It was about eight months after the agreement that witness found out that the Rietgat was really within his property. When witness made the agreement he understood that the old fence which stood about 600 yards from the Rietgat, within witness's property, was the real boundary of the two properties. Witness told old Pienaar, at a later period, that the Rietgat was, he had found, really in witness's property, and he told Pienaar he considered the agreement cancelled. Old Mr. Pienaar said he was old and decrepit, and that witness had plenty of water and he might let it stand, so witness allowed the water to be still used by the plaintiff. Witness, however, understood himself that the agreement was cancelled, and told Mr. Van Zyl so. Witness explained the full circumstances to the defendant. The plaintiff was present when he told the defendant about this, and witness further remarked that if defendant had to give Pienaar the water right he had to do so. Witness remembered the year 1897, which was a year of exceptional drought. All the time he was on the farm he took what water he required, and let the surplus water flow down.

Re-examined: Witness never cut off any water from the plaintiff while he was on the farm. Plaintiff used to come up and clean the furrow. To the best of his recollection defendant raised no objection when witness told him the circumstances of the servitude on the fountain. Witness had been subpoenaed and had attended consultations on both sides. Witness did not understand the legal position of the servitude.

Ewart Nicholas Badenhorst, attorney, said he was articled to Mr. Bottes in 1889, and was in Colesberg at that time. Mr. Bottes left in September of that year prior to any business in connection with the case. Mr. Kotzé took over Bottes' business. Witness's office acted for Mr. Hopley in the latter's dispute with one Will. Witness remembered Mr. Hopley bringing Van Zyl and plaintiff to the office, when Mr. Hopley said that the farm Poplar Grove had been sold to Van Zyl. He said: "You must be very careful about the servitude." The koop-brief was drawn up and signed.

De Villiers, C.J.: Why wasn't the servitude mentioned in the koop-brief?—I simply drew it up upon the memoranda handed me.

Examination continued: He was positive the word "servitude" was mentioned. Hopley handed witness a number of old documents, and he found a document among them dealing with the agreement between Pienaar and Hopley as to the servitude on the Poplar Grove fountain. Witness handed the document to Mr. Van Zyl with others. Witness was positive that in the document "four days a week" was mentioned as the allowance of water. Hopley said at the time: "You must be very careful about the servitude in favour of Pienaar. Don't get me into trouble about it. I have had enough trouble about this farm already." Van Zyl made no reply.

Cross-examined by Mr. Searle: Witness's duty was to draw up the koop-brief according to what the parties told him. Witness was plaintiff's brother-in-law. To the best of his recollection, the agreement was handed to Mr. Van Zyl. He had searched his office, but had been unable to find it.

Hendrik Willem Kotze said he was Mr. Hopley's uncle. He remembered being present in 1886, when old Mr. Pienaar and his son came to see Mr. Hopley. He remembered the conversation about the Poplar Grove fountain. An agreement was arrived at under which Mr. Pienaar was to have the use of the fountain three days a week on consideration of Pienaar giving Hopley fifteen sheep and the use of the Rietgat.

Cross-examined by Mr. Searle: At the time of the agreement the wire near the Rietgat was on Hopley's side of the vlei. This was according to the old survey. Now, however, the fence came through the vlei. Witness remembered the fence being put up through the Rietgat.

Koolman Lister, a Hottentot, said he had worked for seven years on Drooge Request. During all that time they used the water from Poplar Grove fountain freely. He subsequently worked on Poplar Grove farm. Defendant told witness to give one Pelser water three times a week. Pelser cultivated a portion of the farm Drooge Request.

Cross-examined by Mr. Searle: As long as witness was on the farm Poplar Grove they used the water as they wanted it and then let it flow down to Drooge Request.

Abraham Pelser said he hired a portion of Drooge Request. He occupied all Pienaar's lands. If the water was turned off from the Poplar fountain to the poplar tree it would not reach Pienaar's lands. The water was frequently turned off while he was on the farm. He had been on the farm just a year.

Cross-examined: Witness asked defendant for some water, and defendant said he would allow him to have some three days a week. Witness, however, only got the leakage water. Witness got the water for himself, but not for Pienaar. The summer of 1898 was very dry, but the water would reach Pienaar's lands if not turned off.

Re-examined: The water which came on to his land was not to be given to Pienaar. Defendant said that if it was he (defendant) would take it back.

Peter Badenhorst, of Braasfontein, Colesberg, said he saw the Poplar Grove fountain in November, 1898, when there was enough water to irrigate all the lands.

Cross-examined by Mr. Searle: He saw it after the rain in September, several weeks before.

Christian Kotze said he lived with plaintiff for two years on Drooge Request. While witness was there the water from Poplar Grove was cut off and wasted in the poplar bush. The farm suffered much in consequence. There were no crops, and 330 head of stock died.

Cross-examined by Mr. Searle: It was very dry in 1897, and a number of farmers were losing their sheep. Witness knew that Mr. Van Zyl lost a good deal of stock.

This closed the case for the plaintiff.

Mr. Searle asked that the Court should grant absolute from the instance, with costs, on the ground that the document had been lost.

De Villiers, C.J., asked if the defendant was still willing to let the water flow three days a week.

Mr. Searle said he was prepared to allow this, that the water should flow for three days without defendant pumping on those days, and that the water should flow free on Sundays, the furrow to be direct from the fountain and not through the poplar bush.

De Villiers, C.J.: There appears to have been no real consideration in the matter of the alleged contract between Pienaar, sen., and Hopley.

Mr. Innes argued at some length to show that consideration was given. He

contended that the mere fact of the handing over of the fifteen sheep by Pienaar, jun., was a consideration.

De Villiers, C.J., said that the only question was really the question of costs, and he would be willing to hear Mr. Innes on that point.

After argument by Mr. Innes,

The Court decided to hear defendant's evidence.

Hermanus van Zyl, the defendant, said he lived at Hondeklip, and bought Poplar Grove in 1889. He remembered having a conversation about the water agreement with Hopley, who said that Pienaar, sen., wished him to give his son the use of the Poplar fountain in return for the use of the Rietgat as a drinking place. Subsequently Mr. Hopley found that his boundary passed through the Rietgat, and Hopley told witness that he considered Pienaar's water-right was cancelled. Hopley told witness he did not think witness need give the water to the plaintiff, and witness replied that he did not think it was necessary either, as Hopley had in effect paid away his own horse in exchange for his own horse. Mr. Pienaar was present when the koop-brief was drawn up by Mr. Badenhorst. The portion of the Rietgat within Poplar Grove was quite enough to provide witness with a watering-place. The first witness heard about the plaintiff's complaint regarding the water was the letter from the latter's attorneys. In 1897, in November, witness gave instructions to have his grounds watered, because of the drought. The fountain would not run down to plaintiff's property in times of drought. In ordinary years it would run down. Witness gave Pelser the use of the water, but never gave instructions that Pienaar was not to have it. Defendant was quite willing to allow the plaintiff to have three days' use of the water. Plaintiff, however, approached him about the matter.

Cross-examined: In 1896 his friendship with the plaintiff terminated. Witness absolutely denied that he gave instructions for plaintiff's water supply to be cut off. He knew that Pienaar had a certain servitude on the water. The Rietgat was, in the old days, a hole of water. There was no hole of water on the Poplar Grove side of the fence.

Cross-examined: He could not say whether he would get any water if a masoned wall were put up on the Groenfontein side of the fence. He admitted that

the water ran down from Groenfontein. When witness met Pienaar and Hopley at the office, the latter said that there might be some trouble about the servitude. Witness said that if there was a servitude, he would take it over. If Hopley was bound to give three days' water, he (witness) was bound to do the same.

After hearing Mr. Innes further, the Court gave judgment.

De Villiers, C.J.: It appears from the evidence that the farm Poplar Grove was transferred to the defendant without any servitude having been registered against it. (On this farm there was a fountain, but not of sufficient strength to supply its owner as well as any of the owners of lower farms with water for irrigation. The plaintiff is the owner of the adjoining lower farm called Drooge Request. In 1885, Hopley was the owner of Poplar Grove, and in that year the plaintiff's father, who was the owner of the farm Droogefontein above Poplar Grove, approached Hopley with a view to some arrangement securing water rights to the plaintiff as owner of the lowest farm. The evidence as to what took place at the interview is somewhat conflicting, but we are of opinion that the arrangement was that, in consideration of the plaintiff's father allowing Hopley to lead water from a certain pool on Droogefontein, Hopley would allow the plaintiff to have the free and uninterrupted use of the water from the Poplar Grove fountain for three days in each week. The pool in question was at that time assumed to be on Droogefontein, but it is by no means clear that it is not really on Poplar Grove. The plaintiff alleges that the agreement was that he was to have the Poplar Grove water for four days in each week, and he claims that this agreement be registered against the title deeds of Poplar Grove. The defendant, as owner of Poplar Grove, is willing to allow three days uninterrupted use of water, and he consents to a servitude to that effect being registered against his property. It is to be regretted that the plaintiff did not accept this liberal offer, for if the defendant had objected to the registration of any servitude, it would have been difficult for the Court to enforce such a servitude. The defendant admits that he bought Poplar Grove from Hopley, on the understanding that if there was a binding agreement to establish a servitude he would take the farm subject to the servitude. But was there such a binding agreement? Either the pool is on Droogefontein or it is on

Poplar Grove. If it is on Droogefontein the plaintiff cannot claim the Poplar Grove water without tendering to the defendant the use of the water from the pool, which he is not in a position to do. If the pool is on Poplar Grove there was really no consideration for Hopley's alleged promise to allow the lower farm the use of Poplar Grove water. As matters stand, judgment will be given in terms of the defendant's offer, but the costs must be paid by the plaintiff.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Van Zyl & Buissinnó.]

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## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

RAYMOND V. RAYMOND. { 1899.  
May 9th.

This was an action for judicial separation, in which the wife, Lydia Raymond, prayed for an order of separation from her husband on the grounds of cruelty and intemperance. The parties were married at Port Elizabeth in 1876 in community of property.

Mr. Close appeared for the plaintiff.

Francis Henry le Sueur, clerk in the Colonial Office, produced the certificate of marriage.

Lydia Louisa Raymond, the plaintiff, said that she was married at Port Elizabeth in 1876. She married her husband under a promise from him that he would reform, as she had heard that he was given to intemperance. After the marriage her husband began drinking very heavily, and did not support the house. Witness kept a boarding-house. Her husband got a situation at Jagersfontein when he promised to reform, but he was sold up in consequence of his drunken habits. Witness had her life insured, but respondent sold the policy. Respondent never supported her or her child. Witness lately started another shop in Woodstock, and on her husband's promise of reform received him again. He again fell into intemperate habits, and once

threw a plate at her. She instituted proceedings for separation against him, but withdrew them on his promise of reform. "He came to me on a wet night," she said, "and pleaded with me." The respondent was still in the house. He still drank heavily, and maltreated her. His habits in the house were disgusting. Two years ago she had to have him bound over to keep the peace. Witness had very little means of her own. Respondent had been living upon her all these years. Witness wanted him to leave the house.

By the Court: The shop was rented by witness. Defendant was once an agent for the sale of photographs, but had done nothing for months. Respondent could support himself if he chose.

The Court granted a decree of judicial separation *a mensu et thoro*, with custody of the minor child; respondent to be restrained from interfering with the plaintiff in the conduct of her business.

[Plaintiff's Attorneys, W. E. Moore & Son.]

ALEXANDER V. LISCHITTY. { 1899.  
May 9th.

This was an action for damages for an alleged malicious prosecution, brought by plaintiff against defendant. The case was first heard at the last Circuit Court at Worcester, and was removed from that court up to the Supreme Court.

The summons set out that on the 19th and 27th December, 1898, defendant was charged before the Resident Magistrate at Worcester with having assaulted one Rebecca Marks. About the 31st December, 1898, defendant, it was alleged, falsely and maliciously made an affidavit charging plaintiff with having committed the crime of perjury in his evidence at the trial at Worcester. In consequence, it was alleged, of the false and malicious affidavit of the defendant a preliminary examination on the charge of perjury was heard in January, 1899, and as a result plaintiff was committed for trial, but on the 5th March the Attorney-General refused to prosecute plaintiff. Plaintiff contended that he was thereby put to great ignominy and expense in defending the action, and that he had sustained damages to the extent of £250, which he now claimed.

The defendant in his plea admitted all the statements in the summons, except the paragraph alleging malice. He denied that he made a false or malicious affidavit, but said that it was made with reasonable and

probable cause. The affidavit was made by him truly and without malice, and with reasonable and probable cause for believing that the facts therein stated were true. He denied that the plaintiff had suffered damage to the extent of £250, or any part thereof by reason of any malicious conduct on the part of the respondent.

Mr. Buchanan appeared for plaintiff: Mr. Close for defendant.

The facts appear sufficiently from the judgment.

After argument,

Buchanan, J., said: It appears that the defendant in this case had a quarrel with his sister-in-law, Mrs. Marks, and was charged with committing an assault upon her. The sister-in-law gave evidence before the Magistrate at Worcester, and the plaintiff in the present case was called and gave evidence supporting Mrs. Marks's statement. After this evidence, the defendant made an affidavit before the Magistrate in which he charged the plaintiff with having committed perjury, in saying that he saw the accused throw Mrs. Marks down and kick her. The defendant now comes forward and says that he never assaulted Mrs. Marks, but I think it has been clearly proved that he did commit that assault. The evidence conclusively proves that the assault did take place, and the question is whether the plaintiff saw the assault, and saw defendant throw Mrs. Marks down. Mrs. Marks's evidence is quite clear to the effect that she was standing in the doorway, where she could have been seen by plaintiff from the stoep of Mr. Harris's shop, as alleged in the case heard before the Magistrate. The plaintiff in his evidence stated that he saw defendant kick Mrs. Marks once. I am convinced that the defendant did kick her. The plaintiff further stated that the assault took place upstairs. The photographs which have been put in clearly describe the premises, and from the stoep one could see through the door slightly into the passage where Mrs. Marks declares that she was standing. I have no doubt, therefore, that all the statements made by plaintiff upon which the allegation of perjury was founded were perfectly true statements. It is said, however, that the defendant had reasonable cause to believe that the plaintiff knew that these charges were false. The affidavit of the defendant having been made the Magistrate was justified in issuing a warrant and tak-

ing a preliminary examination, but the Attorney-General very properly decided that there was no case against the plaintiff and declined to prosecute. I have not the slightest doubt that the defendant did throw Mrs. Marks down, and that this assault took place upstairs, and that plaintiff saw it from where he was standing on Mr. Harris's stoep. The plaintiff had no interest in the matter, and I have hardly ever heard of any case in which there has been a grosser failure of reasonable and probable cause for a prosecution for perjury. Defendant was not justified in making a criminal allegation against the boy (plaintiff), who had no interest whatever in the case, and had no reason for saying what he saw other than in the interests of justice. Under these circumstances the case reduces itself to one simply of the amount of damages. I do not think that vindictive damages should be given, because the boy was not taken to gaol. Fortunately he has a good character, but he has had the indignity of having the charge brought against him, and the damages should be substantial. The sum of £25 will, I think, meet the case. As to costs, all costs incurred in this Court and in the Court below should be awarded to plaintiff. I do not like the system of giving costs as between attorney and client in any case. Judgment will be for the plaintiff for £25 damages, and costs in the Supreme Court and the Court below.

Maasdorp, J., concurred, and judgment was entered accordingly.

[Plaintiff's Attorney, C. Home, jun. : Defendant's Attorney, V. A. van der Byl.]

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## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and a jury.]

WARMSLEY V. CAPE TOWN & 1899.  
TRAMWAY COMPANY, LTD. (May 9th.

Tram-car—Improper construction  
— Negligence — Contributory  
negligence—Boarding in motion.

*The plaintiff mounted a tram-car  
belonging to the defendant com-*

*pany while it was in motion, and alleged that the handle which he seized in order to mount was so improperly constructed that he was unable to grasp it properly, and that the speed of the car being immediately increased, he was thrown to the ground and injured. In an action for damages instituted by him, the jury were directed to consider (1) whether the handle of the car was in such a condition as to prevent the plaintiff from getting a proper grip and thus causing the accident; (2) whether the plaintiff was guilty of contributory negligence; and, with respect to the latter, that if there was no risk usually attending the mounting of the car when slowed down, then the plaintiff could have contemplated no danger if the car was in proper order.*

This was an action in which the plaintiff claimed £2,000 as damages sustained through personal injury, caused by the defendant company's tramcar.

The declaration was as follows:

1. The plaintiff is a commercial traveller and resides at Green Point. The defendant is the Cape Town Tramway Company (Limited), duly registered in this colony with the powers granted by Acts 33 of 1861 and 22 of 1895.

2. Under and by virtue of the powers granted by the said Acts the defendant company runs electric trams from Cape Town to Sea Point for the purpose of conveying passengers for reward.

3. On the 24th of October, 1893, the plaintiff was in the upper main road, Green Point, along which road the said trams run, for the purpose of being conveyed as a passenger by one of the said defendant company's trams.

4. One of the defendant's trams approached the spot at which the plaintiff was stationed at a very rapid pace, and upon being signalled by the plaintiff, the servants and agents of the company very considerably reduced the speed of the tram car, whereupon the plaintiff mounted upon the foot board of the tram for the purpose of being conveyed to Cape Town for reward, which he was ready and willing to pay.

5. The plaintiff says that the said tram-car was negligently and improperly constructed, inasmuch as the handle used by the passengers to enable them to mount and to enable them to remain upon the said foot-board was bent in such a manner as to prevent anyone from properly grasping the same, as was well known to the servants and agents of the company.

6. Upon the plaintiff mounting upon the the said foot-board, which is the proper place for a passenger to mount upon, the servants and agents of the company, who then had the sole control and management of the tram, so negligently and carelessly worked the tram by suddenly increasing the speed thereof that the plaintiff was by reason of this and by reason of the facts set forth in the last preceding paragraph precipitated to the ground.

7. By reason of the said fall so occasioned as aforesaid, the plaintiff was thrown beneath a second car, which followed and was attached to the car upon which the plaintiff had mounted, and the said car, which also belonged to the defendant company, passed over the plaintiff's foot and so crushed and injured it that it became necessary to have the same amputated.

8. The plaintiff in consequence of the said injuries has suffered great pain, has been put to great expense for medical and other attendance, has been incapacitated from attending to his business, and is no longer able to carry on the business of a commercial traveller, and is by reason of the said injuries still suffering pain and has been crippled for life.

9. By reason of the premises the plaintiff has sustained damages in the sum of £2,000, &c.

The defendant's plea was as follows :

1. It admits paragraphs 1, 2 and 3 of the declaration.

2. In accordance with duly established practice the tram-cars of the defendant company are only stopped at certain indicated halting-places for the purpose of taking up passengers. The said practice has been duly published and notified, and was and is well known to the plaintiff.

3. The spot at which the plaintiff stood on the 24th October, 1898, was not one of the said halting-places. The car referred to in the declaration was not at the time approaching this spot at a very rapid pace, nor was its speed reduced at the instance of the plaintiff for the purpose of allowing him to board the car at the said spot.

4. The plaintiff did wrongfully and negligently mount upon the foot-board of the said car while the car was in motion. The speed of the said car was not thereupon increased suddenly or at all. The plaintiff owing to his own wrong conduct and negligence fell to the ground, and his foot was injured by a car attached as a trailer to the car which he attempted to enter, and also belonging to the defendant company.

5. The handle or bar referred to in section 5 of the declaration was bent, but not through any negligence on the part of the defendant company's servants, nor in such manner as to prevent any person from properly grasping the same, and had the plaintiff used due care and diligence in mounting, the accident would not have occurred.

6. The said car was properly constructed, the defendant's servants in charge of it used all due diligence in the discharge of their duties, and the injury to the plaintiff was caused by his own negligence and improper conduct aforesaid. Subject to the above paragraphs 4, 5, 6 and 7 are denied.

7. The defendant company refers this Honourable Court to such proofs of the allegations in the 8th paragraph as the plaintiff may adduce, but the said company is in no way liable in respect of the matters there alleged.

8. The 9th paragraph is denied except the refusal to pay.

In the replication, the plaintiff said : He admits that the spot at which the plaintiff stood on the 24th October, 1898, was not at one of the halting-places referred to in paragraph 2 of the plea, but he says that notwithstanding the fact that tram-cars of the company are only stopped at certain indicated halting-places, it is the established practice of the company to permit passengers travelling in the said cars to remount and dismount whilst the cars are in motion.

The rejoinder was general.

Mr. Graham, Q.C. (with whom was Mr. Upington), appeared for the plaintiff, and Mr. Innes, Q.C. (with whom was Mr. Searle, Q.C.), appeared for the defendant company.

The plaintiff, A. H. Warmsley, said he had resided at Green Point for some nineteen years. He was a commercial traveller. He was twenty-nine years of age, and was married. Before the accident he was about to take a holiday in England. On the morning of October 24 in last year a tram bound for Cape Town came along, and witness went to the proper side of the road

to get on to the tram. He put up his hand to signal the motor man to stop, and the motor man switched off the current, and applied the brake. When the car came alongside he tried to grasp the handle to get on the step, but as the handle was bent he could not grasp it properly. The car then made a lurch forward, and jerked his hand off the handle, causing plaintiff to fall on the road. While plaintiff was on the ground the wheels of the trailer attached to the car went over his left foot. If the handle had not been bent he could have maintained his footing, and would not have fallen. After the accident he was taken to the hospital, where his foot was amputated by Dr. Kitching. Three operations had been performed. His first account came to £27. His income as a commercial traveller was £240 a year, and he did not think he would be able to pursue that occupation as a livelihood. It was the custom on the portion of the line where the accident happened for male passengers to get on and off cars while they were in motion. The Tram Company had not offered him any compensation since the accident occurred.

**Cross-examined :** Notices were affixed in the cars stating that cars only stopped at certain places, and warning passengers against getting on or off the cars while they were in motion. He did not notice that a trailer was affixed to the car until the car was close to him. He had a pipe in his hand when he endeavoured to board the car. The car was going at about five miles an hour when he tried to board it. The next boarding place was only a few seconds' walk further on.

**Re-examined :** The guard was not on the platform at the time. He had never seen a commercial traveller going his rounds with one leg. It would seriously interfere with his business.

Dr. C. T. Anderson, of the New Somerset Hospital, said he had attended the plaintiff about two days after the operation. Plaintiff had had his foot amputated just below the leg bones. The wound had not yet healed. It might be necessary to have a further operation.

Dr. W. R. Labalestier said he was a passenger by the tram in question, and bound up plaintiff's wound. Witness had frequently observed that trams did not stop even at stopping-places, but only slowed down. The car turned Varney's corner at a

great speed, but after it turned the corner it slackened speed. He felt a jerk when the car went over plaintiff's foot.

By the Court : Trams had frequently not stopped at the stopping places even when they were not full.

Edward Martin, residing at Sea Point, and carrying on business in Cape Town, said he was on the first car upon the occasion in question. He saw plaintiff signal the tram and attempt to mount the car in the ordinary way. He grasped the handle and kept on the step for about two seconds, and then he fell off. When he mounted the tram had passed the corner. Witness got down to examine him. Subsequently witness found that the handle which plaintiff seized was bent, which rendered it difficult to grasp it properly. The handle produced was not an accurate reproduction of the handle of the car from which the plaintiff fell, which was much nearer the woodwork. Cars did not as a rule stop for passengers, but slowed down, and after passengers had boarded the car the motorman increased the speed.

**Cross-examined :** He thought that it was madness for plaintiff to board the car at the speed at which it was going, but still if the handle-bar had not been bent, the accident would, in witness's opinion, not have happened.

Robert Alfred McIntyre, an attorney, residing at Three Anchor Bay, corroborated the last witness as to the condition of the handle. When he tried the handle his fingers were quite tight between the handle and the woodwork.

Thos. Stewart, a clerk in the Public Works Department, said he saw the accident, which occurred on the Cape Town side of the Post-office near the corner. Witness was of opinion that the fact that the handle was bent was the cause of the accident.

Norman Black, a clerk, said he saw the plaintiff attempt to board the tram and fall. Witness believed that the accident occurred on the Cape Town side of the Post-office.

Correspondence which had passed between the parties having been read, the case for the plaintiff was closed.

For the defence.

Alfred Jennings, the motorman in charge of the car, said he had been in the service of the Tramway Company for two years and a month. When he first saw the plaintiff on the day in question the latter was stand-



ing on the footway opposite the shop at Varney's Corner, and he crossed the road about thirty yards ahead of the car. The car was going about six miles an hour round the curve. Witness always slowed down when going round a curve. When he first saw plaintiff, witness put out his hand, indicating that he would stop at the next stopping board. He first heard of the accident when he received a signal from the guard of the car to stop immediately. Witness stopped the car as soon as possible. On the morning previous to the accident plaintiff mounted a car at about the same spot. After the accident something was said about the handle, and he tried it, and found that he could get his hand in up to the knuckle under the bent part. He always stopped at stopping places until he received a signal from the guard to go on. Many people got on to the car before the tram had stopped. They always stopped the car for ladies.

Cross-examined: There were thirty-six or thirty-seven stopping places between Cape Town and Sea Point. Cars did not slow down between stopping-places. The plaintiff was standing with a lady when witness first saw him. He did not give a signal. The handle was in exactly the same state now as it was at the time of the accident. He did not think that trams travelled at a higher speed than ten miles an hour between Cape Town and Sea Point. He did not know how the handle was bent.

By the jury: If he had noticed that the handle was bent he would have reported it, whether an accident had occurred or not.

Marmaduke Kirk, the guard on the tram, said he saw plaintiff after the accident. Witness then tried the handle produced in court and found that he could pass his hand under the handle. He did not notice that the handle was bent before the accident, and nobody reported the condition of the handle to witness. When the car reached the Toll the car was exchanged for another car with a straight handle.

Cross-examined: There had been one accident since the accident upon which the presentation was brought—the accident in which a police-constable lost his life. A great many male passengers boarded cars while they were in motion. He had been in the service of the company for two and a half years.

Re-examined: Previous to the accident several persons had boarded the tram with-

out mishap, although the handle was bent. Before the accident plaintiff was standing in the road with a lady.

Chas. Augustus Prior, a general foreman in charge of the workshops at the toll, said his attention was not drawn to the handle until the day of the accident. He took the car off the road at about eleven o'clock that morning. The distance of the nearest portion of the bent handle to the beading was 13-17 of an inch.

Cross-examined: He did not consider that the handle in its present condition was dangerous to the public. The proper distance of the handle from the beading was 1½ inches. He did not know what caused the handle to bend.

W. I. Perrott, an engineer, said he was in the neighbourhood of the Toll when he heard of the accident, and saw the car in question (No. 19) coming from Cape Town. He saw the handle, which was bent. It was now in the same condition as it was then. His attention was called to the handle by Mr. McDonald.

Horatio Wm. Stockham, residing at Green Point, and the proprietor of the Grand Parade Restaurant, Cape Town, said that when the car was coming round the corner it was travelling at about the rate of eight miles an hour. When the plaintiff crossed the road to board the car it did not slacken, but was proceeding to its point. Witness did not see the plaintiff signal. He could not have seen him signal if he had done so, as he was sitting on the opposite side of the car. The car stopped on the Cape Town side of the Post-office. He had always found that cars stopped at the stopping-places. If people got upon the cars between stopping-places he would imagine that they did so at their own risk.

Cross-examined: When he saw plaintiff before the accident plaintiff was alone. He heard nothing about the handle being bent. He had never noticed an ordinary tram slacken speed between stopping-places. He estimated the speed of the tram by his knowledge of the speed of vehicles drawn by horses.

Donald McDonald, superintendent of the Tramway Company, said all trams stop upon signal. If a person boarded the car before it stopped, it continued in motion, but if a person waited the car stopped. This practice was in accordance with instructions

given to the officials. The handle produced was now in the same condition as it was at the time of the accident.

Cross-examined: He did not know the cause of the handle being bent. He had seen cars slow down between stopping-places, although this was contrary to instructions.

Frederick Gatace, a night foreman in the employ of the defendants, said he did not notice anything wrong with the handle of the car on the evening previous to the accident.

Cross-examined: He could not swear whether the handle was then bent or not.

Arthur George Syfret, an attorney, having given formal evidence, the defence concluded.

After argument.

De Villiers, J.C. in directing the jury, said:

"The questions for the jury to consider are: (1) Whether the handle of the car was in such a condition as to prevent the plaintiff from getting a proper grip and thus causing the accident: (2) whether the plaintiff himself was guilty of contributory negligence. If you believe that the car had really slowed down, the evidence for the plaintiff is conclusive, because it is shown that it is the custom on the line for people to mount while it is in motion and that as a matter of fact the cars do not stop. They do so at their own risk certainly, but the question is, what is the risk? If there is no risk usually attending the mounting of the car when slowed down then plaintiff could contemplate no danger if the car was in proper order. You have to consider what was the speed of the car at the time. The question is whether a reasonable man exercising his sound judgment would have done as he did. If you think it was not a reasonable act for him to mount the car at the rate at which it was going, you must find for the defendants.

The jury found that the defendants were guilty of negligence and the plaintiff not guilty of contributory negligence. They assessed the damages at £1,000, and judgment was given accordingly.

[Plaintiff's Attorneys, Messrs. J. C. Bearrngé & Son: Defendant's Attorneys, Messrs. Scanlen & Syfret].

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

WATSON V. FRAETAS { 1899.  
{ May 10th.

Will—Construction—Remarriage of survivor—Condition.

*Husband and wife, married in community, made a joint will by which they appointed the children of their marriage to be joint heirs of the estate of the first dying "provided that the survivor shall so long as he or she remains unmarried receive the income of such estate and upon his or her death the estate shall be divided between the said children." The testatrix died first and the survivor married again.*

*Held, that upon such remarriage the children of the testatrix became entitled to receive payment of their maternal inheritance.*

This was a special case stated for the determination of the Court. In the last December term proceedings were instituted by Mrs. Watson against her husband for alimony, to prosecute a divorce suit, and the Court then ordered the latter to assist his wife in order to get a certain inheritance due to her from her mother's estate. The construction of the joint will of plaintiff's parents was rather ambiguous, and this action was to determine the meaning of this will.

The special case stated was as follows:

1. The plaintiff is the daughter of defendant, and is assisted in this action by her husband, Thomas Hunter Watson, to whom she was married in community of property on the 14th October, 1894. The defendant is the father of the plaintiff, and is sued both in his individual capacity and in his capacity as executor testamentary and administrator of the estate of his predeceased spouse, Frederika Fraetas (born Gosslett), to whom he was married in community of property.

2. On the 4th February, 1879, the defendant and his said wife (hereinafter called

the testatrix) executed a joint will, by which they made the following provision: "Testators do appoint the children of their present marriage to be joint heirs of the estate, property, and effects of the first dying of them, of what nature or kind soever and wheresoever the same may be situate, nothing excepted. Provided, however, that the survivor of them the testators shall so long as he or she remains unmarried receive and enjoy the interest and income of the estate of the first dying of them, and upon the death of the said survivor the said estate shall be divided between the said children share and share alike." The will also appointed the survivor executor of the will, administrator of the estate, and guardian of the minor children.

3. The testatrix died on or about the 8th February, 1889, leaving the aforesaid will of full force and effect as far as it related to her, and leaving also her surviving six children, issue of the marriage with defendant, of whom the plaintiff is one.

4. Thereafter defendant was duly empowered by the Master of the Supreme Court as executor testamentary of the estate of testatrix, and on the 12th July, 1890, he filed an account with the Master, in which he brought up the value of the movable and immovable property in the joint estate as £1,766 11s. 6d., and after deducting sundry expenses due, awarded the sum of £130 18s. 9d. to each of the six children of the marriage as their portion of the half-share belonging to testatrix.

5. The defendant entered into another marriage on the 23rd July, 1890. The immovable property is the principal asset of the estate, and its value has greatly increased since the date of the above-mentioned account.

6. The defendant has made no payment or distribution to plaintiff on account of the inheritance bequeathed by testatrix.

Plaintiff contended: (a) That it was the duty of defendant as executor testamentary and administrator as aforesaid to distribute and pay out to her upon his re-marriage the one-sixth share of the estate of testatrix, and that she is now entitled to claim from defendant payment of the sum of £130 18s. 9d., with interest thereon at 6 per cent. per annum from the 1st August, 1890.

Or in alternative to (a): (b) That it is the duty of defendant as executor and administrator aforesaid to account to her for a one-sixth of the interest and income derived

from the estate of testatrix since the date of defendant's remarriage, and that she is now at the lowest estimate entitled to claim from defendant, and to be paid interest on £130 18s. 9d. from the 1st August, 1890, to the 1st August, 1898, at 6 per cent., and from the latter date and for as long as defendant shall live on the one-sixth share of the net annual income derived from the estate of testatrix.

The defendant contended that the plaintiff was not entitled to claim any payment under said will until his (the survivor's) death.

Mr. Buchanan, for the plaintiff: There is an apparent omission in the will. Nothing is said as to what is to become of the interest between the date of the survivor's remarriage and death. Claim (a) depends upon the Court holding that the words "or re-marriage" should be considered to be inserted in the proviso after the word "death." The legacy vests in the children subject to limitations, but there are no limitations in the defendant's favour after his re-marriage.

[De Villiers, C.J.: You might have claimed a division of the property upon defendant's re-marriage, but having delayed in that it is a question whether you can now claim interest from 1890.]

Mr. Graham, Q.C., for the defendant: The will is unskillfully drawn, and is ambiguous, but it plainly provides that the estate shall be divided only upon the death of the survivor. As it is so ambiguous the defendant is entitled to the use of the money.

De Villiers, C.J.: The governing portion of the clause which appoints the heirs is the first part, which reads thus: "Testators do appoint the children of their marriage to be joint heirs of the estate of the first dying of them." If the clause had stopped there, it is clear that upon the death of the testatrix her children would be entitled to claim their maternal inheritance at once. But there follows the proviso that "the survivor of the testators shall so long as he or she remains unmarried receive the interest and income of the estate of the first dying, and upon the survivor's death the estate shall be divided between the said children, share and share alike." The survivor has married again, and he maintains that under the proviso the children can only claim their maternal inheritance upon his death. The plaintiff on the other hand, who is one of the heirs, contends that upon the survivor's remarriage the maternal inheritance became payable. In my opinion her contention is the correct one. The condition on which the surviving testator is entitled to the income

arising out of his wife's estate, is that he remain unmarried. Upon his re-marriage that condition failed and the maternal inheritance, which would otherwise not have been payable until the death of the survivor, became forthwith payable. The amount of the inheritance is admitted, but the plaintiff claims interest thereon from the date of the marriage. Interest can, however, only be allowed *a tempore morae*, that is to say, from the date when the present action was brought. Judgment must in other respects be given in terms of the plaintiff's contention, with costs out of the joint estate.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, J. C. Berrangé & Son.]

CWABA V. KUHN. { 1899.  
                                  { May 10th.

**Magistrate's Court—Summons—Exception—Act 20 of 1856.**

*It is no ground of exception to a summons claiming damages in a Magistrate's Court for breach of contract, that the summons does not state whether the contract is in writing or not.*

This was an appeal from a decision of the Acting Resident Magistrate of King William's Town, in an action in which the appellant claimed £20 from the respondent upon the following grounds set out in the summons:

1. The plaintiff, about the 16th June last, hired a certain piece of land from one Julius Bekker at a yearly tenancy.
2. About September last Bekker sold the said piece of land to the defendant.
3. The plaintiff had up to that time cultivated the said land, and sown it with oats, potatoes, Kafir corn, and mealies.
4. About October last the defendant agreed with the plaintiff that if the plaintiff forthwith cancelled the lease which he held with Bekker and gave defendant possession of the grounds, the defendant would compensate the plaintiff for all loss he would sustain by giving possession of the land to the defendant.
5. Plaintiff thereupon gave up possession to the defendant, who had since remained in possession of the land and the crops.
6. The loss sustained by the plaintiff amounted to £20.

7. Defendant refuses to pay the sum of £20.

The defendant excepted to the summons on the ground that it was vague and insufficient, there being no allegation that the contract with Bekker, referred to in paragraph 1, was verbal or in writing; if in writing then he said a copy of the same should have been served with the summons. He took the same objection to paragraph 4.

The Acting Magistrate upheld the exception, with costs. In his reasons he referred to Act 20 of 1856, Schedule B, Rule 10, and said he was of opinion that the defendant was prejudiced in his defence.

The plaintiff appealed.

Mr. Close appeared for the appellant.

There was no appearance for the respondent.

Mr. Close: The action is not founded upon the agreement with Bekker, and moreover there is a reference to the lease inserted in the summons. The basis of the case is set out in the fourth paragraph of the summons. *Wessels v. Gildenhuys* (1879, p. 1).

De Villiers, C.J.: I confess that I cannot discover any vagueness in the summons, which was excepted to in the Court below. It states distinctly that the plaintiff had hired the land from Bekker on a yearly tenancy, that Bekker then sold the land to the defendant, that the defendant agreed with the plaintiff that if the plaintiff would cancel the lease and give up possession of the land the defendant would compensate him for the loss he would thereby sustain. The summons further alleged that the plaintiff did cancel the lease and give up possession of the land and that the loss sustained and claimed by him amounts to £20. The Magistrate upheld the exception to the summons on the ground that it does not state whether the contracts are oral or in writing. I take it that the contracts must have been oral. At all events the 10th Rule of Schedule B, Act 20 of 1856, does not apply, because the demand contained in the summons is not founded on any document. Should it appear at the trial that the claim is really founded on a document the Magistrate may dismiss the summons, but even then he would not dismiss it if it should appear that the omission has not prejudiced the defendant in his defence. The appeal will be allowed, with costs in this Court and in the Court below, and the case remitted to be tried on its merits.

[Appellant's Attorney, D. Godlonton.]

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MAGISTRATE'S CASE REVIEWED. { 1899.  
May 12th.

Act 27 of 1882, section 10.

*Creating a disturbance in a private house does not constitute a contravention of Act 27 of 1882, section 10.*

Maasdorp, J., said that as Judge of the week a case had come before him from the Special Justice of the Peace for Heidelberg, in which the prisoner was charged with contravening section 10 of Act 27 of 1882, by creating a disturbance in the house of C. Peters. Prisoner pleaded guilty, and was fined £1, or in default of payment, to be imprisoned for one month. In the section the offence consisted in using insulting language likely to cause a breach of the peace in some public place. But here the accused was charged with using the words in a private house, and the section consequently had not been contravened. Both the conviction and the sentence must be quashed.

## PROVISIONAL ROLL.

JAGGER AND CO. V. J. COSAY.

Mr. Buchanan applied for the compulsory sequestration of defendant's estate. The provisional order had been granted by Mr. Justice Maasdorp.

The order was granted.

## ILLIQUID ROLL.

SETTLER AND CO. V. W. MCKENDRICK.

Mr. H. Jones applied, under Rule 329D, for judgment for £36 0s. 1d., debt.  
Order granted.

LUCKE V. LUYT.

Mr. Gardiner applied for judgment under Rule 329D for £65, being the purchase price of thirteen lots of ground sold to the defendant, with interest on the same at the rate of 6 per cent. from September 24, 1898, and

payment of the costs and charges connected with and incidental to the said purchase, and the transfer of the said property.

Judgment was granted for the amount sued for with the exception of the costs connected with the purchase and the transfer of the property.

W. AND G. SCOTT V. JOHAN H. FICK.

Mr. P. Jones applied for judgment, under Rule 329D, for £10 19s. 11d., goods sold, with interest *a tempore morae* and costs of suit.

Order granted.

COLONIAL GOVERNMENT V. PERCY JOHNS.

Mr. Ward applied, under Rule 329D, for judgment for the sum of £56 14s. 6d., being rent due on certain mineral leases in the division of Namaqualand for the years 1896, 1897, and 1898, with interest *a tempore morae* and costs of suit.

Order granted.

SWANSON V. POEZYN.

Mr. P. Jones moved, under Rule 329D, for judgment for £70, goods sold and delivered, with interest *a tempore morae*.

Order granted.

GORDON AND GOTCH V. MINNAAR.

Mr. P. Jones applied for judgment under Rule 329D, for the sum of £36.

Granted.

## ADMISSION.

Mr. Buchanan moved for the admission of Benjamin Osler, jun., as an attorney and notary of the Court.

The order was granted, the oath to be taken before the Resident Magistrate of Riversdale.

## REHABILITATION.

Mr. Gardiner applied for the rehabilitation of Henry Mastern Fellows, whose estate was sequestered twenty years ago.

The order was granted.

## GENERAL MOTIONS.

IN THE MATTER OF THE CAPE TOWN AND GREEN POINT TRAMWAY COMPANY, IN LIQUIDATION.

Mr. Innes, Q.C., presented the report of the liquidators.

The usual order was made.

**DUTCH REFORMED CHURCH AT SIMON'S TOWN V. THE COLONIAL GOVERNMENT.**

Mr. Innes, Q.C., asked that the arbitrators' award be made a rule of Court. The arbitrators had awarded £4,400 as the value of certain property belonging to the church.

Mr. Ward appeared to consent on behalf of the Colonial Government.

The award was made a rule of Court.

**IN THE MATTER OF THE PETITION OF SIR ROBERT HASTINGS HARRIS, K.C.M.G., AS REPRESENTING HER MAJESTY'S LORDS COMMISSIONERS OF THE ADMIRALTY.**

Mr. H. Jones moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

The order was granted.

**KOENIG AND CO. V. DIVINE, GATES AND CO.**

Mr. Innes said that this was an application upon notice calling upon the respondents to show cause why an award of arbitrators should not be made a rule of Court, and also why the respondents should not pay the costs of the application. The case had arisen out of a claim for damages for the non-delivery of certain goods.

Defendants were in default.

The order was granted.

**EASTERN AND SOUTH AFRICAN CABLE COMPANY V. CAPE TOWN TRAMWAY COMPANY.**

This was an application for an order allowing the defendants further time for to plead.

Mr. Innes, Q.C., Mr. Searle, Q.C., and Mr. Graham, Q.C., appeared for the applicants (the defendants in the action).

Mr. McGregor appeared for the respondents (the plaintiffs in the action).

The Court ordered the bar to be removed and the defendant company to have fourteen days to plead; the action to be removed from the list, and the date of trial to be fixed later on. The Chief Justice said that if it was convenient to parties, a date might be fixed out of term.

**KNIGHT V. KNIGHT. } 1899.  
May 12th.**

This was an action for divorce instituted by Elizabeth Petronella Knight against her husband, Edward H. Knight, of Mowbray, on the ground of his adultery with one Mrs. Nellie Creagh.

Mr. Benjamin appeared for the plaintiff, the defendant was in default.

Francis Henry le Sueur, clerk in charge of the marriage records in the Colonial Office, produced the certificate of the marriage between the parties, Edward H. Knight and Elizabeth Petronella Hendricks.

Elizabeth Petronella Knight stated that she was married to the defendant on April 16, 1894. Defendant was previously a clerk in the Navy, but at the time of the marriage he had left the Navy, and was in no employment. For twelve months after marriage they lived with her parents, after which they took lodgings in Cape Town. Her mother and brother, and not her husband, supported her then.

Mr. Justice Buchanan: Did defendant not do anything?

Witness: No.

He could not get work!—He would not get work.

Examination continued: Plaintiff and her husband afterwards went to Port Elizabeth, and the latter got work on the line there. From there defendant went to Johannesburg, but witness did not accompany him. During that time she supported herself by needlework. Subsequently he returned, and then got work on the railway at Middelburg. Witness wanted him to find accommodation for her there, but he said he could not do so. He came to Port Elizabeth and arranged that she should go home to her mother at Cape Town. He accompanied her as far as Middelburg-road. On the journey witness came across a bundle of letters in his portmanteau which had not been written by her. She asked him about them, and he said she could have had a divorce long before. He tore the letters from her hand, with the exception of the one produced. That was three years ago. Her husband had contributed nothing towards her support for two years. He had never written to her until November, 1897. While he was with her he sometimes stayed out all night. Witness heard something about Mrs. Creagh, and subsequently found some books in his possession marked Nellie Creagh. A dog used to come home with her husband when he was in Cape Town. He said the dog belonged to a gentleman who had gone up-country, but one day she followed it, and it went to a house in Mowbray, which she afterwards found was occupied by Mr. Salt, and also that Mrs. Creagh lived there. When

witness first knew Mrs. Creagh, she lived at Mowbray. Defendant had never supported witness since they were married.

By the Chief Justice: The Maud mentioned in the letter produced was Maud Paterson, who was at Port Elizabeth. She was a single woman. Witness spoke to her husband about Maud, and he said she could have had a divorce long ago.

Albert Edward Salt deposed that Mrs. Creagh occupied a room at his house in Mowbray about the beginning of June last year. At the time she engaged the room a man, whom witness subsequently found to be Knight, came with her. She had one room only, a bedroom. Knight afterwards frequently visited Mrs. Creagh, and was with her in her bedroom. Mrs. Creagh had been in bed when he visited her, and witness had seen her partially undressed when Knight visited her. Knight had resided at witness's house on two occasions. The second time he occupied a room opposite Mrs. Creagh's. Defendant suffered from a chest complaint. Subsequently witness discovered that Knight was a married man, and at once turned him out. On one occasion after that defendant again came to the house. Witness heard somebody in Mrs. Creagh's room, and asked who was there. She said it was a lady come to see her, but witness was rather suspicious, and watching, saw the defendant leave. That was about August last. Witness then gave Mrs. Creagh notice to quit.

Elizabeth Twine stated that Mrs. Creagh lodged at her house about May last year. Defendant used to visit her in her bedroom, and had been there while she was in her bed. Mrs. Creagh was always in bed in the daytime.

The Chief Justice: All day long?

Witness: Mostly all day.

Then was she ill?—No, she was not ill.

Where was she at night then, if she was in bed all day and was not ill?—In bed, too.

Continuing, witness said that in consequence of her husband objecting she gave Mrs. Creagh notice to quit.

Mrs. Knight (recalled by the Chief Justice) said she had received a letter from her husband in which he said he hoped the memory of old times might lead her to forgive and forget as far as possible. That referred to the life he had led her, always going and staying out all night. She had spoken to him about Mrs. Creagh, when she found in his pocket a bill showing that he had paid for Mrs. Creagh's board at Poole's hotel. He then told her she must mind her

own business. She had last seen him about five or six months ago. He was never too ill to go out at night.

The Chief Justice: He has written now saying that he cannot defend the case, because he has been ordered to England, the doctor saying that he has consumption.

Witness: That might be, but he was always well enough to get out at night.

Decree of divorce was granted.

[Plaintiff's Attorneys, Messrs. W. E. Moore & Son.]

PAULSEN V. PAULSEN.

This was an action brought by Abraham Paulsen against his wife, Adriana H. Paulsen, for divorce on the ground of her adultery with one John Hudson. There were two male children, both minors, issue of the marriage.

Mr. Buchanan appeared for the plaintiff and defendant was in default.

Francis Henry le Sueur produced the marriage register showing that the plaintiff was married to Adriana H. Wentzel on February 14, 1887.

Abraham Paulsen, the plaintiff, said that after his marriage to defendant they went to live at Longkloof, in the division of George. There were two children—boys—born of the marriage. The elder was eleven years of age and the younger nine years. Until 1891 plaintiff and his wife lived happily together at Longkloof. They then went to Mossel Bay, where they also lived happily, but witness heard that his wife had been out after ten o'clock at night in a gentleman's office. He taxed her with that, and she acknowledged it. He sent her with the children to his father at Longkloof. Witness went from Mossel Bay to Port Elizabeth, and had never lived with his wife since. She left his father's house, and witness had since heard something in connection with her and John Hudson. Witness had gone with a man named Ohlsson to a house in Aspelings-street, Cape Town, and found his wife there. His wife was anxious to have the custody of the younger of the two boys, and he was willing to allow that, as it was the custody of the elder boy he wanted.

The Chief Justice: Can she support the younger child?

Witness I do not know; she asked for it.

Elizabeth Ohlsson said that she lived at 106, Loop Street, Cape Town. In November last year Mrs. Paulsen and a man named Hudson lived at the same house. They

occupied a single room with only room with one bed in it, and lived together as man and wife.

Hudson was coloured, and so was Mrs. Paulsen.

Decree of divorce was granted; the plaintiff to have the custody of the elder, and the defendant the custody of the younger child of the marriage; access allowed to both parties at all reasonable times.

[Plaintiff Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

*Re* THE FRESH FISH AND FRUIT { 1899.  
SUPPLY COMPANY, LIMITED. { May 12th.

Mr. De Waal applied for an order placing the Fresh Fish and Fruit Supply Company (Limited) in liquidation, and also for the appointment of two provisional liquidators.

The affidavits of Messrs. P. J. Bosman and Alexander Chiappini stated that this application was made in accordance with a resolution passed at a meeting of the shareholders of the company. It was found that the company was in difficulties and unable to pay debts due or becoming due. Three judgments had already been obtained against it, two in the Resident Magistrate's Court for sums amounting to £803s. 1d., and one in the Supreme Court for £195 18s. 1d. Writs of execution had been issued, and nearly the whole of the movable property in the Plein-street shop had been attached. Unless the company were forthwith wound up, the judgment creditors would dispose of the property of the company, and the claims of the other creditors would remain unpaid. An order was wanted by the company restraining those judgment sales. As provisional liquidators Messrs. Alexander John Chiappini and Alfred Gerald Anderson were suggested. It was estimated that if the assets were realised there would be a deficiency of £621, the assets of the company being valued at £2,969, and the liabilities at £3,590. Counsel said he believed both of the proposed provisional liquidators were directors of the company.

The order was granted as prayed, Messrs. Alexander John Chiappini and Alfred Gerald Anderson being appointed provisional liquidators, with the powers conferred by the 149th section of the Act.

Security to be given in the sum of £1,000.

VAN BREDA V. TOWN COUNCIL { 1899.  
OF CAPE TOWN. { May 12th.

Valuation—Servitude—*Fidei commissum*—Rate.

*In the municipal valuation of immoveable property the valuer should, in the absence of any statutory direction to the contrary, allow for any real servitude upon the property, but not for any fidei-commissum imposed thereon.*

This was an application on notice to the respondents by Michael Alexander Willem Van Breda calling upon them to shew cause why the valuation of £15,000 placed upon the property known as "Orangezicht," owned and occupied by him, by the Valuers appointed by the respondents under Act 26 of 1893, and confirmed by the valuation Court, should not be altered amended or reduced.

The affidavit of the applicant set out that the "Orangezicht Estate" was the property of the family of Van Breda held by them subject to the burden of *fidei-commissum* under the provisions of the will of the late M. Van Breda, senior, that is to say, "that the whole of the 'Orangezicht Estate' shall for ever and for the utmost and longest time that the law of this Colony may permit such fiduciary limitations to subsist, be and remain an inalienable hereditary family estate of the family of Van Breda."

That *inter alia* there was the following condition "that the said estate shall not at any time be mortgaged nor let to any person, nor occupied, used, nor the fruit, revenue or profits thereof be enjoyed by any person other than the said Dirk Gysbert Van Reen Van Breda, or after his death the successors for the time being as fiduciary heirs as aforesaid."

That on the death of the deponent's father (son of D. G. Van Reen Van Breda) in 1888, applicant became entitled to the estate.

That he took possession in October, 1888.

That the estate was then in a very dilapidated condition.

That applicant took the management of the estate into his hands but found it impossible to make sufficient money out of it from sources other than those for which the Town Council as hereafter mentioned paid an annual rental to pay rates and taxes and other outgoings and restore the building to any thing like proper repair.



That he supported and maintained his mother, two sisters and two younger brothers, the latter of whom were still at school.

That by Act 29 of 1877 the sale of a portion of the estate on which the Molteno Reservoir was constructed was sanctioned by Parliament and thereafter duly transferred to the Town Council. That for this portion of the property he received an annual payment of £105. This was not included in the valuation of £15,000.

That by Act 23 of 1882 the Council acquired the rights to all the springs and other sources of water on the estate and other rights which enormously depreciated the value thereof. For these rights the Council paid annually £700.

That a supply of 6,000 gallons of water per diem were reserved for the use of the estate, which, however, was wholly insufficient for keeping the gardens, orchards and vineyards, &c., watered, owing to the sandy nature of the soil which required a great deal of water. The said fruit trees had consequently died off and there was nothing left to speak of.

That at one time the estate was wooded with large forests but these had been greatly destroyed by fire. During the period he had been in possession of the estate as much as half had at one time been destroyed by fire.

That most of the trees on the estate were young ones and not sufficiently large to dispose of to wood-cutters.

That the total revenue of the estate other than that paid by the Town Council does not amount to much more than £100 per annum.

That in the year 1888 applicant's father applied to the Supreme Court for the reduction of the valuation then placed upon the estate by the Town Council, and applicant referred to those proceedings.

That the total income from the estate was a little more than £800 per annum.

That the Town Council had valued the property at £15,000, the previous valuation being £6,000.

That objection had been lodged at the Valuation Court on applicant's behalf, but that the Court on going to the vote carried a resolution that the valuation should stand at £15,000.

That at the rate of threepence in the pound he would have to pay the Council £187 10s. per annum, which added to the

Divisional Council rate of a penny in the pound, brought up the two rates to the sum of £250 per annum.

The affidavit of A. P. de Villiers, auctioneer and sworn appraiser, set out that deponent felt confident that if the property were put up to public auction, owing to the entail servitudes and restrictions no purchaser would buy it at the present time for £5,000, which he considered a fair and reasonable valuation under all the circumstances.

The valuation of G. C. Behr was £6,000, taking into consideration the restrictions imposed.

The valuation of J. W. Reeler was £5,500 with the existing servitudes and restrictions.

C. J. Byworth, the Town Clerk of the City, filed an affidavit in which he said that under section 84 of Act 26 of 1893, the valuation put upon immovable property in terms of the Act had to be the amount which the property would be likely to realise if sold voluntarily upon the usual terms and conditions.

That under section 97 of the Act, the person in whom the legal title to any property is vested on the 15th March in each year, shall be the person primarily liable for the rate, and any person entitled to the usufruct or any other limited interest for life in respect of any property shall be deemed to be vested with the legal title thereto for the purposes of the section.

That the Valuation Court were of opinion that the value of the property in terms of the Act was at least the sum of £15,000, and that they had no power to reduce the valuation on account of the reasons urged by the applicant.

T. W. Cairncross, the Engineer of Waterworks of the Cape Town Municipality and formerly City Engineer, deposed on affidavit that in his opinion the value of the estate quite apart from the buildings which were in a dilapidated condition was fully £20,000. He set out the facts upon which he based this opinion.

G. H. Moller and J. Fock filed a joint affidavit setting out that they had been employed by the Town Council to make the valuation of the immovable property in the city, and had valued applicant's property at £15,000.

That in arriving at this valuation they had taken into consideration the fact that the house and outbuildings, gardens, &c., had been allowed to fall into disrepair or to go out of cultivation to such an extent that it

would take £8,000 or £10,000 to put the property into proper order. They thought that the property would realise at least \$25,000 if put into good condition. In arriving at that figure they took into consideration the actual value of the property, bearing in mind the fact that the Town Council paid to the owner the sum of £700 per annum.

That they did not value the property as it would stand subject to the entail upon it. They were aware of the fact that the applicant had no power to sell or dispose of the property, but they did not think that that fact should affect their valuation.

G W. Steytler and E. R. Syfret filed a joint affidavit alleging that they had inspected the estate in question, and considered that its value if sold free from any *fidei-commisum* or restriction would be £37,500.

The applicant in a replying affidavit alleged *inter alia* that he was one of the third generation, of the fourth generation no children had as yet been born in his family.

Mr. Searle, Q.C., for the applicant: The application is made by virtue of section 92 of Act 26 of 1893, the question is whether the property has been properly valued in terms of that Act. In terms of section 88 the value placed on the property should be "the full and fair price or sum which the property would be likely to realise, if bought at the time of valuation to voluntary sale." That has not been done. What should be valued is what the applicant really has, the peculiar condition of the estate must be looked at—not the individual interest of the present owner but the interest of the family.

[De Villiers, C.J.: That is rather opposed to section 97.]

Section 97 only points out who is the person to be sued.

[De Villiers, C.J.: Can you treat the restrictions upon the property as servitudes?]

They are in the same position—a carving out of the *dominium*. The former application *Van Broda v. Cape Town Town Council* (J. 6, p. 71) was decided under the provisions of Act 44 of 1882, which does not contain a clause similar to section 88 of Act 26 of 1893.

The Court in that case reduced the valuation to £4,000. That was in 1888, and the property is in the same condition now as it was then. The provisions of the will are registered. The Town Council valuers

admit that they have placed its full value upon the property. They have valued the property moreover as if the water belonged to it, but the water does not belong to it.

[De Villiers, C.J.: I think the Court has decided that where there are several conflicting interests, the life tenant must pay the rates and taxes for his life.]

That was in *Meyer's Executors v. Meyer* (J. 1, p. 377).

Mr. Innes, Q.C., for the respondents: There must be many properties within the Municipality which are burdened with a *fidei-commisum*. It cannot make any difference, as regards the principle of valuation, that in this *fidei-commisum* there are still two generations to run.

[De Villiers, C.J.: There may be a *fidei-commisum* where there may be a sale because all the heirs can consent to it; but is it not a different case where some of the heirs are unborn and cannot consent?]

By our law a life interest is not immovable property. There is no provision in Act 26 of 1893 for valuing a life interest. A servitude is immovable property but a *fidei-commisum* is not a servitude. Where the Town Council expropriate land, it has to pay the full value of the land even though the occupier has only a life interest. *Hiddingh v. Town Council of Cape Town* (11 S.C.R., p. 146), one of the arguments for reduction of the valuation is that the property can not be let: but if an owner of property some years ago let that property for a term of years at a low rental he would not be able now to object to pay on the full value on the ground that he is compelled to accept a small rent.

Mr. Searle in reply.

De Villiers, C. J.: The valuers are bound by the 88th section of the Act 26 of 1893 to take as a test of the value the price which the property would be likely to realise at a voluntary sale. In the case of such a voluntary sale the fact that there is a real servitude on the property in favour of another property might materially affect the price and would have to be allowed for by the valuer. By virtue of the servitude a portion of the rights of the owner has been as it were carved out of the property, and the immovable property to be valued is that which is left to the owner. The value of the property enjoying the servitude is enhanced in proportion to the diminution in the value of the servient tenement. But a *fidei-commisum* is not a servitude on the property in favour of another property, but

a burthen upon the fiduciary in favour of the fidei-commissary who may or may not be a person already in existence. The ownership is in the fiduciary until his death or other event on which the property is to be given over. In the present case a *fidei-commissum* has been imposed which must endure for the full period allowed by law. The successive fiduciaries, of whom the applicant is one, are liable for the taxes imposed upon the land during their successive terms of ownership. They may have the right, with the consent of the Court, to sell portion of the land if they are unable to meet the obligations affecting the land, but they cannot claim, in the absence of any statutory direction to that effect, that the valuer shall make a deduction from the value of the land by reason merely of the existence of the *fidei-commissum*. It is clear from the evidence that the sum of £15,000 is not an excessive valuation even after making full allowance for the existence of a servitude of waterleading upon the applicant's land. Without the servitude the land would, according to competent valuers, be worth £37,500. For these reasons, I am of opinion that the application for a review of the valuation must be refused with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Applicant's Attorneys, Messrs Tredgold, McIntyre & Bisset; Repondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

REGINA V. SCOTT. { 1899.  
{ May 12th.

Diamond Trade Act, section 2—Evidence—Trap.

*Two diamonds were tied up in a rag and placed under a stone at a certain spot by a detective in the presence of two overseers, H. and M., and B., a convict. The diamonds were subsequently found in the prisoner's pipe; the pipe was in a pipe-case and the pipe-case was in a basket in the possession of the prisoner. B. alleged that he saw the prisoner take the rag containing the diamonds, and put it in his pipe-case. M. alleged that he saw the prisoner kick the stone, pass on, and shortly afterwards return, stoop down at the place where he had kicked the*

*stone away, and pick up something there, after that he appeared to be closing his pipe-case.*

*Held, on appeal, that the evidence was sufficient to convict the prisoner.*

This was an appeal from the conviction of the appellant, John Christian Scott, by the Special Court for Griqualand West held at Kimberley on the 15th March last.

The appellant was charged with the crime of contravening section 2 of Act 48 of 1882 "in that upon or about the 24th day of February, 1899, and at or near Kimberley, the said Scott did wrongfully and unlawfully have in his possession two rough and uncut diamonds, and is and was on the day aforesaid unable to account satisfactorily for or to prove his right to the possession of the same, or to produce a proper permit for the same in accordance with the provisions of the aforesaid Act."

The prisoner being arraigned pleaded not guilty.

The facts established by the evidence appear from the following judgment which was delivered by the Judge President in passing sentence. The prisoner is charged under the 2nd section of the Diamond Trade Act with having been found on February 24, in unlawful possession of two rough diamonds. These diamonds were found by the detective in the bowl of the prisoner's pipe, the pipe itself being found in a basket, the property and in the possession of the prisoner. This fact taken by itself would not, according to the practice of this Court, be sufficient to prove the contravention alleged. The only question in the case is whether these diamonds were in the conscious possession of the prisoner, or whether they may have been placed where they were found by some third party without his knowledge or consent. I propose as briefly as possible to summarise the evidence, so far as material, as to where these diamonds came from, and how they came to be where they were found. They were trap stones which early that morning had been tied up in a red rag by detective Brink, and by him placed, in the presence of two overseers, Harris and Moffat, and of a native convict named Bain, all employed on the De Beers floors, on a certain spot on the floors close to a stump; the end of a stay, a piece of timber about 18 inch in height. The rag containing the diamonds was con-

cealed under a stone. During the early part of the morning, the place was watched by Harris, the head overseer at the convict station, and subsequently by Moffat, whose duty at that time was to supervise the traffic on the adjacent tram line, and these witnesses state that throughout the day no one approached this spot except the prisoner and the native Bain. The prisoner was in charge of a gang of natives working in the neighbourhood; Bain was employed as a cook, and his work seems to have kept him in the vicinity of the guard house and small adjacent "shanty" indicated on the plan, and a few yards distant from the stump. Shortly before the prisoner arrived with his gang, Bain was searched by Moffat. Soon after the arrival of the prisoner Moffat saw Bain remove a parcel from his basket and place it in an empty grain bag just outside the shanty, this parcel was afterwards found to contain dagga, the prisoner denies that he brought any such parcel with him, but the evidence on the point appears conclusive. Bain's statement is that the prisoner had repeatedly asked him to procure diamonds, and in return offered to supply dagga for the use of the convicts. He admitted, however, in cross-examination, that until about a week before he had had no communication with the prisoner, whose work had apparently been in another quarter for over a year. This fact may be said to a certain extent to diminish the probability of the prisoner having made such proposals to Bain, on the other hand, if Bain had any such conversation with the other convict Makomo, as alleged by the letter in December last, it seems to preclude the possibility of that conversation having had any special reference to any relations, which could not have existed between Bain and the accused. Bain's evidence is to the effect that on the arrival of the prisoner, he informed him where the diamonds had been placed, and the prisoner objected on the ground that the spot was too exposed. Subsequently, by his directions, he washed a red handkerchief belonging to the prisoner, and placed it on the stump to dry, whence the prisoner afterwards sent him to fetch it. If at this time, as Bain admitted in cross-examination, he had informed the prisoner that he would not bring him the parcel, and the latter understood this as a definitive refusal, the object of this alleged manoeuvre seems doubtful, but however that may have been shortly before leaving, the accused went up to a lamp post near the stump, and there made water.

Bain tells us that, on his return from the post, he shoved aside the stone with his foot, stooped down, picked up the rag containing the diamonds, brought it back to the shanty and put it in his pipe-case. This, of course, is very direct evidence and must be accepted as conclusive unless there is something to rebut the natural inference. Bain, however, was a convict undergoing a sentence of two years imprisonment for theft and admits that this was not his first conviction. His testimony therefore requires careful scrutiny, and it would be unsafe to accept it without substantial corroboration. It does not, however, appear that any inducement had been held out to him to concoct his story, or himself to place the diamonds where they were subsequently found, which in the circumstances of the case is the only possible defence. This would have been a very risky proceeding, especially as he would have been well aware that all his movements were being closely watched. If, however, his evidence as to what took place were unsupported, it would in my opinion be insufficient. The case really turns on the statements of Moffat who, if a somewhat zealous witness, cannot be said to have given his evidence unfairly. He seems to be a man in a responsible position, and there is not even a suggestion that he was influenced by any feeling against the accused, or any motive of any indirect character. Now Moffat is positive that neither when Bain placed the handkerchief upon the stump, nor when he removed it, did he stoop down, nor could he have removed the stone and picked up the rag, while on the other hand he distinctly saw the prisoner stoop down, after kicking away the stone, and apparently pick something up. There is a slight discrepancy between Moffat and Bain as to the moment when the stone was thrust away, but I cannot regard this of any special significance: and the prisoner does not deny that he may have stooped, as alleged, or that Moffat, as he states, very shortly afterwards saw him in the act of closing his pipe-case. The case is one in which, in view of the prisoner's respectable position and his antecedents, which, with one exception of no great importance seem to speak in his favour, we have considered with great care, and in which we should have been glad had the facts enabled us to say that there were such elements of doubt as to make it unsafe to convict. Character, however, as has often been pointed out, does not go very far against the positive testimony as to fact of credible witnesses.

it is only when the facts are doubtful that the Court, sitting as a jury, can be influenced by the previous reputation of the accused. While deeply conscious of the fallibility of human testimony and human judgment, a court of justice is bound to appreciate the former and exercise the latter; and on the facts which we consider established, we feel forced to the conclusion that the prisoner must be found to have been in possession of these diamonds in circumstances which constitute the offence alleged by the Crown.

The prisoner was sentenced to five years imprisonment with hard labour.

Sir H. Juta, Q.C., for the appellant.

Mr. Ward for the Crown.

Sir H. Juta contended that the evidence was inconsistent and insufficient for the conviction of the appellant.

Without calling on Mr. Ward the Court dismissed the appeal.

De Villiers, C.J., said: If the case had depended entirely upon Bain (the convict who trapped Scott), then undoubtedly there would have been great force in the argument of Sir Henry Juta on behalf of the appellant. But the facts are that the prisoner was undoubtedly found in possession of the diamonds. They were found in his pipe; that pipe was in a pipe-case, and the pipe-case was in a basket in the possession of prisoner. If these had been stolen diamonds, the clear presumption would have been that the prisoner was the thief unless he could give a satisfactory explanation as to how they came into his possession. As to the suggestion that the diamonds had been placed in the pipe-case by Bain, that would have been the last place in which anyone who was seeking to establish false evidence against another would have placed them, for there is nothing to show that Bain knew the prisoner would not use his pipe on the way home. If it had been desired to establish false evidence nothing would have been easier than to throw the diamonds into the basket, because it was not likely that the prisoner would go rummaging in the basket before he went home, while there was every probability that he would have occasion to smoke his pipe. Still, if the case had depended entirely upon the evidence given by Bain, I would not have hesitated to give the prisoner the benefit of the doubt. To my mind, however, the case depends almost entirely, apart from the fact of the diamonds being found in the possession of

the prisoner, upon the evidence given by Moffat, of whom even Sir Henry Juta would not say that he intentionally gave false evidence. Moreover there was no opportunity for Bain to tamper with the pipe-case between the time of Moffat seeing prisoner pick something up from where the diamonds were placed, do something with his pipe, then place it in his pipe-case, which he put in his pocket, and leave for home. As to the fact that the Court below took some time to consider their judgment, that was to go thoroughly into the case in view of the previous good character of the prisoner. They postponed judgment because they were anxious to see whether there might not have been a reasonable doubt such as would justify them giving prisoner the benefit of it. In view of the facts, I do not feel justified in reversing the verdict of the Court below.

Buchanan, J., concurred, and said that if the Court had been asked to decide the case on the evidence given, they would have been bound to come to the same conclusion as the Court below.

Maasdorp, J., also concurred.

[Appellant's Attorney, D. Tennant.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PEARSON V. DUFFY. { 1899.  
{ May 15th.

Mr. Benjamin said that this was an action in connection with a mortgage bond for £80. The cession of the bond not being in order it was necessary to proceed in this matter in illiquid form. Their lordships had given leave to sue by edictal citation, and defendant was now in court. Mr. Benjamin now asked that a commissioner be appointed to take the evidence of the plaintiff (Mr. Pearson) in Port Elizabeth, the latter being too ill to come down to Cape Town. He asked that the Resident

Magistrate at Port Elizabeth be appointed a commissioner to take plaintiff's evidence, and that the matter stand over *sine die*.

Granted.

JACOBS V. CLEGHORN AND { 1899.  
HARRIS. { May 15th.

Trepass — Removal of goods —  
Consent.

This was an action for damages for trespass.

The declaration set forth that the plaintiff was a shopkeeper resident at Salt River, and the defendants were merchants in Cape Town. That on the 1st February, 1898, defendants wrongfully and unlawfully trespassed upon the plaintiff's premises, and removed from the shop goods belonging to the plaintiff to the value of £25. The plaintiff claimed damages to the extent of £100.

The defence was that the defendants entered upon the premises and removed the goods with the leave of the plaintiff.

Mr. Graham, Q.C. (with Mr. Joubert), appeared for the plaintiff, and Mr. Innes, Q.C. (with Mr. Upington), for defendants.

Abraham Jacobs, the plaintiff, said he had been in the Colony a year and three weeks. He had been carrying on business in Hull in a small way. He started business at Woodstock with one Gander, and from 1st November carried on business in Rutter's Field as a bootmaker on his own account. He had dealings with the defendants from the commencement, and always saw Mr. Abbin, a member of the firm of Cleghorn & Harris. Witness asked for credit, saying he was a new starter in business. When witness started on his own account, Mr. Abbin was quite willing to give him credit, and saw the premises, which he said were in a good position. Witness did a very good business, not at first, but subsequently. He had a book, which was kept in Hebrew. The book showed the cash takings and payments. Mr. Dale had translated the book (produced). The book showed that in November he received more than £25 for repairs and orders. In December £31, in January £31, in February £3. That was after the seizure.

He could neither read nor write English. He did a good business with the railway men at Salt River. In February witness came to Cape Town and paid defendants £4 on account of his debt. He owed about £25. Nothing was said then about the remainder of his debt, and he had not been pressed in

any way for 'the account. An assistant in defendant's shop asked witness if he wanted more goods, and witness said "Not at present." At 11.30 witness got back to Salt River and went to his shop, where he had an assistant. About an hour later two gentlemen—one of whom, Mr. de Beer he recognised as being from Cleghorn & Harris—came out to the shop. Witness had been paying his monthly rent regularly. Mr. De Beer said a man had informed them that witness had offered to sell his shop and stuff for £30. Witness told them that a man had offered to buy the good-will for £30, but that he had refused to sell. Witness said, "I can get security if you will wait an hour," and witness went over to Mr. Dale, who kept a restaurant opposite. He told Mr. Dale everything, and asked him to come back to the shop. Mr. De Beer's companion said he came from Messrs. Maxwell & Earp, to whom witness owed about £19. Mr. De Beer then said they were sent from two firms, and wanted better security than Mr. Dale. The latter said he would stand security if witness could get another person who knew him longer. Witness went to see Mr. Isaacs with that intention, and when he got back he found the shop locked. Witness came back in order to tell them that he had not found Mr. Isaacs, and ask them to wait a little longer. He saw Mr. Dale, who told him that De Beer and his companion had said they would be back at three o'clock. When witness looked into his shop through the window the shop was empty. When witness returned at three o'clock the two men were there again. Witness brought Mr. Isaacs with him, and by this time all the stuff in the shop was taken out. Isaacs said he would stand security at sixty days. The men would not agree to that, and took the remaining goods away. They left a few pair of boots, because Mr. Isaacs said he knew they did not belong to them. He sent a large order to Holland in January, and these goods arrived recently. Witness had no intention of leaving, and was quite satisfied with his shop. Since the seizure he had been unable to do any business. The value of the stock on January 23 was £71 odd. Some of the goods were taken by Cleghorn & Harris, and some by Maxwell & Earp. Witness sent a letter of demand to each firm for £25 without first having taken stock. De Beer gave no receipt for the goods. Defendants had not returned the goods, and the books showed that although

witness had been doing a good business up to that time he had been able to do nothing since.

Cross-examined: It was 11.30 when De Beer came out to his shop. Witness never saw a man named Levi. Witness denied that he told De Beer the offer of £30 for the shop was a joke. Levi had offered to buy the good-will from him for £30, but nothing was said about the stock. Witness saw Mr. Harvey, of Cleghorn & Harris, when he began business, and the latter gave him credit without asking any questions. There was no limit to be fixed as to what he should take on credit, and there was no limit as to the amount he was to pay off each month. Witness denied ever telling them to take the goods back. He denied ever calling out the values of the goods while De Beer and his companion took them away. Witness denied ever receiving a receipt note from either De Beer or Teague. Besides Dale, the only man present at the time was one Huyseer, witness's assistant. The latter never went away to dinner, but cooked it himself in the shop. Witness would swear that Isaacs never said he would stand security for 10s. in the £ for sixty days. The English entries in the book produced were made last Saturday by Dale. Witness denied that he had ever said to Levi that he owed Dale money, and that was why he was selling his business. All the pencil notes in the book were made last Saturday. He never told Levi he was tired of Cape Town. He maintained that when he took stock on January 23 there was £71 worth of stock in the shop. He had no idea what was taken away.

Re-examined: He had heard of Levi that morning for the first time. When Levi came to see him there was a coloured man in the shop whom witness now identified as Harry Abrahams. When Levi said he wanted to start a grocer's shop, witness said he would have difficulty in finding a shop. Levi asked him to sell his shop for £30, which witness refused. Abrahams then told Levi that there was a shop to let higher up the road. Witness never told Levi that he had lost money through Dale.

Henry Dale said he was relieving station-master for twelve years, and had been at Salt River for some time, where he had a shop opposite plaintiff. Witness knew all the railway employes, and often took them over to plaintiff. He did not owe the plaintiff any money. Witness then gave

evidence as to the events of the morning of the seizure. He saw Mr. De Beer and Mr. Teague take away all the goods in the shop across to Mr. Dreyer's shop over the road as soon as plaintiff had left in search of Mr. Isaacs. Mr. De Beer told witness, "When Jacobs returns tell him we shall be back at three." Witness watched the operations, put his man on to watch and told the policeman on the beat to watch. Witness had to make pencil entries in the books from plaintiff's dictation. There was no doubt that plaintiff was up to the time of the seizure doing very good business. Witness remembered seeing Levi in plaintiff's shop about a fortnight before the seizure. He saw Levi on February 1, after the shop was shut up. There was a tall stout gentleman with him whom witness should imagine was an attorney. Witness had never seen Jacobs before he came to Salt River. He took an interest in plaintiff's business because the latter used to have lunch at his (witness's) restaurant. He used to recommend plaintiff's shop to his customers. He had never gambled with the plaintiff. Witness offered no security for Jacobs, but said that if he would get someone who knew plaintiff, he would stand security with that man.

Abraham Isaacs said he carried on business in Loop-street as a tailor. He remembered plaintiff coming to him on February 1, and asking him to stand security. Witness went to the shop and asked the two gentlemen there who were taking the stock away to value it. They did so, and said it represented more than the plaintiff owed. Witness then offered to stand security for 10s. in the £. The two men conferred, and then said they would accept 12s. 6d. in the £. To this witness demurred, and the men proceeded to take away the stock. Witness took away some of the stock for plaintiff, saying that it did not belong to the defendants. Jacobs was in such a fright that he could not say anything.

Cross-examined: The two men said they were willing to take security for 12s. 6d. in the £. Plaintiff told witness in Hebrew that De Beer and Teague were taking away the stock. Witness denied that they gave plaintiff a receipt for the goods. One of the men told witness Jacobs had offered to sell the shop for £30. Jacobs never said that it was a joke. Witness had recommended plaintiff to the firm of Wonenberg & Godwin, but had never stood security for him.

Charles Bergman said he was employed as a carrier in the General Post-office last February. He was at plaintiff's shop on February 1 at 1.30. He saw two gentlemen busy taking boxes from the shelves. He said: "Are you going to take the stock?" They said if they could get security they would not take stock. The shop assistant was standing wringing his hands.

Richard Peddie, electrician at Salt River, said he was a customer at plaintiff's shop. He sent a pair of boots to plaintiff's to be repaired. He called for them lately and found that they had gone. He should say that the shop was in a good position.

Cross-examined: Witness had only worn the pair of boots on one day.

Schumann, who was in plaintiff's employ at Salt River, said that when the two men from the defendant called they told him to go out of the shop and locked the door.

This closed the case for the plaintiff.

For the defence

Andries Zaachaeus de Beer, said he was bookkeeper in the employ of Messrs. Cleg-horn & Harris. He knew the plaintiff, whose account with the firm was a thirty-day account, to be reduced by weekly payments. On February 1 plaintiff owed the firm altogether £27, and had been in arrears of payment. Plaintiff had made a payment of £4 that morning. Witness heard something about him from one Levi, and went out to plaintiff's shop with Teague, who had heard the same thing. They reached the shop at 11.20, where they found Schumann, the cobbler, and Jacobs. Jacobs said he had paid £4 that morning, but witness said his account was much overdue, and he must pay up more. Plaintiff said he would in time. Teague then said he had heard something about him, and plaintiff said, "Yes, from Grandeur"; but Teague said, "No." Plaintiff admitted having gone through the stock, and offered the shop to Levi, but he said it was only done in a joke. Teague asked, "What about the £8 worth of goods on order from Maxwell & Earp's?" and plaintiff said the whole thing was a joke. He did not deny having made the offer to sell the shop. Witness then said he would have to take further proceedings. Plaintiff told them they could take stock. Levi then came up, and told Jacobs that the latter had offered him the business for sale, but the plaintiff said he had only done it for him. Plaintiff then said witness could take back the stock. Witness suggested that plaintiff should find security, and the latter went

over to Dale. Witness had begun to take down the stock, and was assisted by the plaintiff in doing so. After plaintiff left the building, witness continued taking the stock down. Plaintiff came back with Dale, who told them they had been misinformed, and that he was prepared to stand security with another man. Plaintiff joined with Dale in saying that the rumour was started in spite. Dale left the shop before Jacobs, and the latter left just before twelve o'clock. Witness told Schumann, the cobbler, he had better leave for lunch a little earlier than usual, and leave the key. Teague then locked up the shop. In the afternoon witness returned to the shop and took stock. Plaintiff told them the prices, and helped them to take stock. The value of his firm's goods was £13, and that of Maxwell & Earp's an almost similar amount. The total stock in the place was about £37. Witness denied taking stock over to Dreyer's in the morning. This was only done in the afternoon. Witness gave Jacobs a receipt for so many pairs of boots, valued so much, and Teague did the same. Isaacs was present at the time. Witness said they would send the proper credit note the following day. Isaacs was willing to pay 10s. security in the £, but witness was not open to that, and was not satisfied. Isaacs was very indignant at this, and said they must think he was a rogue.

Cross-examined: Witness had seen the plaintiff several times buying goods. Witness had never raised any difficulty in the matter of giving credit. Plaintiff paid £4 on his account some time before eleven. Witness went out to the shop by the 11.5 train. He first heard of Mr. Levi from Mr. Harris, a partner of the firm, who said he had received information from Levi. He was not aware that any more letters had been written by Levi to damage the plaintiff. Witness was at the plaintiff's shop half an hour before Dale came in. Witness did not go out to the shop with the intention of seizing the goods. Mr. Jacobs offered the goods to witness.

Then why did you go to all this trouble about the security?—Well, the stock was in a dirty condition. He does a dirty trade.

Continuing, witness said it was not correct that Jacobs had left the shop before he took down goods from the shelves. Witness gave plaintiff the receipt out of a Sunday-school note book of his (produced). Witness only



took stuff that belonged to him. The total amount of stuff witness and Teague took away was worth about £25.

Re-examined: Witness could not have taken away his own stock without plaintiff's assistance.

De Villiers, C.J.: When you removed the goods, did you believe that he freely consented to your removing the goods?—I thought at the time he was a fully consenting party to the transaction.

Alfred Teague, manager to Messrs. Maxwell & Earp, said that in February last plaintiff owed his firm about £20, and was in arrear in his payments. When witness went out to plaintiff's shop he told the plaintiff that he had heard he intended to sell his business. Levi passed by just then, and plaintiff pointed the latter out, saying that Levi was the man who had told them the rumour. Plaintiff denied having made any offer to Levi, but in the afternoon he admitted it in Isaac's presence. Jacobs suggested that he could find security, and brought over Dale. Witness was certain that he and the last witness began to take down the stock from the shelves while plaintiff was still in the shop. Witness and De Beer finished taking the value of the stock in the morning. In the afternoon Jacobs assisted them in dividing the stock. Isaac told witness that he ought to give him a receipt, and witness wrote one out, stating that plaintiff had consented to the goods being removed.

Cross-examined: Witness understood Dale to say when he came to the shop and the security was mentioned, that his wife had told him to have nothing to do with the security.

Witness asked Levi to be present as a witness to the transactions. Witness had no knowledge of stating that he must take plaintiff's money or his stock. The security was suggested by Jacobs.

It was entirely on account of the information received from Levi that he went out to the shop. Witness saw De Beer writing out a receipt. When witness went out in the morning, plaintiff said, "I can't pay you. There's the stock. Take it."

By the Court: Witness believed plaintiff voluntarily allowed them to remove the goods.

De Villiers, C.J.: Then why did you lock the door?—So that neither the cobbler nor anyone else might take the goods away.

Arend Levi said he had seen plaintiff, and told him he was anxious to set up in business. Plaintiff told witness he was doing a good business, but wanted to leave the town for London.

Mr. Graham objected to evidence being led on this conversation, unless he had the right of recalling witnesses on the evidence led.

Mr. Innes consented.

Witness (continuing): Plaintiff said he had £80 worth of stock. Plaintiff told witness the next day that he had outstanding debts to the amount of £30. Witness asked him why he wanted to leave, and plaintiff said he had incurred gambling debts with a man named Dale. Witness said he would be willing to buy the shop for £30. Plaintiff went over the stock with the witness, and said he would take £35 for the lot. Witness said he would be willing to pay that, provided he would go to Cleg-horn & Harris's and Maxwell & Earp's. If the latter consented, witness said he would pay the £35. Plaintiff said if witness would close at once he (plaintiff) would leave for Kimberley at once. Witness said "Nothing of the sort," and went and saw Mr. Teague, at Maxwell & Earp's. He went out to the shop with Teague and De Beer, and plaintiff then said that if he had ever made the offer he was joking. Witness had been subpoenaed that morning.

Cross-examined: Witness had been in the mineral water line.

Did you get into any trouble in connection with it?—None whatever.

Have you written any letters to anyone in connection with this business?—No, sir, I have not. Witness denied absolutely that an anonymous letter produced was written by him or was like his writing.

C. Abrahams, a coloured man, examined by the Court, said he was positive the last witness came to plaintiff's shop, and asked if he knew of a shop to let. Witness told him there was a shop higher up the street.

This closed the case for the defence.

After argument,

De Villiers, C.J., in giving judgment, said: This case affords another illustration of the facility with which credit can be obtained from Cape Town merchants. Here was an utter stranger, the plaintiff coming from Hull, who had no difficulty whatever in obtaining credit from merchants in Cape Town, setting up a bootmaker's shop at Salt River, and obtaining this credit quite easily. The credit would apparently

have been extended indefinitely but that certain information was given to Messrs. Maxwell & Earp on February 1, and also to the present defendants. In consequence of that information steps were taken by their representatives which led to the present action. Now, the first point to be considered in this case is whether that information in itself was correct. Upon that point we have had the evidence of Levi and the plaintiff, and to my mind it is quite clear that more must have happened between them than plaintiff admits. According to him, there had only been an attempt to purchase the goodwill, which he had refused, and there the matter ended. Now, if this were all that happened, it is impossible to conceive why Levi had such a grudge against plaintiff as to give this information to defendants. Moreover, Levi had knowledge of things which he could not have had if the only question discussed had been the purchase of the goodwill of the shop. Apparently Levi had a very strong grudge against plaintiff, and his version of what took place is quite consistent with the facts. His statement is that there had been an agreement to buy not only the goodwill of the plaintiff's shop but the stock, and he then proceeded to give the information to Maxwell & Earp and the present defendants. That information was that the plaintiff had offered his business for sale. Naturally the merchants who had supplied these goods, fearing that the same result might follow as in so many other cases—viz., credit is given, the business is sold and the creditor disappears—determined to send a representative to protect themselves. Now the important point to determine is what happened when these representatives came to the premises. According to both of them the plaintiff consented to his goods being removed. Upon this point they are both positive. No doubt afterwards the plaintiff endeavoured to obtain security from Dale and from Isaacs, and if the goods had been removed while he was away no doubt he would have been entitled to have succeeded. But the representatives were not satisfied with the security, and proceeded to collect and remove the goods. Meanwhile they were assisted by the plaintiff, according to the evidence of both De Beer and Teague, which I am inclined to accept. There is no positive statement on the plaintiff's side that he formally objected to the goods

being removed. I think that the silence on the part of the plaintiff while the goods were being removed practically amounted to consent. That being my view of the case, and accepting as a whole the version of the facts as given by Teague and De Beer, the only course is to give judgment for the defendants. Another important point is the evidence given by these two witnesses, that they each gave a receipt to plaintiff. Now this is a point upon which they are either swearing falsely or speaking the truth. I am of opinion that these gentlemen would not deliberately swear falsely upon a point of this kind. I believe they did give those receipts, and as the receipts are not now produced by plaintiff, the fact must weigh against him. The actual damages proved to have been sustained had the plaintiff succeeded were not great, but I feel bound to say that, quite independently of the damage proved to have been sustained, if I were satisfied that there had been this gross and unjustifiable conduct on the defendants' part that is alleged, the damages awarded would have been heavy. Judgment will be for the defendants with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs W. E. Moore & Son.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. de VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

PEREIRA V. EQUITABLE } 1899.  
MARINE AND FIRE ASSU- } May 17th.  
RANCE COMPANY.

Fire Insurance — Agent — False answer.

*An agent employed by a Fire Insurance Company to obtain customers, and assist them in filling up the necessary forms of applications for insurance, induced the plaintiff to make an application,*

*and without asking whether the plaintiff had previously had a fire, inserted without the plaintiff's knowledge a negative answer to a similar question in the form. A fire having occurred on the insured premises.*

*Held, that although the plaintiff had previously had a fire, the defendant company could not set up the false answer as a defence to the action.*

This was an action in which the plaintiff, a general dealer, carrying on business at Wynberg, sought to recover £1,000 on a policy entered into between him and the defendant company in 1895.

The declaration alleged that about April, 1895, one E. M. Wilkinson, a duly authorised agent of the defendant company for the purpose of effecting fire insurance, requested the plaintiff, who was then carrying on business as a general dealer in Wynberg, to insure his stock against fire with the defendant company.

The said Wilkinson acting as aforesaid thereafter inspected the premises occupied by the plaintiff, and the stock therein, and on or about the 10th April, 1895, he induced the plaintiff to sign a proposal form in blank, and the plaintiff agreed to insure the said stock with the defendant company for £1,000.

The said Wilkinson took away the proposal form signed as aforesaid, and thereafter the defendant company issued to the plaintiff a policy bearing the same date as the said proposal form, and insuring the stock for £1,000.

Thereafter the plaintiff from time to time paid the premiums falling due under the said policy but on or about October 28th, 1896, a fire broke out in the plaintiff's premises, and the stock aforesaid was destroyed.

The defendant company declined to pay the amount due under the policy on the ground that the answer "No" is given to the question in the proposal form "Have you ever had a fire"?

The plaintiff said that no question was ever put to him by the said Wilkinson or the defendant company as to whether he had previously had a fire nor was the proposal form ever read over to him but he admitted that he had had a fire previously through no fault of his own and he denied

that, under the circumstances above set forth, the defendant company was entitled to repudiate liability.

The defendant company in their plea denied that Wilkinson was their agent for the purpose of effecting fire insurances.

They admitted that the plaintiff on the 10th April, 1895, signed a proposal to insure his stock with the defendant company for £1,000.

They said that they received from Wilkinson on behalf of the plaintiff the said proposal form duly signed and completed, and thereafter issued to the plaintiff the policy referred to in the declaration, but they denied that Wilkinson took away the proposal signed in blank as alleged.

They said that the first of the conditions which were referred to in the said policy and which formed part thereof, provided that any misstatement of or omission to state any fact material to be known for estimating the risk rendered the policy void.

That the plaintiff had as a fact had a fire in the premises occupied by him in or about the year 1882, the said fire destroyed the premises and the goods therein which the plaintiff had insured at the time. The above facts were material to be known for estimating the risk in regard to the proposal and policy signed by and issued to the plaintiff in the month of April, 1895, and it was the duty of the plaintiff to have disclosed the said fact to them.

That the plaintiff not only omitted to state the said fact, but that he signed the said proposal which contained the answer "No" to the question whether he had ever previously had a fire.

They denied the allegations that the question was not put to the plaintiff, and that the policy was not read over to him, and they contended that by reason of the premises they were misled by the plaintiff in entering into the policy, and that the plaintiff was not entitled to recover the amount claimed.

The replication denied the allegation that the plaintiff had previously had a fire in the premises occupied by him inasmuch as the fire referred to in the declaration took place at Rondebosch in 1882, in premises then occupied by him. For the rest, it joined issue.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff, and Mr. Innes, Q.C. (with whom was Mr. Upington), appeared for the defendant company.

Plaintiff said he had a shop at Wynberg, near the station, and not far from the Royal Hotel. He had carried on business there since 1887. Previously he was at Rondebosch. In 1895 Wilkinson, defendants' agent, came to him, and wanted him to insure his wife's life. Witness declined, and Wilkinson then wanted him to insure his stock, and ultimately witness consented to do so. Wilkinson said the rate would be between 6s. and 7s. Witness signed the proposal form. There was no writing on the printed forms.

[Mr. Searle pointed out that the condition referred to in the plea did not in fact appear upon the policy. Mr. Innes admitted that the plea was in error.]

Wilkinson never asked him whether he had previously had a fire. He had had a fire previously, when the Equitable paid him the whole amount, between £300 or £400. There was nothing to hide in connection with the first fire. The same company reinsured witness after that at Rondebosch and also at Wynberg. The New Zealand Company with whom he was also insured, paid the full amount for the fire at Wynberg.

Cross-examined: In his proposal to the New Zealand he said he had had no fire at Wynberg. He did not know whether the New Zealand Company found out anything about the first fire before they paid for the second. In his proposal to the Imperial Insurance Company, he also said that he had had no fire. In four proposals he said he had never had a fire. The Equitable Fire Assurance and Trust Company (not the defendants) offered a reward of £200 for information leading to the discovery of the origin of the first fire.

By the Court: He believed that in the last fire he lost stock to the value of between £2,000 and £2,300.

Agnes May Chapman Pereira, the wife of the plaintiff, said that in 1895 plaintiff signed a blank form, no questions being read over to him by Wilkinson. Witness signed one of the proposal forms filled up in 1896.

Cross-examined: When plaintiff signed the proposal in 1895, witness heard no reference made to a previous fire. The proposal to the Imperial Assurance Company for a further £500 was in blank, and witness signed it.

Robert Charles Orr, a builder and contractor, residing at Wynberg, who said he had known the plaintiff for nearly eight years,

gave corroborative evidence as to the signing of the form handed by Wilkinson to plaintiff.

William James Merrington, secretary to the Equitable Fire Assurance and Trust Company (not the defendant company), said plaintiff's building and goods had been insured in that company. A fire broke out, and the company offered a reward for the discovery of the cause, but eventually they paid out the full amount. Plaintiff was again insured in witness's company, but subsequently plaintiff's policy was taken over by the New Zealand Company. There was no question as to previous fires in the proposals issued by witness's company.

L. E. Wilkinson said that when he saw plaintiff in 1895, he asked plaintiff a few hurried questions, after which plaintiff signed the proposal of the defendant company in blank. Witness did not remember asking plaintiff if he had had a fire before. The entry in the proposal form to the effect that plaintiff had never had a fire was in witness's handwriting. Witness did not think that the question regarding a previous fire was of importance, as the Equitable Trust Company, for which witness had also canvassed, did not ask that question.

Cross-examined: Witness made inquiries in Wynberg as to whether plaintiff had had a fire, after which he filled in the form in the negative.

Re-examined: Witness acted for the defendant company in this matter, and he concluded that he acted as their agent.

For the defence.

Francis Chiappini, secretary to the defendant company, said that in 1895 he was chief clerk in the employ of the company, Mr. Percival being then secretary. In 1895 Wilkinson brought in a proposal form from Pereira, which was filled in, and a policy was issued. Wilkinson had never occupied the position of canvasser to the defendant company, but he received 10 per cent. commission in respect of Pereira's policy and also (witness believed) in respect of one other policy. At that time any person, not the person insured, who procured business for the company, could obtain commission if they asked for it. That system was abandoned about two years ago, and now all the assurance companies in Cape Town employed only recognised agents. If witness had known that Pereira had had a fire he would not have renewed his policy.

Cross-examined: He believed that the best English companies always asked an appli-

cant for a policy if he had had a fire. Witness would be surprised to learn that the Sun and the Phoenix companies did not ask the question. If he had known that £200 reward was offered in connection with the first fire he would not have accepted Pereira's application.

William Billingsley Percival said he was secretary to the defendant company in 1895. At that time Wilkinson was in very low water, and obtained translation work. Wilkinson then said he could do insurance business, and witness replied, "If you can do business I will consider it." Wilkinson only obtained two proposals, and then witness lost sight of him. Wilkinson was never a recognised agent of the company. In 1895 the company paid anybody commission who obtained proposals for the company and applied for commission. He would not have accepted Pereira's risk without consulting the Board of Directors, if he had known that he had had a fire. The fact that a reward had been offered would have considerably influenced his mind.

J. A. Breda, agent for the Imperial Assurance Company, said the signature to the proposal for £300 was in the handwriting of Mrs. Pereira.

The witness Percival (recalled) said Wilkinson was remunerated by means of a commission for any risks which he obtained.

Mr. Searle: Wilkinson was the agent of the company, and not of the plaintiff; the company is bound therefore by his acts. *Porter on the Law of Insurance* (pp. 409, 410). The company has recognised Wilkinson's power to submit proposals. *Bunyon on Insurance* (p. 50), citing *In re Universal Non-Tariff Fire Insurance Company* (L.R. 19, Eq., p. 485); *Simon and Equitable Marine and Fire Assurance Company* (9 Juta, p. 455) and *Drysdale v. Union Fire Insurance Company* (8 Juta, p. 63) are similar cases. There was clearly no fraud or collusion on Wilkinson's part, he was authorised by the company to canvass, was given forms of proposal and was paid a commission. *May on Insurance* (Vol. I, sections 120, 144(A) 144(C), 144(D)). If the agent of a company makes a statement, the company is bound. *Beal v. Park Fire Insurance Company* (82 Am. Dec., p. 719); *Raputjes Dig.* (Vol. 2, p. 1889). With regard to the materiality of the question, it is one which some insurers ask and some do not.

Mr. Innes: The plea is drawn upon conditions which appear in the company's present form of policy, and do not appear in the

policy in question in this case, but after all, it is a doctrine of common law that a contract of insurance is a contract *aberrimae fidei*, and that every material fact must be disclosed. There can be no doubt that this question of a previous fire is a material fact as it is one of the questions put, and moreover, it materially affects the risk. Then if it is clear that Wilkinson wrote the answer to the question without reference to the plaintiff the question arises, whose agent was Wilkinson. He came from the plaintiff to the company, and obtained two proposal forms, clearly he was plaintiff's agent. Unless he was defendant's agent, if the plaintiff signed the form in blank, he is responsible for what was inserted therein. *Bardon v. London, Edinburgh and Glasgow Assurance Company* (1892, Q.B. 2, p. 534); *Bunyon on Fire Assurance* (4th ed., p. 86) *May on Insurance*, sections 144(G) and 155(A); *Bunyon* (4th ed., p. 61), commenting on a colonial case in which the company's clerk had filled in an answer by mistake; *Parsons v. Bigwood* (15 L.I. Ch., p. 379). Where an agent writes down answers for an applicant and the applicant signs the form, he is presumed to have read those answers. *Porter on Insurance* (p. 152).

Mr. Searle in reply.

De Villiers, C.J.: The Court may take judicial cognisance of the fact that Insurance Companies are in the habit of employing agents, whose duty it is to obtain customers and assist them in filling in the necessary forms of application for insurance. The defendant company certainly so employed Wilkinson and gave him the necessary forms to be filled in by persons intending to be insured against fire. Wilkinson called on the plaintiff and persuaded him to apply for an insurance. He put a few questions to the plaintiff, but did not ask him whether he had previously had a fire. Wilkinson then filled in the answers to the questions, and in answer to the question whether the plaintiff had previously had a fire he wrote "no." The plaintiff had no knowledge of this being done. The insurance was effected and a fire having subsequently taken place, the defendant company, while admitting the amount of the loss, refuse to pay it. In my opinion the defendant company are not entitled to set up as a defence a false answer written by their own agent without the knowledge of the plaintiff, and judgment must be given for the plaintiff with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

FLETCHER AND CO. V. WHITE. { 1899.  
{ May 18th.

Sequestration—Petitioning creditor  
—Insolvent ordinance.

*Final order of sequestration refused in the absence of prima facie proof to the satisfaction of the Court that the petitioning creditor's debt amounted to £50 in terms of the 6th section of the Insolvent Ordinance.*

This was an application for a final order of sequestration of the defendant's estate.

The petition upon which the provisional order was granted, alleged that the defendant was indebted to the petitioner in the sum of £26 6s. 10d. for goods sold and delivered, and £30 17s. 6d. being balance due for cash advanced and monies paid by the petitioner on behalf of and at the instance of the defendant, that petitioner had obtained judgment against defendant for £26 6s. 10d. which judgment had not been satisfied, that a writ of execution had been taken out, and a return of *nulla bona* made to the writ.

The defendant now filed an affidavit stating that he formerly carried on business at Oudtshoorn as a general dealer, in partnership with petitioner. The partnership was dissolved, whereupon the petitioner took over the business and carried it on himself. The estate was sequestered on his petition in November last. At that time it was stated defendant owed Fletcher & Co. £5,000, and proceedings were commenced to recover that amount. Defendant resisted the claim, and the action was discontinued. He denied that he was indebted to the petitioner for any amount whatever for cash advanced and monies paid for his account. No account for the £30 17s. 6d. had ever been

rendered to him. In April last, he received a legal demand from petitioner's firm for £57 4s. 4d. being £26 6s. 10d. for goods sold, and £30 17s. 6d. for monies paid, yet he was only sued for the £26 6s. 10d., the £30 17s. 6d. being erased from the account. The petitioner in an answering affidavit stated that the action for £5,000 was not proceeded with, because it was considered inadvisable to incur the heavy law expenses when the defendant was hopelessly insolvent. He said further that the reason why the £30 17s. 6d. was not included in the summons for £26 6s. 10d. was that the claim would have been beyond the Magistrate's jurisdiction.

Mr. P. Jones appeared for the petitioner.

Mr. Searle, Q.C., for the defendant, referred to section 6 of Ordinance 6 of 1843, which requires that the petitioning creditor should be a creditor for £50. The evidence of this debt is very vague, the proof of it should be clear.

Mr. Jones: The estate appears to be hopelessly insolvent. There is a judgment for £35, including the costs, and a further debt of £30 17s. 6d. which has only not been sued for, because it was not considered worth while.

The Court discharged the provisional order.

De Villiers, C.J.: It was stated and not denied that in April last the defendant was served by the petitioning creditor with a demand for £56, consisting of £26 for goods sold, and £30 for money paid by the petitioner on behalf of the defendant. Yet the defendant was sued for only £26. The fact that only £26 was sued for, would, in the absence of any satisfactory explanation, lead to the inference that the claim for the additional £30 could not be substantiated. The 5th and 6th sections of the Insolvent Ordinance require that the creditor's debt shall amount to £50, and the 18th section enacts that if the debt is not proved to the satisfaction of the Court, the order for sequestration shall be superseded. In the present case the defendant denies the debt. The plaintiff's explanation of his not suing for the full amount of £56 is that to save expense, he confined himself to the claim for £26, in order to bring the case within the Magistrate's jurisdiction. The explanation is by no means satisfactory, for if he intended to sue the defendant for compulsory sequestration he should have been prepared to produce *prima facie* proof that he was a creditor for the full amount of

£50. Such proof has not been given and the order for compulsory sequestration must therefore be discharged with costs.

[Petitioner's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

ADDINGTON AND OTHERS V. R. GLUCK  
AND CO.

Mr. Buchanan asked that the provisional order of sequestration granted be superseded, as an assignment would be made.

Granted.

GRAHAM BROS. V. C. ZERNEY AND CO.

Mr. Buchanan asked for provisional sentence upon a promissory note for £127 14s. 6d., dated March 31, 1899, and signed by defendants.

Granted.

SEDGWICK AND CO. V. WADDELL.

Mr. Buchanan asked for provisional sentence with costs on a promissory note for £150, and also under Rule 329 for the sum of £100 for money advanced with interest at the rate of 7 per cent.; also for £56 for money paid on behalf of the defendant by plaintiff at his special instance; and for £2 12s. 6d., being interest due on the promissory note for £150.

Provisional sentence was granted. As to the illiquid claim the summons was four days premature.

MACKIE, DUNN AND CO. V. WARD AND  
VIMPANY.

Mr. Buchanan asked for provisional sentence on seven promissory notes, to the total value of £4,126.

Granted.

REHABILITATIONS.

Mr. Uppington applied for the rehabilitation of Pieter Cornelius Braam.

Granted.

Mr. Buchanan applied for the rehabilitation of Solomon Horwitch.

Granted.

Mr. P. Jones applied for the rehabilitation of Fowler Harker Dean.

Granted.

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CORKE V. CORKE. { 1899.  
May 18th.

This was an action for divorce instituted by the husband on the ground of his wife's adultery.

Mr. Currey appeared for the plaintiff.

Francis H. le Sueur, clerk in the Deeds Office, gave formal evidence of the marriage.

Louis William Corke, the plaintiff, head messenger at Cape Town Railway-station, said at the time of his marriage he was a private in the East Yorkshire Regiment. He and his wife lived happily till 1896, when witness received information and taxed his wife with misconduct, which she admitted. In 1897 defendant went to Kimberley, and was away six months. She then wrote a letter asking witness to receive her back. He did so on two occasions, the last being in November, 1897. She remained about six weeks, and then went away again, as she said, to Wellington, but witness discovered as a matter of fact that she went to Johannesburg. Witness followed in September, and saw his wife's sister, who told him something. He went to the Castle Hotel, and asked his wife what she was doing there, and she said, "I don't care. You can get a divorce." She owned to him that she was living with a man named Windsor, whom she pointed out to him. Windsor spoke very politely to witness, and said: "I am not to blame. I am saving her from going into the gutter." Witness at a later stage visited the hotel, and found his wife with Windsor.

Isidore Michaels said plaintiff's wife was his sister-in-law. Mrs. Corke had for four months been living with his wife at Johannesburg, she afterwards left to go to the Castle Hotel. Witness had seen respondent misconducting herself with James Windsor.

The Court granted the decree.

[Plaintiff's Attorney, V. A. van der Byl.]

THE EXECUTORS OF THE ESTATE OF THE  
LATE SIGIDI V. MATUMBU.

Sir H. Juta, Q.C., applied for an interdict restraining respondent from parting with, killing, or otherwise disposing of certain cattle, &c., belonging to the estate of the late Sigidi pending the result of an action instituted against him by the applicants.

Mr. Innes, Q.C., appeared for the respondent.

Sir H. Juta read an affidavit made by Dinizulu, who stated that he was one of the executors testamentary in the estate of the deceased Chief Sigidi, of the Idutywa

Reserve. Three or four months after deceased's death, the respondent invaded the kraal, and forcibly took therefrom all the stock in the kraal and had since then kept possession of the stock, or unlawfully disposed of portions thereof, that applicants had issued instructions for summons to be issued for the recovery of the stock or its value, but as the respondent was illegally making away with or killing it, it was feared that it would have disappeared entirely by the time judgment was obtained.

Mr. Innes read an answering affidavit by the respondent, maintaining that the kraal was not forcibly invaded, and that the cattle were taken in accordance with Kafir law and custom. He alleged that he was the Great Son of Sigidi, and that the only stock in his possession which ever belonged to Sigidi, was property which he apportioned to the Great House of which respondent was the heir.

To this an answering affidavit was filed by Dinizulu, stating that according to the deceased chief's will, he appointed his "great-son" Dinizulu sole heir to all his property.

After hearing counsel,

The Court granted the interdict as claimed, pending the result of the action, the interdict to be suspended upon respondent giving security to the satisfaction of the Chief Magistrate of the Transkei for the value of plaintiffs' claim. Costs to be costs in the main action.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

#### MILLIGAN V. MILLIGAN.

Mr. Jones asked the Court to grant substituted service. In March last the Court granted leave to sue by edictal citation for the restitution of conjugal rights. It was then believed that defendant was in Johannesburg, but it had been found impossible to serve the citation, as it was found he had left for Natal. Every possible search had been made for the defendant in Natal, but nothing had been heard of his whereabouts. It was now asked that the rule be published once in the "Natal Witness" and once in the "Government Gazette," returnable on July 12.

Granted.

DE JAGER V. DE JAGER. } 1899.  
May 18th.

Mr. Benjamin asked for an order on respondent to pay to applicant £30 to enable her to institute proceedings against him for divorce.

Mr. Buchanan appeared for the respondent.

Applicant in her affidavit stated that the parties were married in 1884, and there were three children of the marriage. She intended to institute an action for divorce on account of the adultery of the respondent with one Margaret Botha but had no means wherewith to carry on the action. Respondent was a butcher in Cape Town, and owned three butchers' shops. He was doing a good business, in support of which statement two affidavits were annexed.

Respondent made an answering affidavit in which he alleged that he was totally unable to pay the sum of £30 demanded. His rentals for his butchers' shops were very heavy, and he had to pay for the support of his aged father and mother. He was supported in his business by another butcher, to whom he owed £400.

The Court directed the respondent to pay the applicant £15 towards the costs of the action, and £4 a month for maintenance of herself and child pending the action

#### CILLIERS AND OTHERS V. SMIT.

Mr. Gardiner applied for the award in this case to be made a rule of Court.

Granted.

#### IN THE MATTER OF THE PETITION OF EDWARD AND ETHEL DAVIES.

Mr. Buchanan asked for authority for the registration of an ante-nuptial contract. The parties were married on the 3rd April. The contract had been entered into at Port Elizabeth before the marriage, but the copies sent to Cape Town for registration had been lost in the post.

Granted.

#### CAPE OF GOOD HOPE PERMANENT LAND, BUILDING AND INVESTMENT SOCIETY V. STANDARD BANK.

Mr. Innes, Q.C., appeared, with Mr. Gardiner, to apply for a commission to take the evidence of Mr. Harsant, who was shortly leaving for England.

The Court appointed Mr. Howel Jones commissioner.



IN THE MATTER OF THE PETITION OF  
JOHN GEORGE AND MARTHA BERTHOLDA  
CONNAN.

Mr. P. Jones asked for leave for the parties to register an anti-nuptial contract which it was intended should have been executed before their marriage, which took place on the 4th April, 1899. The power to execute the contract had been signed by the parties before marriage, but through an oversight it had not been executed.

Granted.

IN THE MATTER OF THE PETITION OF THE  
REV. JOHANNES HENOCH NEETHLING,  
JUN., J.SON.

Mr. McGregor asked for leave for an extension of the return day of the rule *nisi* granted under the Derelict Lands Act.

Granted.

SKINNER V. SKINNER.

Mr. Close applied for a rule *nisi* for leave to sue *in forma pauperis* to be made absolute.

Granted.

PETERS V. PETERS. { 1899.  
May 18th.  
" 25th.

Domicile—Edictal citation.

Mr. Maskew asked for leave to the plaintiff to sue by edictal citation in an action for restitution of conjugal rights. Applicant's affidavit stated that he was married in Ladismith, Natal, in 1890, out of community of property. There were no children of the marriage. The parties subsequently lived in Natal for six years. In May, 1897, the respondent, Judith Magdalena Peters, drove applicant out of her house and threw his furniture and belongings and clothes into the public road, locked the door of the house, and refused to give him admittance. Though she had been repeatedly asked since to come and reside with applicant or to allow applicant to reside with her, she had refused. Applicant had since May, 1898, resided in Caledon in the Cape Colony, and intended permanently residing there. He now asked for leave to sue by edictal citation for restitution of conjugal rights, and in the event of respondent's failing to comply with the order of the Court, for a divorce.

The application was ordered to stand over for authorities as to the Court's jurisdiction to be produced.

*Pontea* (May 25th).

Mr. Maskew referred to *Miller v. Miller* (S. 3, p. 227); *Bestandig v. Bestandig* (M. 1, p. 20); *Reeves v. Reeves* (M. 1, p. 244); *Westlake on Private International Law* (3rd ed., p. 78).

De Villiers, C.J.: The petitioner is entitled to sue. In the case of *Whipp v. Whipp* (12 S.C., Rep. 174) where a similar application was refused neither the husband nor the wife resided in the Colony. In cases of this kind the law is always open to abuse inasmuch as an applicant might come and reside in the Colony at the time of the application in order to get a divorce and subsequently leave the Colony but the Court has to decide the matter upon the law as it stands. As to what the law is the decision in *Reeves v. Reeves* seems conclusive and in the subsequent case of *Miller v. Miller* that statement of the law was upheld. The application will be granted; the order to be returnable on July 12; personal service.

QUEEN V. VAN ZYL. { 1899.  
May 18th.

Liquor Licensing Acts—Conditions  
—Prohibition

*A condition in a retail liquor licence that no liquor is to be sold on Saturdays before Nachtmal, is not authorised either by Act 28 of 1883 or by Act 25 of 1891.*

This was an appeal from a conviction by the Assistant Resident Magistrate of Clanwilliam.

The appellant was charged with the crime of contravening sub-section 7 of section 73 of Act 28 of 1883 in that upon the 1st day of April, 1899, and at or near Augsburg in the district of Clanwilliam, he did wrongfully and unlawfully keep his licensed premises "Augsburg Hotel" open for the sale of liquor or sell or expose liquor for sale during a time when he was not authorised by the licence to sell.

His plea was (1) Not guilty: (2) That the condition "no liquor to be sold on Saturdays before Nachtmal, during the period of this licence" is *ultra vires* to the Liquor Licensing Act. The evidence proved clearly that the appellant had sold liquor on a Saturday before Nachtmal, and it was proved that the Licensing Court had granted him a retail wine and spirit licence with the condition mentioned in the plea. He was found guilty and fined £2 10s.

Sir H. Juta, Q.C., for the appellant, referred to sub-section 2 of section 7, Act 28 of 1883, and section 4 of Act 25 of 1891. The Licensing Court can only prohibit the sale of liquor on the days mentioned. *Regina v. Transveldt* (J. 5, p. 181); *Rooseboom v. The Piquetberg Licensing Court* (Juta 10, p. 195); *Regina v. Robertson* (Juta 9, p. 299); *Pearson v. Vitenhage Licensing Court* (Juta 3, p. 363).

Mr. Graham, Q.C., for the Crown.

De Villiers, C.J.: The 7th section of Act 28 of 1883 enacts that a "retail licence" shall authorize the sale of liquor in any quantity between six in the morning and nine at night on any other day than Sunday, Christmas Day and Good Friday; or between such other hours as may be fixed by the Licensing Court under the provisions of the Act. It has been suggested that the words "under the provisions of this Act" would be inoperative unless the Licensing Court had the power to impose a condition like the one in question, viz., "that no liquor is to be sold on a Saturday before Nachtmal." But there are other sections to which the words would be clearly applicable. For example, the 39th section authorizes the Licensing Courts to grant midnight and Sunday privileges and thus fix other hours than those mentioned in the 7th section. It has also been suggested that the 3rd section of Act 25 of 1891 implicitly authorizes the Licensing Court to impose the condition now in question. That section enacts that "it shall be lawful for any Licensing Court to fix any hours between seven in the morning and nine at night for the sale of liquor under any retail licence." That is a very different matter, however, from saying that a condition may be imposed prohibiting altogether the sale of liquor on any days other than Sunday, Christmas Day and Good Friday. There would be no *bona fide* fixing of hours between 7 a.m. and 9 p.m. of any day for the sale of liquor, if the licence says that no liquor shall be sold at all on that day. I confess to a feeling of regret that such a condition cannot be legally imposed. Some of the country villages are noted for the intemperance of the coloured labourers, and it would be a most beneficial measure to allow a condition which prevents the servants accompanying their masters to nachtmal from being exposed to temptation while in the village. But the Court cannot, in its desire to check the evil of drunkenness, give a forced construction to the plain pro-

visions of the Act. The Court has gone far in upholding conditions designed to check drunkenness which are consistent with the Act, but the condition now in question would be inconsistent with their express provisions. The appeal must therefore be allowed.

Buchanan, J., concurred, mainly on the ground that the Legislature had specified the days upon which total prohibition might take place.

Maasdorp, J., also concurred. He said that the inference from section 1 of Act 25 of 1891 appeared to be that sales could not be prohibited on any other days than the particular days there mentioned.

[Appellant's Attorney, P. M. Brink.]

QUEEN V. STEVENS. { 1899.  
May 18th.

Perjury — Materiality — Prejudice — Character of witness.

*(On an appeal against the conviction for perjury of a woman who had charged a man with assault with intent to commit rape on her, and was the chief witness in support of the charge.)*

*Held that her previous moral character was material and that she was rightly convicted for having falsely stated on oath that she had never had immoral intercourse with one R.*

This was an appeal from the conviction of the appellant by the Assistant Resident Magistrate of Cape Town upon a charge of perjury, under the following circumstances. One, Logan, was charged with having committed an assault upon the appellant with intent to rape, and at the preparatory examination held subsequently by the Magistrate, she gave evidence against him. Under cross-examination she made the following statements upon oath:—"I do not know the Metropolitan Boarding House, Riebeeck Square. I do not know a man named Van Reenen. I did not pass under the name of Mrs. Robertson. I do not know a house at 33, St. John's-street. I do not know Mrs. Smeda. I never saw her. I have seen Van Reenen before. I cannot say when I have seen him. I have not seen him more than once. It is a story and I do not know

been to stay with him and other men at Mrs. Rorich's house, 33, St. John's-street. I have never lived with Van Reenen as his wife. I have never stayed in a brothel in Cape Town or elsewhere. I have seen Van Reenen only once, at Poole's Hotel, but not to speak to him. I never saw his wife." Logan was acquitted, and the charge of perjury in having made the above statements, was made against the appellant. At her trial the evidence of Frederick Van Reenen was taken, and was to the effect that he had made arrangements for the appellant to stay at the Metropolitan Boarding House, kept by Mrs. Smeda: and that she had stayed there three weeks, and that during that time he had visited her and had repeatedly had intercourse with her there, that she went there under the name of Mrs. Robertson and that he had taken her to a dance at Rorich's house in St. John's-street and occupied a private room with her at that place. Caroline Smeda and Lena Rorich corroborated his evidence. Lena Rorich admitted that she kept a brothel.

The appellant was found guilty and sentenced to six months imprisonment with hard labour.

She appealed against the conviction on the grounds (a) that the indictment served on her set forth no crime known to the law inasmuch as the perjury alleged and relied upon was not relative to anything material—the question of the moral character of the complainant in the case of the prosecution of Logan being irrelevant to the issue in that case: (b) That evidence as to the alleged intimacy ought not to be received inasmuch as it was not material to the issue in the case of the Queen v. Logan, and ought not to have been received, and is inadmissible.

Mr. Benjamin for the appellant: The questions answered by the appellant were not material to the alleged rape. The word "stay" does not mean "going to a dance." *Imp. Dictionary*. The statements which form the ground of the charge against the appellant, were immaterial to the issue with the exception of those in which she denied having "stayed" at Mrs. Rorich's or having lived with Van Reenen; and those statements were true. *Regina v. Oprety* (1877, p. 86); *Regina v. Sicart* (1 App., p. 191). As to the question whether a witness is entitled to refuse to answer questions respecting her intimacy with other men upon a charge of rape, Taylor on Evidence, sections 363, 1441.

Mr. Ward for the Crown: The appellant in the first instance stated voluntarily that

she did not know Mrs. Smeda and that in the presence of Mrs. Smeda in Court. At a later hearing she declined to answer the question and then said that she never had stayed with Van Reenen, &c. The question is the materiality of the evidence. Taylor section 363. Proof that the prosecutrix is a prostitute is admissible as going directly to the issue before the Court. *Regina v. Gibbons* (31 L.J., Magistrates cases, p. 98) per Williams J. It is also material even if it only goes to the credit of the witness. *Regina v. Overton* (C. and M., p. 165) and per Crompon J. in *Regina v. Gibbons*; *Regina v. Larey* (3 C. and K., p. 26); *Regina v. Beek* (1 Q.B.D., 1895 p. 797); *Regina v. Adams* (14 Cox, C.C., p. 214). According to English law the appellant is clearly guilty and there is practically no difference between that law and Colonial law on the point. The question "Do you know A" may be put merely to lead up to another question. In one case where a witness was asked whether his name was—and denied it it was found that the answer had some effect upon the judge.

Mr. Benjamin in reply: If the questions put were material to credibility the appellant was rightly convicted, but they were not, with the exception of those to which she gave true answers.

The appeal was dismissed.

De Villiers, C.J.: The charge brought by the appellant against Mr. Logan was that of assault with intent to commit rape on her. The charge was as grave a one as can be made against any man, and as the appellant was the chief witness in support of the charge it was of the utmost importance in cross-examination to question her as to her character and to test her credibility. Questions were put as to her chastity which she at first refused to answer, but she afterwards denied having at any time been guilty of unchaste behaviour. She was then specifically asked whether she had ever had immoral intercourse with one Van Reenen and she denied it. Mr. Logan was acquitted, and she was then tried for perjury. At the trial it was proved that she had been guilty of immoral intercourse with Van Reenen, and she was convicted. The ground of the present appeal is that the false statement made on oath in the previous case was not material, and that she was consequently wrongly convicted of perjury. In my opinion the character of a woman who charges a man with assault with intent to commit rape is a very material question, especially where, as in

the present case, the verdict must mainly depend upon her evidence. My experience of juries is that in such a case they rarely if ever convict if the prosecutrix is proved to be of a loose character. By denying the fact of immoral conduct on her part, she immensely increased the risk which Mr. Logan incurred of being convicted on her evidence. There is really no difference between our law and that of England as to the degree of materiality required to support a conviction for perjury. The Dutch authorities speak of "prejudice" or "damage" to another, but these terms have always received the widest possible interpretation. In a public prosecution the public prosecutor, as representing the Crown, would be prejudiced by false evidence given for the defence if the matter sworn to was material. In a private prosecution the private prosecutor would also be so prejudiced. It is only where the oath is foreign from the purpose, not tending to aggravate or extenuate the offence, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, that the evidence can be said not to prejudice another or to be immaterial. The evidence in the present case tended to prejudice Mr. Logan, and perjury was therefore properly assigned in it.

The appeal must be dismissed.

Buchanan, J., in concurring, said he thought that the authorities and the decisions of this Court clearly showed that it was a most material matter to decide in cases like this whether the person who made the charge was one of moral or immoral character.

Maasdorp, J., also concurred.

[Appellant's Attorney, D. Tennant.]

QUEEN V. HAY.

1899.  
May 18th.  
" 25th.

Criminal trial—Insanity—Tests of responsibility—Knowledge or right and wrong—Power of choosing between right and wrong.

*Upon certain questions reserved for the consideration of the Court on a conviction for murder,*

Held: (1) *That where the defence of insanity is interposed, the capacity to distinguish between right and wrong is not the sole test of criminal responsibility in all cases.*

(2) *That, in the absence of legislation to the contrary, Courts of law are bound to recognise the existence of a form of mental disease which prevents the sufferer from controlling his conduct, and choosing between right and wrong, although he may have the mental capacity to distinguish between right and wrong.*

(3) *That the defence is established if it be proved that the accused had, by reason of such mental disease, lost the power of will to control his conduct in reference to the particular act charged as an offence.*

(4) *That the capacity of the accused to control his own conduct must be presumed until the contrary is proved and that, therefore, in the absence of such evidence in the present case as might reasonably have induced the jury to find that the accused had lost such capacity, the verdict should not be disturbed, although the presiding judge had not directed the jury to inquire whether the mental condition of the accused at the time he committed the act was such as to deprive him of the power of controlling his conduct.*

This was an argument upon a point of law reserved at the trial of Gilbert Hay, in the Circuit Court of Riversdale, before Mr. Justice Buchanan and a jury. The prisoner was indicted for the murder of his mother; he pleaded not guilty, and the defence raised was that he was of unsound mind at the time the deed was committed, that he was possessed of illusions and imagined he was impelled by devils. He was found guilty and sentenced to death, but at the request of his counsel the following point was reserved for the decision of the Supreme Court "whether the direction of the learned judge, that the jury in order to arrive at their verdict, should inquire whether the prisoner was able to distinguish right from wrong as to the act in question, was a sufficient direction; or whether there should

in law have been the further direction that they should also inquire whether the mental condition of the prisoner was such as to deprive him of the power of controlling his own conduct, or of abstaining from doing any given act."

Mr. Justice Buchanan had given the following reasons for his charge to the jury: The prisoner was tried before the Circuit Court at Riversdale on the 4th April, 1899, for the murder of his mother, Johanna Magdalena Hay, at Heidelberg, on the 16th January, 1899. He pleaded not guilty, and was defended by Advocates McGregor and Gardiner. He was found guilty, and sentenced to death. The main defence at the trial was that the accused, at the time he was alleged to have committed the crime, was of unsound mind. After the conclusion of the learned counsel's addresses in summing up. I directed the jury on the law as to the defence of insanity, in the words of Mr. Justice Stephen (cited in *Taylor's Med. Juris.*, Vol. II., 3rd ed., p. 464), viz: "Sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing, emotion and willing can be performed in their regular and usual manner. Insanity means a state in which one or more of the above-named mental functions is performed in an abnormal manner, or not performed at all, by reason of some disease of the brain or nervous system." This I quoted as a broad legal definition of insanity by a distinguished jurist. Going from the general to the particular, I directed the jury in terms of the principles given in *Alison's Criminal Law of Scotland* (cited in Roscoe, 11th ed. p. 945), viz: "The insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, as applied to the act in question, and of the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong in his own case, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts." As I understood Mr. McGregor, it was to that part of the direction contained in the words I have underlined, that he took exception. I also cited to the jury from the charge of Mr. Justice Le Blanc, in *Regina v. Boulter* (Roscoe, p. 947); of Lord Denman, C.J., in *Regina v. Oxford* (Roscoe, p. 949); from the words of Mr. Justice Maule in answer to the ques-

tions propounded by the House of Lords to the judges in *McNaughton's* case (Roscoe, p. 951); and from Chief Justice Tindall's reply on the same occasion (Roscoe, p. 953). The objection to my direction to the jury was taken verbally at the trial. I endeavoured to formulate the objection as I then understood it, as under: "That the jury ought to have been charged generally; that the existence of delusions, when proved, should excuse the prisoner from punishment, and not that the delusions, if any, should be considered in connection with the particular act committed." As, however, the learned counsel was not prepared to accept this, and as he was not ready with an alternative, as the case was one of a capital offence, I allowed him afterwards to state the question in his own terms. The point reserved, as prepared by counsel, is: "Whether the direction of the learned judge, that the jury, in order to arrive at their verdict, should inquire whether the prisoner was able to distinguish right from wrong as to the act in question, was a sufficient direction; or whether there should in law have been the further direction that they should also inquire whether the mental condition of the prisoner was such as to deprive him of the power of controlling his own conduct, or of abstaining from doing any given act." It will be seen that counsel does not now question the one part of my direction, but objects that there should have also been a further direction whether or not the mental condition of the prisoner was such as to deprive him of the power of abstaining from doing "any given act." If the "given act" be taken in this case to be the act which caused the death of prisoner's mother, the difference between my direction to the jury and the question as stated for the consideration of the Court of Appeal in criminal cases appears to me to be rather one of form than of substance. It was urged for the prisoner that he acted under the impulse of a delusion of intercourse with the devil. As I understand the law, the test of criminal responsibility in such a case is whether the delusion, if it exists, be of a character to dominate the will and action of the accused in reference to the act committed by him. If delusions exist to such an extent as generally to establish insanity, I quite agree with the proposition that in such cases the jury ought to be charged to find for the prisoner, for on proof so general a jury ought to hold that there had been taken from the accused

that freedom of moral action in regard to any act which he might commit, including the specific act which was the subject of the inquiry at the time. It is the free agency of the accused in regard to the act done which, shortly, may be said to constitute the test of responsibility. My directions to the jury were in accordance with these views, which appear to be supported by the authorities above cited. As well as directing the jury to consider the alleged impulsive mania in connection with the act perpetrated by the accused, I also told them that if the impulsive mania was so complete as to control the prisoner's acts generally, they might find insanity to be proved. It was in connection with this aspect of the case that I referred to the fact that the defence was not set up of insanity still existing at the time of the trial. The question is one of great importance, and I am glad that the opportunity has arisen to obtain an authoritative decision thereon, for the guidance of all our Courts.

Mr. McGregor and Mr. Gardiner appeared for the prisoner.

Mr. Howel Jones for the Crown.

Mr. McGregor: There has been no formal decision upon this point since *McNaughton's case*; *Stephen's History of the Criminal Law* (Vol. 2, p. 153). I submit that the jury should have been directed to decide, not whether the prisoner knew the difference between right and wrong, but whether, even if he did, his will-power was so untinged that his mind did not do its rational work. The Roman-Dutch law authorities are not of much assistance upon this point. *Carporius* (Pt. III., Question 145, sections 14, 53, 59). He says that the act must be a voluntary act. *Damhouder, Praxis Rerum Criminalium* (C. 89, section 9); *Van der Linden* (2, 1, 4) uses the expression "persons of defective understanding and will." The Roman-Dutch authorities draw distinctions between different grades of insanity. *Erskine's Principles of the Law of Scotland* (p. 545) refers to lesser degrees of insanity. I submit (1) that insanity is a disease and that it is a disease with many gradations, but that a man cannot be partially sane and partially insane; if insane in one particular, the insanity affects his whole being; (2) insanity or unsoundness of mind means and inevitably produces loss of will-power and inability to control actions; (3) this want of control should be taken to mean immunity from punishment, partial or total,

and this should be substantially put to the jury in the charge. *Stephen's History of the Criminal Law*, commenting on *McNaughton's case* (pp. 157, 161, 171, 183; also pp. 149, 167); *Maudsley, Responsibility in Mental Disease* (pp. 109, 213, 216, 199). There should not be a reference to any particular act, but the jury should be directed with regard to the prisoner's general incontinability of his actions. One cannot ascribe to the insane mind the same power of reasoning as to the sane mind. The mind gets weakened and cannot be held responsible. *Maudsley* (pp. 69, 12, 17, 213, 216, 172, 193, 195, 198); *Luff on Toxicology* (p. 318), citing *Regina v. Gill* (1883); *Quain's Dictionary of Medicine* (p. 316); *Art. Criminal Responsibility*; *Dixon-Mann on Forensic Medicine* (p. 351); *Bishop on Criminal Law* (section 387, note); *Stephen's History of the Criminal Law* (p. 175); *Taylor's Principles of Medical Jurisprudence* (pp. 570, 575, 576); *Taylor's Manual of Medical Jurisprudence* (pp. 735, 775, 786, 789); *Guy and Ferrier's Forensic Medicine* (pp. 185, 189, 196, 197); *The State v. Pike* (6 American Rep., p. 533, at p. 585); *The State v. Anderson* (21 American Rep., p. 669, at pp. 674, 675); *Parsons v. The State* (60 Am. Rep., p. 193, at pp. 201, 205); *The State v. Jones*, cited by *Maudsley* (p. 99) and another American case cited by *Maudsley* (pp. 102, 103); *Regina v. Oxford* (9 C. and P., p. 546).

*Postea* (May 25th).

Without calling upon Mr. Jones, the Court gave judgment.

De Villiers, C.J., said: The prisoner, Gilbert Hay, was tried before Mr. Justice Buchanan for the murder of his mother. He was convicted and sentenced to death, but after sentence the following questions were reserved, at his counsel's request, for the consideration of this Court, viz.: "Whether the direction of the learned judge that the jury, in order to arrive at their verdict, should inquire whether the prisoner was able to distinguish right from wrong as to the act in question was a sufficient direction, or whether there should in law have been the further direction that they should also inquire whether the mental condition of the prisoner was such as to deprive him of the power of controlling his own conduct or of abstaining from doing any given act." The point thus reserved raises questions of paramount interest and importance which have never been authoritatively decided by this Court. The 26th section of the Native Territories

Penal Code enacts that "to establish a defence on the ground of insanity it must be proved that the offender was at the time he committed the act labouring under natural imbecility or disease of or affecting the mind to such an extent as to render him incapable of appreciating the nature and quality of the act, or that the act was wrong. A person labouring under specific delusions but in other respects sane shall not be found not guilty on the ground of insanity unless the delusions caused him to believe in the existence of some state of things which if it existed would justify or excuse this act." This enactment has obviously been taken over from the English law, as it is supposed to have been established by the answers of the judges given to the House of Lords in *McNaghten's case* (10 C. and F. 200). I say "supposed" to have been established, because the answers thus given were really extra-judicial opinions given by the judges to the House of Lords upon an abstract question of law to assist them in a debate which had arisen in consequence of the acquittal of McNaghten by a jury, before whom he had been tried for the murder of Mr. Drummond. The opinions thus given are not, in my opinion, binding on this Court, nor is the enactment I have cited from the penal code applicable to the part of the Colony in which the prisoner's offence is alleged to have been committed. The question, therefore, as to the tests which should be applied to ascertain the criminal responsibility of persons suffering from mental disease is fully open to the Court. It is a commonplace remark in the administration of the criminal law that there can be no crime, in the true sense of the term, without a criminal intention. This intention, which was sometimes expressed by the Roman jurists under the term "*voluntas*," implies the existence of a power of exercising and controlling the will. This power everyone is presumed to possess until the contrary is proved. Under the Roman law as well as under the Dutch law it was always admitted that no criminal intention could be held to exist where an offence was committed by an insane person, but the question whether insanity did or did not exist in any particular case was treated, as it ought to be treated, as a question of fact and not of law. Under the law of England also insanity at the time of the commission of an offence is a good defence to a criminal prosecution, but

the test as to the existence of insanity has been treated as a question of law rather than of fact. In *McNaghten's case* it was laid down by the judges that "to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong." The clear inference from this rule is that the defence would not be established by proof that, although the accused knew the nature and quality of the act and knew that he was doing wrong, he was suffering at the time from a mental disease which created an irresistible impulse to commit the deed. The objection to the rule appears to me that it practically treats the existence or otherwise of a specific disease of the mind as a question of law to be decided by judges instead of treating it as a question of fact to be decided by a jury. Whether there does exist a diseased condition of the mind which absolutely prevents the sufferer from controlling his own conduct, although he may know the difference between right and wrong, is a question of fact which scientific men, who have studied the question in all its bearings, can alone decide. Until it was established as a scientific fact of which Courts might take cognisance it was necessary in each case to take the evidence of experts on the point, leaving it to the jury to decide the question. When once, however, the existence of such a disease is established it seems to me to be impossible to avoid the conclusion that an act which was committed by reason of the disease was not a wilful act, and therefore not criminally punishable. Supposing, to put an extreme case, a person of great strength were to force a pistol into the hand of a weaker man and force the weaker man's hand to aim and fire at another person, it is obvious that the deed is not that of the weaker man. But if it be proved that a mental disease is of such a nature as to supply from within a compulsion which the mind enfeebled by the disease is wholly unable to resist, it would only be carrying out well-established principles of law to hold that the person's knowledge that the act was wrong does not constitute the act a voluntary one. He may know the difference between right and wrong, and yet may be incapacitated by disease from choosing

between the two. That such a disease does exist is the almost universal testimony of physicians who have made mental diseases the subject of special study. Its existence has more than once been admitted by English judges in their charges to juries. In the case, for instance, of *Queen v. Cockroft* (Taylor's Med. Jur., p. 788), which was a trial for murder, Mellor, J., observed that "if the jury thought that the prisoner knew at the time when he committed the act that he was doing wrong and was not labouring under such a disease of the mind as incapacitated him from controlling his impulses, he was not entitled to acquittal on the ground of insanity." There are numerous cases in the American courts in which the existence of this form of disease was taken for granted. In one of the latest of these cases (*Parsons v. State*, 60 A.R., 193) Somerville, J., in delivering the considered judgment of the Alabama Court, made the following observations: "If it be true, as a matter of fact, that the disease of insanity can, in its action on the brain through a shattered nervous organisation, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim to choose between the right and wrong, although he perceive it, is such a one criminally responsible for an act done under the influence of such controlling disease? We clearly think not, and such we believe to be the just, reasonable, and humane rule towards which all the modern authorities in this country, legislation in England, and the laws of other civilised countries, are gradually but surely tending." The German Code recognises the rule by declaring that "an act is not punishable when the person at the time of doing it was in a state of unconsciousness, or of disease of the mind by which a free determination of the will was excluded." In a case tried before me some years ago, a woman was charged with the murder of her child, of whom she was proved to have been passionately fond. It was proved that she tried to conceal the deed, thus and in other ways showing that she knew she was doing wrong, but it was also proved that insanity was hereditary in her family, and that at the time of committing the act she was labouring under an insane delusion that a heavy calamity was overhanging her and her child, which she could only avert by killing the child. If the tests laid down in *McNaghten's* case had been applied she would have been criminally

ally responsible, because she knew she was doing wrong, and the state of facts with respect to which her delusion existed would not have justified her in taking the child's life. I directed the jury, however, that if she was suffering from a mental disease which irresistibly impelled her to do the act or prevented her from controlling her conduct in reference to that act, she should be acquitted on the ground of insanity. There was evidence, medical and otherwise, of her suffering from such a disease, and she was acquitted accordingly. The act committed by her was prompted by the delusion, and there was accordingly a distinct relation of cause and effect between her mental disease and her alleged crime. If no such relation of cause and effect had existed, there would not have been sufficient evidence to show that the act had been committed by reason of the duress of her mental disease. Owing to the form in which the questions have been reserved in the present case for the consideration of the Court, it is impossible to give concise and direct answers to them. The terms in which it is contended the direction of the presiding judge ought to have been given appear to me to be incomplete by not making it clear that the disease was the cause of the particular act charged. The correctness of the directions given by the learned judge can only be tested by reference to the evidence actually given. If there had been evidence which might reasonably have induced the jury to find that the accused had lost the capacity to control his conduct the directions given would, in my opinion, have been insufficient, and it might have become necessary to direct the discharge of the accused. But after carefully reading the evidence I am satisfied that the jury would not have been justified in so finding. There was evidence that he sometimes laboured under the delusion that the devil was urging him to do some wicked deed, but these delusions were temporary in their nature, and came on after drinking more than was good for him. Evidence that his mind was temporarily weakened by drunkenness and thus subjected to delusions would not by itself constitute proof of disease of the mind dominating his will and preventing him from controlling his own conduct. He seems not to have been a confirmed drunkard, but knowing that the effect on him of drink, even in moderate quantities, was to bring on his delusions about the devil, he did wrong in not abstaining from



drink. There is no evidence, moreover, to connect the killing of his mother with the delusions which occasionally possessed him. There seems to have been hereditary weakness of intellect and of will power, aggravated by occasional intemperance, which may deserve consideration in deciding whether the extreme penalty of the law should be enforced, but there was no evidence of such an incapacity to control his own conduct as to relieve him from all criminal responsibility for his atrocious act. In the absence of such evidence I am of opinion that the verdict should not be disturbed. The answers, therefore, which the Court must give to the questions reserved are as follows: (1) Where the defence of insanity is interposed in a criminal trial the capacity to distinguish between right and wrong is not the sole test of responsibility in all cases; (2) in the absence of legislation to the contrary, Courts of law are bound to recognise the existence of a form of mental disease which prevents the sufferer from controlling his conduct, and choosing between right and wrong, although he may have the mental capacity to distinguish between right and wrong; (3) the defence of insanity is established if it be proved that the accused had, by reason of such mental disease, lost the power of will to control his conduct in reference to the particular act charged as an offence; (4) the capacity of the accused to control his own conduct must be presumed until the contrary is proved, and that, therefore, in the absence of such evidence in the present case as might reasonably have induced the jury to find that the accused had lost such capacity, the verdict should not be disturbed, although the learned judge is stated in the questions reserved not to have directed the jury to inquire whether the mental condition of the accused at the time when he committed the act was such as to deprive him of the power of controlling his conduct. The result is that the verdict and sentence must be confirmed.

Buchanan, J., said: The discussion raised by the point of law reserved has gone beyond the actual requirements of the case before us. As far as that particular case is concerned I am satisfied on reconsideration that the directions given by me to the jury were in accordance with its requirements. The actual terms of my direction are sufficiently detailed in my reasons, which are with the papers. The larger issue dealing with the question of insanity as a defence

in criminal cases in the abstract has, however, been most usefully considered, and the points of law stated with such clearness and preciseness by the learned Chief Justice will greatly assist our criminal courts in the future. The law has never before been authoritatively laid down by our Court of Appeal. Opinion on the subject of insanity has long been indefinite owing to the progressive views necessitated by the advance of science and knowledge, and as a consequence of a more humane conception of the criminal liability of lunatics. It is interesting to note that our Legislature, in 1886, adopted in the Native Territories Penal Code the test of the appreciation of right and wrong, and also laid down that a person labouring under specific delusions, but in other respects sane, shall not be found not guilty on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify and excuse the act (section 26). The reasoning of the Chief Justice will now, however, place our Colonial law on a sounder basis. The arguments of counsel, which go beyond what I think the law allows, have been sufficiently dealt with by his lordship, and I could not with any advantage again go over the ground covered by his judgment, in which I will only express my concurrence generally.

Maasdorp, J., also concurred.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

LITSENBORGH V. DE BEER } 1899.  
AND LOUW. { May 19th.

Malicious prosecution—Reasonable and probable cause—Malice—Polling officer.

*The defendants, upon the receipt of certain information with respect to the conduct of the plaintiff as a polling officer at a Parliamentary election, sent a letter to the Magistrate of the district, making certain allegations and requesting him to make an inquiry into the matter. The allegations made constituted four distinct charges of misconduct. The Magistrate held a preliminary examination*

*upon these charges, but the Attorney-General refused to prosecute. In an action for malicious prosecution instituted by the plaintiff,*

*Held, that inasmuch as there was reasonable and probable cause for three of the charges, malice could not be inferred from the absence of such cause with respect to the remaining charge.*

This was an action for damages for malicious prosecution.

The declaration set forth that the parties all resided in the Piquetberg district. In August last an election took place for the House of Assembly, and plaintiff was appointed polling officer for the Uithoek district. Thereafter the defendants wrongfully, maliciously, and without reasonable and probable cause preferred a charge against the plaintiff in the Resident Magistrate's Court, Piquetberg, to the effect that plaintiff had in the exercise of his duty as polling officer contravened the law and been guilty of criminal offences in that the voting had taken place with closed doors; that the persons voting were not allowed to throw their papers into the ballot-box, but that the papers were first opened by the plaintiff; that drink was supplied by the polling officer in the polling-station to persons who had voted according to his wishes, and that persons were allowed to vote who were not entitled to do so. It alleged that a preliminary examination was held by the Magistrate upon the said charges, but the Attorney-General refused to prosecute, and the criminal proceedings accordingly ended. Plaintiff now claimed £1,500 as damages.

Defendants' plea was that there was reasonable and probable cause for preferring the charge and causing the said proceedings, and that in so doing they were acting without malice, and in the *bona-fide* belief that they were discharging a public duty.

Sir H. Juta, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff, and Mr. Innes, Q.C. (with Mr. Graham, Q.C.), for the defendants.

Arthur William Baker, Resident Magistrate for Piquetberg, said that he knew the parties in the suit. Plaintiff was Field-

cornet and polling-officer at Uithoek, in the Piquetberg division. In August witness read a letter signed by De Beer and Louw (the defendants) drawing attention to the manner in which the election had been conducted, and asking that an inquiry should be instituted. This letter he referred to the plaintiff for report, and received a report in reply. On September 20 witness had another letter from defendants enclosing the names of witnesses in the matter, and asking that an inquiry should be proceeded with. Witness replied to this asking for sworn declarations, which were subsequently supplied. The sworn declarations were made by Dr. Gough and Verkuy, but witness was not present. A summons was then issued, and subpoenas were sent out, and a preliminary examination was held on October 21 under the Ballot Act. The charge was the contravention of certain regulations published under the Constitution Ordinance and the Ballot Act. Questions were put by Mr. De Beer, one of the defendants. The trial caused a good deal of interest, and the court was crowded. Witness sent the whole proceedings to the Attorney-General, who declined to prosecute. The position of the plaintiff in the district was a very good one indeed.

Cross-examined: There were not many votes recorded; about 100. Witness knew the room where the election took place. There was a door and a window in it, the latter shutting with a flap. He sent the original letters to Mr. Litzendorgh for report. He held the examination simply to find out what regulations had been contravened, and there was no committal. As far as witness knew, plaintiff had sustained no more damage than the trouble he had been put to.

Re-examined: It was usual at these polling places for a rush to take place at one time of the day, after which there would be little more voting.

Jacobus Hendrik van Litsenborgh, plaintiff, residing at Uithoek, in the Piquetberg division, said he had been Field-cornet for fifteen years, and J.P. for ten years. His farm adjoined De Beer's, and Louw's adjoined De Beer's. He was polling officer at the General Election last August and received certain instructions. At the time of the election witness was not on very good terms with the defendants. He had had a dispute with Louw about some horses. The latter used to drive his horses on to witness's

farm and hobble them there. Witness had threatened him with proceedings for ill-treating his horses. He had also threatened him for ill-treating his pigs. Witness had had a dispute with Louw's father about some land, which caused dissension between them. Witness had had a dispute with De Beer about some land at Elandsveit. He had also had to take steps owing to De Beer breaking the rinderpest regulations last year. Defendants made witness an offer to drop the criminal proceedings against him on condition that witness sent in his resignation as Justice of the Peace and polling officer. He remembered that at the poll there was a great rush of voters in the morning, and he had the doors closed, admitting one voter only at a time. The window was open all the day, and Verkuyt came to the window. Witness did not touch any voter's papers after the voting. He knew one Visser, a blind man, and took his declaration, voting for him according to instructions. Witness denied that he told any people how they must vote. He never took any voter's paper to see how he had voted. The voters had to show witness the papers with the official mark at the back, but some of the voters brought their paper open, and he told them to fold them so that he could see the official mark. Witness was asked to see the crosses marked by the voters. There were three candidates, De Waal, Marais, and Brink. The latter might have had an agent outside the polling-station. Rieve, De Waal and Marais' agent, were inside the polling-room the whole time. No votes were given after two. Witness denied having ever given drink to people who voted according to his wishes. He gave Louw, the defendant, a drink in the afternoon. Louw had voted in the morning. De Jongh was with Louw. One Moutton was in the room when Louw came to say good-bye. The latter asked for a glass of wine, and witness gave him and De Jongh a glass each. Verkuyt, who was outside the window, also had a glass of wine, which witness handed through the window. He might have given Moutton a glass also, but that was after he had voted. This was the only drink he gave anyone. He denied allowing anyone to vote who was not entitled to vote. Moutton was a registered voter. Witness heard complaints first of all when he received a certain letter from the Magistrate. The handwriting of the letter was

De Jongh's. Witness was eventually brought up before the Magistrate, a great deal of interest being taken in the case. He was put to about £30 expense, and since the examination he had noticed people saying that the charges were true. He asked for £1,500 damages. He had never heard any complaints against him before. Louw told him he was working on Brink's behalf, but De Beer never spoke about the question. Witness certainly considered that his character had suffered.

Cross-examined: Witness had always been good friends with Louw, "the kind of friendship that exists among farmers." He had quite recently been to Louw's house, but had not had meals there. Louw gave him water for his cattle, and he gave Louw pasturage in return. That was before these proceedings. Louw had said that he had no feeling against witness, and that it was only on account of his conduct as polling officer that he brought the action. Witness was not friendly at all with De Beer. He had had coffee at De Beer's house, the defendant's daughter bringing it to him. That was lately. Witness had never had a quarrel with him. Before the election witness went round with requisitions for De Waal and Marais, and asked the two defendants to sign. He asked a number of men to sign, and distributed circulars. Witness denied making any promises. Verkuyt bought three loads of manure for £2 after the election. The conversation with Louw, in which the latter said he would drop the prosecution on certain conditions, took place after the preliminary examination. Witness did not think Mrs. Verkuyt was present when he had the conversation with Verkuyt about the manure. On the polling day witness and Rieve were alone in the polling-room. Witness locked the door once. That was after voting was finished at two o'clock. He left Van Zyl (a voter) and Rieve, the agent, alone in the polling-room, shut the door, and went away to his house. The number of votes taken at Uithoek altogether were from 80 to 100. Witness never counted the votes. There was such a crush that he was frequently obliged to close the door. When the voters came in one by one he told them to close the door behind them, so that witness, Rieve, and the voter were alone in the room. Witness might have said to Van Zyl, "I wish you would instruct the people how to vote. They stay such a long time in the compartment

and only give one vote." Witness knew that a number of voters only gave one vote. One old man, De Waal, brought witness a paper which was not filled in, and asked him where he must sign. He told him to go to the compartment. He never asked Mr. De Beer for his paper. Witness told Rieve, the agent, to show one J. de Waal how to fold his paper. Witness denied that he asked De Waal for his paper, saying he was too stupid to fold it. He also denied having opened the paper and looked at it. He never asked for any papers at all. He had a little keg of wine in the room.

You told the Magistrate that you only took a bottle of wine into the room for your own use?—There was a little keg as well. Witness brought the wine-keg there himself. He admitted giving Verkuyl, De Jongh, and Louw wine, but denied giving it to anyone else. When Louw came in Moutton had finished voting. Witness never showed him how to vote, or anyone else. He could not swear whether he gave Moutton any wine. He only employed one agent for his defence.

Re-examined: The circulars were sent by witness in stamped letters. He did not know what the contents were, and it was quite usual for him to do this. He had a field-cornet's post. He left the polling room, leaving Rieve and Van Zyl there, because his spectacles broke. He was only away a minute. He used the room where the poll was taken as an office, and it was usual for him to keep wine there.

By the Court: He was a married man. He had only two rooms, a kitchen, and a pantry in his house.

De Villiers, C.J.: Why don't you keep your wine there?—Well, I do keep it there, but I tap it and take it into the office. My wife keeps the pantry key. Witness said he kept some wine in the pantry and some in the outhouse. He kept it in two places, so that he might not have to go in search of his wife for the pantry key whenever he wanted wine.

By Mr. Innes: Witness denied that on the evening of the polling day he said to the people in the neighbourhood, "All you that have voted for Marais and De Waal, come and have something to eat and drink."

Francois Joseph Rieve, of Boddefontein, Piquetberg, said he was an unpaid agent for De Waal and Marais at the election. Plaintiff was not assisted in his work by any

one. There was a great rush to the poll on the morning of the day. Plaintiff told the voters to come in one at a time. He never saw plaintiff open any ballot papers during the day. Plaintiff however assisted Visser, the blind man, but he was the only man whom plaintiff helped. Witness never heard plaintiff tell anyone how they must vote. If the plaintiff had touched any papers witness must have seen him do so. He remembered Louw having wine. It was just after Moutton had voted. De Jongh came in just afterwards. Witness was not aware that there was wine in the room. This was the only occasion on which he saw wine given. He could not remember whether Moutton got any drink. Witness saw nothing improper on the plaintiff's part the whole day. De Beer had dinner with plaintiff in the evening.

Cross-examined: Witness had no wine in his cart when he came over to the election. In the evening he got some wine from Mr. Kotze. He denied reading out the numbers to the plaintiff in the polling-room. Witness denied the accuracy of the record in the preliminary examination, where it was reported that he had admitted that the evidence of De Jongh and De Beer was correct. Witness knew a man named Fuchs, but never offered him a glass of wine or asked him for his paper. He knew one Haanekamp, but never examined his paper. The only paper witness touched was De Waal's. Witness could not remember being alone in the room with Van Zyl, but he remembered plaintiff leaving the room for a moment. The door was left open.

Jacobus Johannes Eckstein, member of the Piquetberg Divisional Council, said he remembered a conversation he had had with Mr. De Beer and others, who expressed themselves dissatisfied with plaintiff's behaviour as polling officer. This was after the criminal proceedings had been commenced.

John Meissenheimer, general dealer at Piquetberg, said he was at the polling-station at Uithoek. He remembered telling the voters to come in one by one to record their votes. He was with De Beer nearly all day, but never heard him make any complaint as to plaintiff's behaviour.

Cross-examined: Witness arrived at Uithoek at eight a.m. and left at five. He had nothing to drink in the polling station, but he offered some relations of the plaintiff some wine. Witness gave Mr. De Beer and his son wine during the midday meal. He denied giving either of the De Beers wine

in the polling-station. He never saw a rush at the polling-station.—He never saw the door of the polling-station locked, nor did he hear plaintiff say that anyone who had voted for De Waal and Marais might come and have lunch.

Re-examined: If old Mr. De Beer were to say that witness gave him drink during the day at the polling-station witness would deny it. Witness was working for Brink.

This closed the case for the plaintiff.

For the defence,

Johannes de Waal, said he voted at Uithoek on the day in question. The door was closed at the polling-station. Witness got his paper and made his mark on it. The plaintiff then asked him on whose side he was. That was before he voted. Witness replied, for Brink. Plaintiff, after he had voted, told him to give up his voting paper, as witness was too stupid to fold it up. Plaintiff then opened it so that he could see the cross on the inside. Witness then went out.

Cross-examined: When witness came in plaintiff asked him what was his name, but not where he came from. Witness folded up his paper after he had voted, but could not say whether he folded it absolutely right. His cross was folded on the inside. Plaintiff never told him to fold up the paper so as to show the official mark. Witness told De Beer that plaintiff opened his voting paper two days after it happened.

A. Haanekamp, a farmer in the Piquetberg district, said that on the polling day after he had voted plaintiff told him to hand the paper to Rieve "to see if it was right." Rieve opened the paper as witness was leaving the polling-station. Witness, at plaintiff's request, then gave the paper open to the latter, who looked at it.

Andries Kleusen said he knew plaintiff well, and was a voter at the last election. Plaintiff met him a day or two before the election, and asked him for whom he was going to vote, adding "De Beer wants you to vote for Brink. They are both equally stupid. Come to-morrow and vote for De Waal and Marais." The next day witness went to vote, and entered the room. Plaintiff was standing in the room. Rieve was also there. Plaintiff asked witness twice, "For whom are you going to vote?" Witness made no reply, and plaintiff took a voting paper and said: "Look here. Vote for these two men. The other is of no significance." Witness then folded his paper, and was about to put it into the ballot-box when the plaintiff said, "Give it me; it's

not all right." Witness gave it to plaintiff, and then went out. Witness told his brother about this the same day, and some time after De Beer came to him about it; this was shortly before the action.

Cross-examined: Plaintiff said, when he saw whom witness had voted for. "Good gracious, everyone is voting for Brink."

Johannes Christian van Zyl said he had been polling officer at Clanwilliam for several years. He was now resident at Piquetberg, and went to record his vote at Uithoek on the day in question. When he entered Rieve called out his number, and plaintiff said: "Where have you been so long? You might have come in and instructed the people how to vote, because they go and stand there, and then only give one vote." He was certain that this was what was said by the plaintiff. This was about eleven. There was a smell of wine in the room. He took particular notice of this, as something that had occurred outside had attracted his attention.

Cross-examined: Uneducated people sometimes asked the polling officer how they ought to vote. Witness would allow a paper to be put into the ballot-box even if he had not seen the official mark upon it. People would sometimes come up to the polling officers and ask them how their papers should be folded, and generally how they should proceed.

Michael Johannes de Beer, uncle of the defendant, said he remembered the plaintiff coming to witness's house the day before the poll. Plaintiff said he had a message for him from Mr. Stephan. Plaintiff asked if he was in need of money, and he replied, "Yes, I am always in need of money." Plaintiff told him to vote for De Waal and Marais. Witness refused to take money. Plaintiff came to witness again later, and asked him if he was coming to vote, and told him if he came his house would be free and open for eating and drinking. Witness went to the polling-station on the polling-day, and the door was closed behind him. Plaintiff asked him to go and vote, and came and stood next him in the polling-compartment, and said, "Vote for these two people," indicating two names on the polling-paper. Witness recorded his vote, and plaintiff took the paper and said he would see to it. Plaintiff then said, "Have a drink of wine." This was a little after ten. Witness went into the voting-room a little after twelve with his son,

and again had wine. Witness saw Miss Van Zyl hand the keg of wine through the window.

Cross examined: Louw was witness's cousin, and De Beer was his stepbrother's child. De Beer was very active in Brink's interest. Meissenheimer promised to give witness drink if he voted for De Waal and Marais.

But Meissenheimer said he was very energetic for Brink:—I don't believe it.

Continuing, witness said that he voted for De Waal and Marais not on account of his having had wine, but because plaintiff stood next to him. Witness would have cheated the plaintiff about the voting if he could, but the plaintiff stood too close.

You said nothing to the Magistrate about Meissenheimer being present:—No, I wasn't asked. I've added a lot to what I said before the Magistrate. The wine didn't make a difference.

But you said that the wine did make a difference:—Well, I thought that as he was taking such very particular care of me, I would take a glass of wine in return.

Cross-examined at considerable length as to the correctness of certain statements recorded in the preliminary examination, and as to why he had not made certain statements to the Magistrate, witness said the Magistrate must have omitted to take them down.

By the Court: Witness told De Beer what he had told the Court two or three days after the poll.

By Mr. Innes: Witness had voted at a previous election, when plaintiff was polling-officer. The door of the polling-station was then left open.

M. J. de Jongh, school teacher at Uithoek, said that on the polling day after witness had given his vote Rieve called out a number and plaintiff took the paper and looked at it. Witness was about to leave when plaintiff called him back and said, "Have some wine." Witness had some wine. This was about ten in the morning. In the afternoon witness was again at the polling-station when Moutton was in the room. Louw said to plaintiff, "Give me a glass of wine as I'm going now." Plaintiff said, "A Bondman and a Rhodesman can't drink together." Louw said, "Never mind that now," and then they all had a drink Moutton then said, "I came here to vote for a dop, and I got it." Witness did not speak to Louw or De Beer about anything else that transpired.

Cross-examined: If there was a rush of electors the best thing was to have closed the door. When witness came out from voting he had no idea there was anything wrong. Witness took the glass of wine as a friend, and not because he voted. Plaintiff never spoke to him before the election. Witness saw Miss Van Zyl put in some wine through the window. This was about 10.15. Nothing whatever was said about voting in the afternoon when witness was at the polling-station, and witness had no suspicions whatever that there was anything that there should not have been.

By the Court: De Beer told witness that he had certain information from witnesses before he wrote the letter. After hearing what De Beer had said witness had suspicions. Nothing was said by De Beer that seemed to indicate that he was actuated by spite. De Beer appeared to thoroughly believe what the witnesses had said to him.

Michael Johannes de Beer, one of the defendants, said he had had no quarrel with the plaintiff, and had no personal feeling against him. Witness was still on good terms with him. Witness went to the Uithoek polling-station, the door of which was closed by Rieve after witness had entered. There was no crowd near the door. Witness saw plaintiff leave the polling-room and lock the door. Rieve and Van Zyl were in the room at the time. Young De Waal and old Mr. De Beer spoke to witness about the events of the day shortly afterwards. Witness had stated in the letter to the Magistrate that persons had voted who were not entitled to vote on account of the Moutton incident, Moutton's name not being correct. An agent had taken exception to Moutton's voting, but the latter went in again and voted. Witness and Louw had been asked by all the leading men of the place to take up the matter as a public duty. Plaintiff had been to witness's house since the criminal proceedings.

Cross-examined: Witness dictated the letter that was written to the Magistrate. Amongst the charges was one that drink had been given at the polling-station to people about to vote.

When you made that statement you knew nothing whatever about that charge?—Yes, I did.

Who told you about it?—Old Mr. De Beer and Verkuyl.

Now, before the Magistrate you said with regard to charge No 3: I know nothing about that?—I had no personal knowledge of it.

Continuing, witness said he was aware there was only one Moutton, a harness-maker, resident at Verlorenvlei. Witness was not aware that a person whose name was down wrongly in the register roll was none the less entitled to vote. All the witness wanted was an inquiry. Witness had had a hawker's licence in Namaqualand. Plaintiff had never made any inquiries about that licence. Witness remembered having brought some cattle from Malmesbury into the Piquetberg district at the time of the rinderpest regulations, but plaintiff had never taken any steps against him in the matter.

Wasn't the whole of the proceedings instituted by you so that you might do as you liked when he had resigned his field-cornetcy?—No.

Witness denied having ever said to the plaintiff that he would withdraw the action if Litzenborgh would resign. He had never said so to White, a policeman. White served a subpoena upon him.

Adriaan H. P. Louw, one of the defendants, said he had had a conversation with the plaintiff about withdrawing the charge. Witness had no personal feeling against the plaintiff. They had all lived in peace and happiness. Plaintiff had asked him to vote for De Waal, and said, "What is the good of voting for Brink. He is too ugly and too stupid to be sent to Parliament." Witness said, "Never mind if he is ugly. If he is too stupid to be good he is too stupid to do any harm in Parliament." On the occasion when wine was drunk in the afternoon, plaintiff said, "A Bondman and a Rhodesian can't drink together," but witness replied, "Oh, a glass of wine will make us all jolly together."

Cross-examined: Only those who voted for Brink did not get wine from the plaintiff. So at least he was told at the time. Witness was working on Brink's behalf.

Sir H. Juta: Is this correct (reading from the records): "I only base my charge against Mr. Litzenborgh on Moutton's remark that he only came to vote to get a glass of wine"?—Yes.

So you brought a criminal charge against a polling-officer upon what you thought and without proof?—Yes.

And of course you are the best of friends?—Yes.

Do you remember his saying he would prosecute you for cruelty to the horses or pigs?—The pigs and horses were well treated.

Sir H. Juta: Four charges have been made and the defendants must prove reasonable and probable cause and absence of malice with respect to each one of them; it will not be sufficient to show this with respect to any individual charges less than the whole number. There was no *bona fides* shown in the case of the first charge; what was meant was that the doors were locked and voters thereby prevented from going into the room, not that the door was simply shut; shutting the door was a very reasonable precaution to take in order to ensure only one voter going in at a time. As to the second charge there is a conflict of evidence, and with respect to this it is probable that ignorant people would misunderstand a request by the polling officer that they should show him the official mark and satisfy him that the voting paper had been properly folded. With regard to the third charge it is not sufficient to prove merely that drink was given, but it must be proved that it was given to those who voted as the plaintiff wished them to. As to the charge that persons not on the voters' roll were allowed to vote the only case brought up was that of Moutton and the evidence given with respect to him was not sufficient to base such a charge upon. This case should be judged as if that were the only charge made. Malice should be inferred from the fact that the defendants did not wait for sworn depositions on the point but insisted that the Magistrate should hold inquiry upon verbal statements.

Mr. Innes was not called upon.

De Villiers, C.J., said: The question which the Court has now to determine is not whether plaintiff has been guilty of any of the charges alleged against him, but whether defendants, in making those charges, had reasonable and probable cause for making them, and whether they were influenced by malice. Going into the history of the case, we find that the plaintiff himself was an active politician before the events complained of occurred. He had taken an active part in canvassing for certain candidates, and he had also been the means of distributing circulars which the Committee van Toezicht had authorised. Plaintiff says that he was not aware of the contents of these circulars, but I am unable to accept that statement in view of the fact that he had approached several persons before the election with the object of inducing them to vote for a certain person. One might at

all events have expected that at the polling station he would have shown some partiality as between the two candidates. The facts as proved clearly show that the first thing he did was to prevent more than one person coming into the polling place at a time. It is said that there was a great crush there, and that it was necessary for him to close the door after each voter had come in. But it seems almost absurd to speak of such a crush when only one hundred persons had to vote, and had from eight a.m. till five p.m. to record their votes. There seems to have been no necessity for so carefully closing the door, more especially as there was only one agent present. It would have been better to have allowed at least two people to have come in at a time, so as to have prevented anything improper taking place. I think that the statements made by witnesses on behalf of the defendants prove that plaintiff took the opportunity, after persons had voted, to obtain from them the voting papers, and under the guise of folding them properly, to open them and see for whom they were voting. This the plaintiff denies. There is also evidence that plaintiff had taken wine into this room. It is not quite clear how much was consumed, but however little was consumed, it was a most improper proceeding on the part of a polling officer to supply a voter with liquor on a polling day. To my mind it is most reprehensible. If it is true that the cask of wine was handed through the window on two occasions by Miss Van Zyl a considerable amount of wine must have been consumed. There was, according to one witness, a smell of liquor in the room. Now these facts having been clearly proved it appears to me clearly a case for inquiry, and any voter to whom these facts had been brought would really have been guilty of a dereliction of duty if he had not brought them to the notice of the authorities. That is what defendants did. They made no criminal charge. They sent a letter which was a very fair letter to send to the Magistrate, saying that certain facts had been brought to their notice, and they requested the Magistrate immediately to make an inquiry into the case, and the allegations made by them were those which are now relied upon as constituting a malicious prosecution. The first was that voting had been held with closed doors. I consider that this charge has been proved. The second allegation was that persons who voted had not been allowed

threw their voting papers into the ballot-box, but that the papers were first opened by the polling officer. It has been proved that some of these circumstances did take place is placed by the plaintiff upon the third and fourth charges as showing a want of reasonable and probable cause. Now it is said that drink was offered to Louw, who did not vote according to plaintiff's wishes. But drink might also have been offered to others who did vote according to his wishes. We have the evidence of De Beer on that point. There was therefore reasonable and probable cause for at all events the three first charges. But main reliance is placed by the plaintiff upon the fourth charge that persons were allowed to vote who had no right to vote. Upon that point the evidence is not so satisfactory. There is, however, the case of Moutton, who was first called in and not allowed to vote, and was afterwards allowed to vote. But supposing that there was no reasonable cause for this charge as it stood alone, the question is whether there was proof of malice in regard to this charge. But the Court cannot infer malice if there was good cause for the first three charges. In order to prove malice some evidence has been led as to previous quarrels between the plaintiff and defendants. Really, these quarrels were of the most trivial description, and amounted to nothing, and it is wholly incredible that the defendants would have preferred these charges by reason of those petty little quarrels. The question of malice has wholly failed. It is certainly to be hoped that after this glaring instance of the manner in which elections are conducted such a thing will not occur again. Judgment must be for the defendants with costs.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendants' Attorneys, D. Tennant.]





were engaged during the day at work on the farm, but that these natives might do so after sundown when they had finished their day's work for him. Defendant continued to send wagons for these mealies from time to time, and received delivery from plaintiff until about one month before Xmas, 1898, when plaintiff deliberately refused to allow his natives to take the balance of mealies out of his store room or load them on defendant's wagon. This was reported to defendant, who again sent his messenger requesting delivery of the balance of mealies, but plaintiff still refused to do so, and the defendant's wagon left without any load after a delay of three days, and defendant alleges he had to purchase mealies elsewhere at great personal inconvenience and some loss in order to supply his post cart horses at the various stables, he being a contractor for the conveyance of mails by post cart. It is difficult to understand why plaintiff refused to deliver the balance of mealies; they were stored on his premises, and it was his clear legal duty to remove them on to defendant's wagon from his store-room. He plaintiff maintains that when he told defendant that he had reaped 350 bags of mealies for him, and that they were lying in his plaintiff's store-room ready to be taken away, that he there and then actually delivered them to defendants and had nothing more to do with them. Defendant on the other hand alleges he never went to the plaintiff's farm to see the 350 bags of mealies, nor did he take delivery of them, that it was understood between plaintiff and himself that he should take delivery as transport offered, and it appears he did so take delivery by his agents of 270 or 271 bags, for which he has paid the sum of £270. The Magistrate held that the position taken up by the plaintiff was wrong, and that he could not succeed in his claim in respect to this item. He allowed the item of £1 for transport and store-rent for two months at £2 10s. per month, he gave judgment for the plaintiff for £7 14s. 6d. with costs, and judgment for the defendant on his claim for damages to the amount of £5 and cost.

The plaintiff appealed.

Mr. Searle, Q.C., for the appellant: It was a sufficient delivery to put the goods aside for the defendant in his store, the defendant had possession of them, and on many occasions availed himself of the possession, they are still there for the defendant to take. The defendant, however, appeared to con-

sider that the plaintiff should assist him in loading up the goods. But the seller is not bound to load up the goods which he sells; he has only to put them in a reasonably accessible place. *Friis v. British United Diamond Mining Co.* (7 Juta, p. 17, at p. 32); *Court v. Mosenthal & Co.* (13 S.C.R., p. 127); *Taylor v. Mackie, Dunn & Co.* (1879, p. 166).

Mr. McGregor for the respondent: There was no proper delivery. *Moyle's Contract of Sale in the Civil Law* (p. 86).

[De Villiers, C.J., referred to *Benjamin on Sale* (4th ed., p. 685) quoting opinion of *Kent*.]

There is evidence of a custom that in the case of farmers the seller loads or assists in loading on the wagon, and the parties to a sale contract with knowledge that such custom prevails. *Story on Contract* (section 1,923); *Benjamin on Sale* (4th ed., p. 707); citing *Playford v. Mercer* (22 L.T., N.S., p. 41).

De Villiers, C.J.: Was there a tender of the mealies lying there now?

Mr. Searle: That was known and assumed on both sides.

De Villiers, C.J.: The question at issue is whether there was delivery or tender of the mealies sold by the plaintiff to the defendant. It is clear from the evidence that the plaintiff refused to load or assist in loading the mealies on to the defendant's wagons, but it is equally clear that the mealies were at the disposal of the defendant in the plaintiff's store. There is no proof that the store was inconveniently situated for the defendant's purposes; he had free access to it, but he demanded that the plaintiff should by his labourers assist in loading the mealies on to the wagons. There was no contract binding the plaintiff to do this, and the evidence as to the custom of farmers selling produce is not sufficient to prove a custom to assist in loading such produce. The point therefore is whether a vendor is bound to do more than place the goods sold at the buyer's disposal at the place where they were when sold. No cases on the point have been cited, but I find that Kent in his *Commentaries* (Vol. 2, p. 505, 12th ed.), says: "If no place be designated by the contract, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where

the demand and delivery are to be made, when the contract is to pay upon demand and is silent as to the place." And *Benjamin on Sales* (p. 682, 4th ed.), says: "In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction." The rules thus enunciated are really founded upon well established principles of the Roman law. From these principles *Vort* (46, 3, 12) also deduces the rule that for the due performance of an obligation the debtor is not bound to bring the money or thing owing to the creditor's house or place of domicile unless required so to do by the agreement or by custom. And *Pothier* (Pt. 3, C. 1, art. 5) in discussing the question where payment ought to be made says: "If no place is appointed, and the debt is of a specific thing, the payment should be made where the thing is. For instance, if I have sold the wine of my vineyard to a merchant, the delivery ought to be made in my repository where the wine is, he should send there for it, and load at his own expense; my obligation is to deliver it to him where it is, and I am not obliged to take it up, but merely to give him the key and permit him so to do." He adds that if the debtor, after the sale, transfers the thing to another place, so as to make the carriage more expensive to the creditor, the latter would be compensated for the extra cost. Nothing of this kind was done in the present case. The mealies were placed in the plaintiff's store, the key of which was at the defendant's disposal. There was no obligation on the plaintiff to go further, and load them on the defendant's wagons, and judgment must therefore be given for the plaintiff for the purchase price, on condition that the defendant be allowed to remove the mealies from the store; and the claim in reconvention for damages must be dismissed. The judgment of the Court below must be altered accordingly, and the defendant must pay the costs in this Court and in the Court below.

[Appellant's Attorney's, Messrs. Van Zyl & Buissinac; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

JACKSON V. VOF. { 1899.  
May 25th.

Mr. P. Jones applied for provisional sentence upon a promissory note for £138.  
Granted.

ARDERNE AND CO. V. EGAN AND POWER.

Mr. Benjamin applied for the final adjudication of the defendants' estate.  
Granted.

PERKINS V. BIDDULPH.

Mr. Buchanan applied for provisional sentence upon a promissory note for £254 17s. 1d.  
Granted.

### ILLIQUID ROLL.

MILLS AND SON V. VAN DER SPUY.

Mr. Buchanan applied for judgment under Rule 329 for £515 6s 2d., for cash lent and advanced.  
Granted.

SEDGWICK AND CO. V. WADDELL.

Mr. Buchanan applied for judgment under Rule 329 for £100, money lent, and for £56 12s. 1d., money paid by the plaintiffs on behalf of the defendant, and for interest on a promissory note.  
Granted.

### GENERAL MOTIONS.

IN THE MATTER OF THE COLESBERG COLLEGIATE SCHOOL ASSOCIATION IN LIQUIDATION.

Mr. Benjamin presented the report of the official liquidator, and asked for the usual order.

The order was granted accordingly.

## HAMILTON V. HAMILTON.

Mr. Buchanan, for the petitioner, said the present was the return day of a rule *nisi* calling upon the defendant to show cause why a decree of divorce should not be granted. The case was tried at the last Circuit Court at Worcester. The defendant had not complied with the order of the Court, and application was now made that the rule be made absolute.

The Court granted the order.

*In re* BUTLER (MINOR).

The original order authorised the South African Mutual Life Assurance Society with whom the petitioner was insured to pay £25 quarterly for two years, out of the accumulated profits of the policy, to certain trustees to whom the petitioner had ceded the policy in trust for his minor daughter. The money so paid was to be spent on her education. The present petition alleged that the Assurance Society had represented that the order as granted amounted to surrender and cancellation of as much bonus as would provide the necessary cash, or the surrender of £55 14s. 4d. bonus for £25 cash. The order was therefore varied by allowing loans to be effected on security of the surrender value of the policy and bonuses, the interest paid to be refunded to the brothers of the minor (who had arranged to pay it) when the policy becomes due, they being prepared to await the event.

REVELS BROTHERS V. COLONIAL GOVERNMENT. { 1899.  
May 25th.  
June 5th.

## Negligence—Furrow—Damages.

This was an action for £200 damages instituted by the plaintiffs against the Colonial Government.

The declaration alleged :

1. The plaintiffs are brickmakers carrying on business together at Kromboom River, Rondebosch Flats, and the defendant is the Commissioner of Public Works, and as such representing the Colonial Government is sued in this action.

2. In or about the month of October, 1898, the said Government, while constructing a new road to Kromboom River Bridge, Rondebosch, constructed a new channel or watercourse, into which the rainfall and other waters of the neighbourhood were diverted from their natural and usual course.

3. The said new channel or watercourse was so negligently and improperly con-

structed, that on or about the night of the 4th October, or the morning of the 5th October, 1898, the said channel or watercourse overflowed, and flooded plaintiffs' premises, whereby they have sustained damages to the extent of £200, which sum the defendant has refused and neglected to pay.

The plaintiffs prayed for judgment for £200 and costs.

The defendant in his plea admitted paragraph 1 of the declaration. He denied each and every allegation in paragraphs 2 and 3, and with special reference to the said paragraphs, he said as follows: (a) For many years prior to October, 1898, a road led from the Rondebosch Flats to the Kromboom River. (b) In or about the month of January, 1898, it was represented to the Government that the aforesaid road encroached upon private property, and about 100 yards of the said road was, by direction of the defendant, reconstructed in or about the month of August, 1898. (c) The reconstruction of the part of the aforesaid road was well and efficiently carried out under the supervision of the engineers of the Public Works Department. (d) In carrying out the aforesaid work of reconstruction it became necessary to cut a channel to carry off the storm and other waters, which, prior to the reconstruction of the said road, used to flow down by the side of the old road, and on to the plaintiff's property, to his great damage and injury. (e) The aforesaid channel was constructed for the benefit of owners of property on both sides of the road, including the plaintiff, and was led into a natural watercourse, which has run through or immediately above the plaintiff's land from time immemorial. The said channel was well and properly constructed. (f) The defendant further says that the plaintiff's property lies very much below the level of the surrounding land; his property slopes down rapidly to the Kromboom River, and from its natural position large quantities of water must in the wet season and during heavy rains flow over it and damage it. (g) On the night of the 4th October there was an exceptionally heavy fall of rain, all the land above the plaintiff's property was inundated with water, and large quantities of water flowed from the land above the plaintiff's property into the natural watercourse hereinbefore referred to, and thence on to the plaintiff's land, and occasioned the damage complained of. (h) The defendant further says that the damage which the plaintiff sustained on

the night of the 4th October, or on the morning of the 5th October, was largely contributed to by himself in consequence of his having constructed an embankment at the point where the road crosses the natural watercourse hereinbefore referred to, and which embankment had the effect of diverting large quantities of water to his property, which but for the said embankment would have flowed over the road and on to adjoining properties, or down to the Kromboom River direct.

He denied that the plaintiff had sustained damage in the sum of £200, or in any amount, through any act or omission on his part, or on the part of any officers or servants of the Colonial Government. Wherefore he prayed that the plaintiffs' claims may be dismissed with costs.

The replication was general, and on these pleadings issue was joined.

Mr. Benjamin (with whom was Mr. Buchanan) appeared for the plaintiffs.

Mr. Innes, Q.C. (with whom was Mr. Upington), for the Government.

Mr. Benjamin applied for the sanction of the Court to the substitution of the original plaintiff's trustee as plaintiff, insolvency having taken place since the institution of the action. Mr. Innes consented, and the consent was confirmed.

The evidence for the plaintiffs was to the effect that previously to the construction of the new road by the Government, the old roads, which were sandy tracks, lower in the centre than at the sides, and altogether on a lower level than the new road, carried away most of the water after heavy rains. One road in particular carried off the water which was now dammed up by the new road and overflowed on to the plaintiff's land: formerly it flowed along the road past the corner of the plaintiff's land. That there had been very heavy rainfalls at the commencement of October, and the water instead of flowing in its former channel had overflowed on to plaintiff's land, washed away a great deal of fertile soil and trees, and done great damage to their bricks.

The defendants led evidence to the effect that the old road was quite as high as the new one; that before the new road was made the water ran down the side of the old one and never over it, and that the defendants had diverted the water in another direction with the result that even less ran down the side of the new road than of the old. It was alleged that the flooding of the

plaintiff's property had been caused by the exceptionally heavy rains, and that if no road had been made, the same amount of water would have reached the plaintiffs. After hearing the evidence the case was adjourned with an intimation that the Court would inspect the property before proceeding further with the case.

*Postea* (June 5th).

After hearing Mr. Benjamin and without calling on Mr. Innes,

The Court granted absolution from the instance with costs.

De Villiers, C.J., said the Court, after hearing the evidence, had come to the conclusion that the construction of the road by the department had nothing to do with the inundation of the plaintiff's property. The plaintiff had failed to satisfy the Court that the defendants had anything to do with his loss, and the Court would therefore give absolution from the instance with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorney, C. W. Herold; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

OLIVIER V. FOURIE.

1899.  
May 26th.  
" 27th.  
" 29th.

Riparian proprietors—Water-rights  
—Public stream—Distribution  
of water.

*A lower riparian proprietor is not entitled to an interdict restraining two or more upper proprietors from regulating among themselves as they think fit, the distribution of their respective shares of the water of a public stream for the irrigation of their riparian properties, provided that he is not thereby deprived of his reasonable share, or of any rights he might have acquired by contract, grant or prescription.*

This was an action for a declaration of rights as to certain water in the district of Oudtshoorn.

The declaration was as follows :

1. The plaintiffs are Gert Cornelius Olivier, Johannes Petrus Lategaan, Petrus Johannes Jacobus Stephanus Lategaan, Andries Johannes Lategaan, Helgard Marthinus du Preez, and Noble Harry Ogle Gavin, residing in the division of Oudtshoorn.

2. The defendants are Louis Fourie, Hendrik Willem Fourie, Ockert Fourie, and Andries Hendrik Fourie, residing in the said division.

3. The plaintiffs are the registered owners, together with the defendant Louis Fourie, of defined and divided shares in the farm Zeekoerivier, situate in the said division. The defendant Louis Fourie refuses to join in this action, and has been joined as a defendant by the plaintiffs, who are the remaining owners of Zeekoerivier.

4. The defendants are the registered owners in defined and divided shares of the farm Lategaansvlei, adjoining the farm Zeekoerivier, and the defendant Ockert Fourie is likewise the registered owner of a defined and divided share of the farm Buffelsboschrivier, equal to one-fourth share, adjoining the said farm Lategaansvlei.

5. A public and perennial stream, the Wynand's River, flows through the three farms, Buffelsboschrivier, Lategaansvlei, and Zeekoerivier, in the order mentioned, and thence flows on to the farm De Dam.

6. The farm Lategaansvlei was granted on June 30, 1832, to one Hendrik Willem Lategaan, the grant containing the condition 'that the stream marked on the diagram (being the said Wynand's River) shall not be diverted from its present course.'

7. The farm Buffelsboschrivier was granted on November 25, 1846, to the said Hendrik Willem Lategaan as owner of one-half, and to two other persons as owners each of one-fourth of such farm, and the grant contained the following condition, "That they (the grantees) shall have only for one week at a time during the dry season the use of the water (that is, of the said Wynand's River) in succession with their neighbours, who now or hereafter may be dependent on the same stream for the use of their respective lands."

8. On August 30, 1847, the said Hendrik Willem Lategaan was owner of the fourth share of the farm Buffelsboschrivier, now vested in the defendant Ockert Fourie, and

was likewise owner of the whole farm Lategaansvlei, and of defined portions of the farm Zeekoerivier.

9. On the aforesaid August 30, 1847, the said Hendrik Willem Lategaan entered into a written agreement with his co-proprietors of the farm Zeekoerivier and with the co-owners of the farms De Dam and Welbedacht.

10. The sixth clause of the said agreement is as follows: "The joint owners of the farms Zeekoerivier, De Dam, and Welbedacht declare by these presents to allow Hendrik Willem Lategaan, for his own use, to take out on the farm Buffelsboschrivier the water of the Wynand's River, and to use and to lead the same to the farm Lategaansvlei, that is to say for two days every fourteen days of the water allowed to Buffelsboschrivier, and further to release and discharge him, the said Hendrik Willem Lategaan, as owner of Lategaansvlei, from the the servitude which has by the grant of June 30, 1832, been imposed by the Government on his farm Lategaansvlei.

11. On October 31, 1848, an amended grant of the farm Lategaansvlei was issued by Government to the said Hendrik Willem Lategaan, in which the following condition was inserted in place of the condition set forth in paragraph six of this declaration: "Further, under such regulations as the proprietors of the adjoining farms have agreed upon in the agreement dated August 30, 1847 (being the agreement in paragraph nine hereof referred to), of which extract is annexed on the back of this grant."

12. Defendants are the successors in title of the said Hendrik Willem Lategaan in respect of his shares in the farm Buffelsboschrivier and the farm Lategaansvlei: The plaintiffs G. C. Olivier, J. P. Lategaan, P. J. J. S. Lategaan, and A. J. Lategaan, and the defendant Louis Fourie are the successors in title of the said Hendrik Willem Lategaan in respect of his share in the farm Zeekoerivier, and the plaintiffs H. M. du Preez, N. H. O. Gavin, and G. C. Olivier are the successors in title of Jacobus Ludovicus du Preez, who was owner of a defined share in the farm Zeekoerivier on August 30, 1847 and one of the parties to the said deed of agreement of that date.

13. By sub-division effected in the year 1881, the defendant Ockert Fourie became the sole owner of the share in the farm Buffelsboschrivier, formerly owned by the

said Hendrik Willem Lategaan, being the share immediately adjoining the farm Lategaansvlei.

14. According to the true intent and meaning of the condition in the agreement of August 30, 1847, above set forth, the farm Lategaansvlei became and is now entitled to the use of the water of the Wynand's River only for two days every fourteen days.

15. The defendants at divers times during the years 1897 and 1898, and more especially in the months of April and May, 1898, and thereafter in breach of the above condition wrongfully used the water of the Wynand's River for more than two days every fourteen days and caught up in a dam on the farm Buffelsboschrivier all the water flowing in the said river and used the same on the farm Lategaansvlei continuously and claim the right so to do.

16. By reason of the above wrongful and unlawful acts the plaintiffs have sustained loss and damage and are entitled to claim from this Honourable Court a declaration as to their rights in respect of the water of the said stream.

17. The plaintiffs claim (a) a declaration of rights as to the respective rights of the farm Lategaansvlei, and of defendants' portion of the farm Buffelsboschrivier, and of the farm Zeekoerivier to the water of the said Wynand's River; (b) that it be declared that the defendants, as owners of the farm Lategaansvlei, are only entitled to the use of the water of the said river for two days every fourteen days on the farm Lategaansvlei, and that on all other days the defendants be ordered to allow the water of the said river flowing on to the farm Lategaansvlei to flow down to the farm Zeekoerivier for the use of the plaintiffs; (c) that the defendants be interdicted from using any water of the said river on the farm Lategaansvlei for more than two days every fourteen days; (d) alternate relief; (e) costs of suit.

1. The plea admitted paragraphs 1 to 6.

2. It admitted paragraph 7, but said that for more than thirty years Buffelsboschrivier during the dry season had used the water of the stream for eight days at a time instead of seven, and that that user was binding upon the parties and all owners of Buffelsboschrivier.

3. As to paragraphs 8 to 13, it referred to the documents.

4. It alleged that during the turn of Buffelsboschrivier, certain of the water was caught by a dam upon the portion of the

farm referred to in the declaration, and with the consent of the owner thereof, and by agreement with the owners of Lategaansvlei, part of such water was used upon Lategaansvlei.

5. The said water had been so caught and used by the defendants and their predecessors in title for more than thirty years, and the defendants contended that both by reason of such prescriptive user and otherwise, the plaintiffs are deterred from claiming that the defendants shall not be entitled to use the said water.

6. Subject to the above they denied paragraphs 14 to 16.

The replication admitted the use of the stream in turns of eight days instead of seven for more than thirty years in the dry season. It also admitted that certain water was caught by a dam on the portion of the farm referred to in the declaration during Buffelsboschrivier turn of water-leading.

In other respects it was in general terms.

Sir Henry Juta, Q.C. (with whom were Mr. Searle, Q.C., and Mr. McGregor), appeared for the plaintiffs, and Mr. Innes, Q.C. (with whom was Mr. Currey), appeared for the defendants.

Noble Harry Gavin, one of the plaintiffs, said he purchased a share of Zeekoerivier in June, 1896. His uncle, Mr. Richard Gavin, was for many years owner of a portion of Zeekoerivier. Witness was well acquainted with the water rights. The plan produced was substantially correct. When he became owner of a portion of the river he drew up a register of the water-turns for his guidance. He produced the register, which was a correct statement as to the division of the water, made from his own calculations. In times of scarcity the water was frequently divided during his term, and witness opened the dam on Buffelsboschrivier. He had suffered damage as a result of defendants closing up the supply. This action had not been brought earlier, because one of the plaintiffs, Mr. Olivier, was not on good terms with witness's uncle, and would not join him in an action.

Cross-examined: He claimed the sole use of the leakage water with the other plaintiffs. The question had been in dispute for ten years to witness's knowledge.

Hermanus Jacobus Redelinghuys, step-son of the late Mr. Jacobus du Preez, the original owner of Zeekoerivier, said he was fifty years of age, and had resided on a farm below the river since he was eighteen

obtaining their eight days water, they are entitled to prevent it, but if, notwithstanding this agreement being acted upon, they receive all the water which they would have received if the leakage water had been used on the upper farm instead of on the intermediate farm, the plaintiffs have no legal ground of complaint. This view by no means conflicts with the judgment of this Court in *Hough v. Van der Merwe* (Buch., Rep., 1874, p. 148). That judgment safeguards the right of lower proprietors, but it by no means lays down the rule contended for on behalf of the plaintiffs, that the upper proprietors are not entitled to regulate as they think fit the distribution of their respective reasonable shares among themselves. The question whether a riparian proprietor may divert his reasonable share to non-riparian property was discussed in *Struben's case* (9 Juta, 68), but it does not arise in the present case. The water which one of the defendants is entitled to use on the uppermost farm he allows the intermediate proprietors to use for the irrigation of their riparian property, and as long as the plaintiffs obtain what they are entitled to, they have no ground of complaint. It makes no difference that the water-rights of the parties have been defined by grant or by agreement. The defendants use no more water than they are entitled to use, and the fact that one of them allows his riparian neighbours to use part of his share does not entitle the plaintiff to the interdict or declaration asked for. The judgment of the Court must therefore be for the defendants with costs.

Buchanan, J., said: As a general rule the riparian owner of land on a public river cannot alienate the water of the stream to other parties who have no connection with any part of the stream, as this would be a confiscation of the rights of the lower proprietors. The case of the *Swindon Water Company v. Wilts and Berks Canal* (L.R., 7 H.L., 697) is an instructive authority on this point. But where several owners are on the stream they may make an alteration of the mode of user by agreement between themselves, so long as they do not cause detriment to the rights of the lower proprietors. When first granted, I think the farm Lategaansvlei was considered by all the parties as one which, though situated on the Wynand's River, was deprived of certain of its riparian rights. The owner of the property was entitled to what has been termed the primary user of the water,

but he was deprived of the extraordinary user. At this time, by grant and agreement between the owners of the farm Buffelsboschrivier above and of the farm Zeekoerivier below, the user of the water of the Wynand's River was divided, instead of by quantity, by turns of eight days' duration each. It was also agreed between them that the restriction on the farm Lategaansvlei should be removed, and a new grant was accordingly issued, under which in effect two of the days of the turn for the use of water allotted to the upper farms was granted to Lategaansvlei, the eight days' turn for Zeekoerivier remaining as before. The position of the parties then stood as follows: The reasonable user of the water of the river was agreed to be six days for Buffelsboschrivier, two days for Lategaansvlei, and eight days for Zeekoerivier. Owing to subdivision of the two upper farms the eight days' turn became divided between the several part owners. The use of the water of the Wynand's River is not now strictly confined to a six days' turn on Buffelsboschrivier and to a two days' turn on Lategaansvlei, but the whole of the combined user does not exceed the eight days' turn. Owing to the fact that one of the proprietors of Lategaansvlei is also the owner of a portion of the upper farm Buffelsboschrivier, it now happens that during certain turns the owners of Lategaansvlei get water outside of the two days' turn originally assigned to the farm. But in my opinion this is only a more convenient way of user by the upper proprietors of their common rights, and as long as it does not in the whole exceed the eight days allowed to the two farms, it in no way diminishes or affects the rights of the proprietors of the lower farm. The case of *Nuttall v. Bracewell* (L.R., 2 Exch., 1), cited with approval in the text books, is an authority for this view. From that case it may be deduced that the owners of two adjoining closes may agree together for their mutual benefit to take the water from the close of one into the close of the other returning the water to the stream in the close of the latter, without doing injury to anyone. That is founded on the same principle. The only question is whether the subsequent division interferes with the rights of the lower proprietors. It may be that under the old manner of user the upper proprietors did not avail themselves to the full of their rights, and that benefit accrued accordingly to the lower proprietors. But



this was not due to any rights vested in them; and the upper proprietors have not divested themselves of any part of their turn. The plaintiffs have not been interfered with in their turn of water leading. Both on the law and on the facts, therefore, the plaintiffs have in my opinion failed to make out a case for relief. Judgment must be entered for the defendants with costs.

Maasdorp, J., dissented. His Lordship said it seemed to him that at the time the grant was made the farm was granted to the first grantee upon certain conditions and under certain reservations amounting to this, that a riparian farm having been granted, the grantor reserved certain riparian rights that would have otherwise belonged to the farm. It seemed to his lordship that the owner of the farm Lategaansvlei was thereby deprived of the right to any portion of the water from the Wynand's River for use upon the farm Lategaansvlei. His lordship was of opinion that Lategaansvlei became entitled by subsequent agreement to the use of two days' water, and in addition to that the lower portion of Buffelsboschvlei was entitled not only to two days' water, but also to the "sloop." The farm was not entitled to share the water which it was reasonably entitled to with any non-riparian farm. He still looked upon the farm Lategaansvlei as a non-riparian farm in the full sense of the word, and distribution of water did not apply in this case. Then the question arose as to whether prescription should be included in this case. Though a great deal of evidence had been led to show that the right might have been acquired by prescription, they had also strong evidence to show that there was not a continuous use of the water. Under all the circumstances, his lordship thought judgment should have been in accordance with the prayer for the declaration of rights of the plaintiffs.

Judgment was entered for the defendants, with costs, in accordance with the judgment of the majority of the Court.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA V. CORNELIS. { 1899.  
{ May 29th.

Maasdorp, J., said that as Judge of the week a case had come under his notice, being the sentence passed by the Resident Magistrate at Victoria West on one Abraham Cornelis. The case had been remitted by the Attorney-General to be tried upon the plea of guilty as to the theft of two blankets. The Magistrate charged the accused not only with the theft of the blankets, but also with the theft of other articles, for the alleged theft of which the Attorney-General had refused to prosecute. In doing so the Magistrate had exceeded his jurisdiction, and it would be necessary now to quash the proceedings in so far as they affected the charge of theft of anything but the two blankets. The conviction and sentence would also be quashed, and the case would be remitted to the Magistrate to pass sentence with reference to conviction in regard to the theft of the two blankets.

HEYMAN V. HEYMAN. { 1899.  
{ May 29th.

This was an action for restitution of conjugal rights.

Mr. Howel Jones appeared for the plaintiff.

Mrs. Minnie Heyman, the plaintiff, said he was married to the defendant, Arthur Augustus Heyman, on February 15, 1894, before the Resident Magistrate of Cape Town. She was then a widow. Her husband had been employed for three or four years in De Beers, and she lived with him at Kimberley about a year and three months. In June, 1895, defendant went home to England and was away four months. He came back and took up his old employment in De Beers, and witness joined him there. Defendant then joined Plumer's Column for four months, and rejoined her at Durban, where witness had a theatrical engagement. At the end of 1896 they returned to Cape Town. Defendant had made a little money at Bulawayo, and witness took a company to Port Elizabeth, but it was not a success. She

then came to Cape Town and lived here until her husband left her. She had been acting at the Opera House. Defendant left her in April, 1898, to go to Bulawayo. She and defendant had had frequent quarrels about his gambling. She wrote to him after he left her. They quarrelled even in their letters. Witness had received no money from him since he left her. He had employment at Bulawayo. In March, witness instructed Messrs. Tredgold, Macintyre & Bisset to write to him. Defendant replied, "I must decline absolutely to make my wife any allowance, or provide a home for her." There were no children of the marriage.

The Court granted an order for the restitution of conjugal rights, with costs, returnable on June 18, failing compliance with which the defendant to show cause why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Tredgold, Macintyre & Bisset.]

SCHOENWOLF V. WEHLE. { 1899.  
May 29th.

#### Seduction—Damages.

This was an action for £250 damages instituted by Freda Schoenwolf, a minor, duly assisted by her father, Carl Schoenwolf.

The declaration alleged *inter alia* that on or about the 26th May, 1898, and on divers occasions thereafter, the defendant seduced the plaintiff, whereby she became pregnant.

That the plaintiff continued pregnant until the 26th February, 1899, when she was delivered of a male child of which the defendant was the father.

That in connection with the delivery of the said child, the plaintiff incurred lying-in and other expenses, and suffered damages to the extent of £250 for which amount she claimed judgment and costs.

Mr. Gardiner appeared for the plaintiff.

The defendant was in default.

Freda Schoenwolf, said she was eighteen in January last. She lived with her father at King William's Town. Defendant came to board at their house in December, 1897. Defendant was very attentive to her and made love to her. He was about twenty-six years old. Her mother fell ill in May, 1898, and her father had to be out at night very often. On May 24 defendant seduced her. She did not cry out as her mother was ill. On two other occasions the defendant seduced her. On each occasion the defen-

dant had forcible connection with her. On February 26, 1899, she gave birth to a child. Defendant left the house at the end of 1898, and before he went he left a note in which he recommended her to take certain remedies, to procure abortion: she did take the medicine. The note was produced: Defendant was a jeweller, and told her mother that he earned £16 a month.

By the Court: Witness never told her father at the time that the defendant had seduced her, as he had told her she would be all right and she was afraid.

The Chief Justice: What induced the defendant to recommend you those remedies?—I don't know.

Rev. Heinrich Baumgarten said he knew the Schoenwolf family. The father was a very strict and harsh man. He had known the plaintiff since she was a little child. She was an innocent and quiet girl, and he was shocked to hear of what had happened.

The Chief Justice, in giving judgment, said that if the Court had been satisfied that seduction had taken place without the plaintiff's consent no damages would have been sufficient and the Court would have directed the defendant to be criminally prosecuted. But it was impossible to believe that the girl had been forced on all three occasions. She probably yielded very reluctantly, but there could be no doubt that she yielded. Judgment would be given for the plaintiff for £200 and costs.

[Plaintiff's Attorney, D. Godlonton.]

CASE V. CASE. { 1899.  
May 29th.

This was an action for divorce instituted by the wife on the ground of her husband's adultery, or in the alternative for a decree of restitution of conjugal rights.

Mr. Close appeared for the plaintiff, and the defendant was in default.

Sarah Elizabeth Case, the plaintiff, stated that she was married to the defendant Thomas Case in February, 1890. On the 7th May, 1891, he left her. Subsequently she went to a place in St. John-street where she found her husband in bed and a woman in the room. He admitted to the plaintiff that that was the woman with whom he was living.

Dora Terff stated that she accompanied the plaintiff to the house in St. John's-street. She produced photographs of the defendant and the woman who was with him at the time.

W. A. Ormond stated that the defendant and the woman whose photograph were produced lived next door to him as man and wife.

The Court granted a decree of divorce with costs.

[Plaintiff's Attorney. Gus. Trollip.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

SWANSON V. SWANSON. { 1899,  
May 30th.

This was an action for restitution of conjugal rights.

Mr. Buchanan appeared for the plaintiff.

Mrs. Annette Cornelia Swanson, the plaintiff, said she was married to the defendant at Woodstock in February, 1897, and for some months after marriage lived happily with her husband, who was employed at the Salt River Works. He treated her very badly after the first nine months, and drank heavily. She had to go and sleep with his brother's wife next door, and later she had to leave him for some time. She returned at his request, but after a day or two he resumed his drunken habits. He had been drinking from October, 1898, to last January, and had not supplied her with enough money to support herself. On January 27 he told her to go away, and locked the door on her. When she saw him again, he told her to go and see an agent and get a separation. Defendant eventually left the house, and she had not seen him since. He had given her no food while she was in the house with him. Witness was willing to go back to him if he treated her as she ought to be treated.

The Court granted a decree of restitution of conjugal rights, returnable by June 28, failing compliance with which, defendant to show cause why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Innes & Button.]

VAN DER WESTHUIZEN V. { 1899,  
THWAITES. (May 30th.

Principal and agent — Sale — Payment of mortgage bond.

*It is the duty of the vendor of property to pay any mortgage bond on that property, and where he hands money over to a third person for the purpose of paying off such mortgage bond prima facie that third person is his agent for the purpose of making the payment.*

This was an action in which the plaintiff claimed an order compelling the transfer of a certain piece of land purchased by him from the defendant and £100 damages.

The declaration alleged that the purchase price of the land was £2,070, which had been subsequently reduced to £2,000 and that the amount had been paid by the plaintiff. An alternative declaration alleged that at the date of sale there was a bond of £100 upon the property which it was the defendant's duty to pay off and obtain the cancellation of, but that he had refused so to do, and in consequence of defendant's conduct plaintiff was unable to obtain transfer. He prayed accordingly for an order upon the defendant to pay off and cancel the said bond, and for £100 damages.

The defendant, in his plea, alleged that the sale was concluded between the plaintiff and W. Thwaites, the defendant's son, acting on the defendant's behalf, and that the latter, at the request of the plaintiff, paid to one J. C. van den Heever, an attorney at law, who was acting in the matter of the sale on plaintiff's behalf, the sum of £100 to pay off the bond in question, but that Van den Heever applied the money to his own use, and thereafter his estate was surrendered as insolvent.

The replication denied that Van den Heever acted as the plaintiff's agent with regard to the cancellation of the bond.

Mr. Graham, Q.C., and Mr. Close appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Howel Jones for the defendant.

Johannes Stephanus van der Westhuizen, a farmer, residing in the Worcester district, said he was in Hope Town in April, 1898, and there met the Thwaites, sen. and jun. He wished to purchase a property at Hope

Town, and approached old Mr. Thwaites himself, who said he must see his son about it. Witness eventually agreed upon a price of £2,060 with Mr. Thwaites, jun. The negotiations were completed on April 21. Witness had no recollection of a broker's note passing. Subsequently a deed of sale (produced) was entered into. He could not account for the document not being signed by himself. He thought, however, that he gave a copy signed by himself to Mr. Van den Heever. He first met Van den Heever two days before the negotiations. The latter drew up the document, having himself offered to do so. He was always trying to interfere and get something to do. Witness had no idea at the time that there was a bond on the property, but after he had bought it Thwaites, sen., said there was a small bond on it. Witness told Thwaites he must cancel the bond at once, and told Van den Heever to see that the papers were in order. Thwaites said his attorneys in Cape Town, Scanlen & Syfret, would see that everything was all right. Witness gave Mr. Van den Heever the necessary documents and his copy of the lease, and eventually took steps to try and obtain transfer. Witness gave Van den Heever the transfer, and the lease and another paper. Witness had never seen the power of attorney, until the papers were sent over to his solicitors. It was not till November after receiving the documents through Mr. Fairbridge that witness learned that the bond had not been cancelled. Witness had no knowledge of Thwaites paying £400 to Van den Heever, the receipt for which was produced. The receipt stated that the cheque for £400 was in settlement of the bond. He had never heard of that transaction until it was pleaded. When he heard that the bond was not cancelled he set it down to old Mr. Thwaites' negligence. The first instalment of £1,000 was paid on the day of sale, and the second and also the balance of £60 on June 8. In September he saw old Mr. Thwaites and asked how it was that he could not get his transfer from Van den Heever. Witness then had a good deal of correspondence with Van den Heever, and paid transfer duty to the amount of £40 to him, which he had since had to pay again. The first letter was dated December 5, and the others January 7 and February 6 (put in). The letters were to Mr. Van den Heever, calling on him to pay the bond forthwith, but there was no reply to any of them. If witness had had his transfer before the case

of *Armstrong and Carter* was decided, he thought he could have resold the property to advantage. He had had no definite offer.

Cross-examined: Witness got possession of the property at once, taking over the lease from Mrs. Bester, the lessee. He did not remember a broker's note being handed to him. The £1,000 was paid the same day that the contract was signed. He could not be sure that he introduced Van den Heever to Thwaites. Van den Heever was not paid by witness for his trouble. Old Mr. Van den Heever was paid £50 to help witness to get a licence, the latter promising to go up to Cape Town and see Sir Gordon Sprigg and the Attorney-General about the matter. Old Mr. Van den Heever did not come to Cape Town after all. He got the £50. Witness had been told by a man he could trust that young Van den Heever was a little shaky.

And yet you introduced him to Mr. Thwaites?—No. They were all on the best of terms together before I came.

Witness denied speaking to Mr. Thwaites, jun., about the bond in June. He never instructed Van den Heever to write to Thwaites. He arranged with Van den Heever about the licence in June. Van den Heever wrote to witness in July asking him to send £41 for transfer duty.

[A letter from Van den Heever to the plaintiff was put in, saying he (Van den Heever) would write to Thwaites about the small bond.]

Re-examined: Witness never in any way authorised Van den Heever to receive money from Mr. Thwaites.

De Villiers, C.J.: It is evident from the expression in the letter, "I shall communicate with Thwaites *re* the small bond," that Van den Heever wished to conceal the fact that he had received the money.

This closed the case for the plaintiff.

For the defence,

William Walter Thwaites, son of the defendant, said he gave plaintiff a sold note on the property. The broker's note was dated the 19th, and he thought the £1,000 instalment was paid on April 20. As soon as witness had received the broker's note plaintiff came in and said he wished to have the deed of sale. Plaintiff brought Van den Heever round to the office, but witness had never seen the latter till two days before this. Van den Heever drew up the documents at plaintiff's suggestion. That afternoon plaintiff came in a hurry and said something about a bond on the

property. Witness did not understand about these matters, and did not know to whom to pay the money. Plaintiff said the best thing would be to pay the £400 to Van den Heever, and let him settle the bond. Van den Heever came in later. Witness paid him £400, and he gave a receipt. Plaintiff was not present. Plaintiff and Van den Heever left Hope Town together the same night. Plaintiff came back in June, and witness saw him and asked him if everything connected with the property was settled, and whether the bond was cancelled. Plaintiff replied that it did not matter whether the bond was settled at once or three months afterwards, as the interest on the amount would be the same.

De Villiers, C.J.: That would seem to show that he did not know that the bond was paid.

Witness said the rest of the money was paid on June 6. This was arranged entirely between plaintiff and witness. His father left to go on a survey to the Bushman country some time before, and was not near Hope Town in June. He met his father again in July, about 100 miles from Hope Town. Witness had agreed on June 6 to deduct £10 from the amount due by the plaintiff for the farm. He knew nothing about the bond not being settled, until his father received a letter of demand. Witness had never spoken or written to Van den Heever in connection with the matter. Witness was astonished that the matter of the bond had not been settled. Witness first spoke to Van den Heever when plaintiff introduced him.

He was not stopping at the same place with Van den Heever.

Cross-examined: Witness's father was living in Prieska at present. In February, 1898, his father was down at the farm, there and also in February, 1899. Witness knew one H. J. Dempers. After his father got the demand witness instructed Mr. Dempers personally to write to Van den Heever.

[Mr. Graham put in a letter from Van den Heever to Mr. Dempers, dated Venterstad, February 13, 1899, in reply to a letter from Mr. Dempers. The letter said, in reply to Mr. Dempers's letter: "I must state that it was arranged between Mr. Thwaites and myself that I should have the use of the money until the notice of the bondholder had expired, provided I could settle the interest. I wish you to communicate with young Mr. Thwaites to this effect."]

By the Court: As soon as he found out that the bond had not been paid he explained the position to Mr. Dempers, and asked for his opinion. Mr. Dempers then said that the best thing to do would be to write to Van den Heever and ask him why he had not paid this money. Mr. Dempers told him it was no good prosecuting Van den Heever criminally, because he would only be struck off the rolls.

De Villiers, C.J.: The defendants ought to have produced a copy of the letter written by Mr. Dempers to Van den Heever.

Witness said that the statement in the letter was entirely untrue. He had seen the letters from Messrs. Fairbridge & Arderne to his father. He knew that no reply had been sent to the letters. Witness would not say that he had not spoken to Van den Heever casually, but he was sure he had not played billiards with him. He admitted having played a good many games of billiards at Hope Town. Witness was quite willing that Van den Heever should undertake the whole transaction. Witness denied telling plaintiff that he was to pay £1,000 to his father's account on the purchase price and £60 to himself (witness).

Re-examined: Witness's father did not know at the time that he was going to see Dempers on the matter of the bond. Witness handed the letter that had been put in to the attorneys (Scanlen & Syfret).

By the Court: The cheque for £400 paid to Van den Heever was drawn on Thwaites & Overbeek.

James Alexander Thwaites, the defendant, said nothing whatever passed between himself and the plaintiff in connection with the sale of the hotel. Witness was in Hope Town or the neighbourhood on April 19. He gave his son authority to conclude the sale. Witness signed the power of attorney at his son's office. Van den Heever was there. Witness never instructed Van den Heever to act for him. Van den Heever was alone when witness signed the power of attorney. Witness had never had any conversation with Van den Heever before or since. He referred Van den Heever and his son to Mr. E. R. Syfret in Cape Town, who was his general agent. Shortly after that witness left Hope Town. His son never told him that he had given £400 to Van den Heever. In June witness was two or three hundred miles from Hope Town, in Bushmanland. He had no personal communication about the matter with anyone. He sent a letter to Fairbridge &

Arderne in reply to the second letter, through Mr. A. Syfret, asking the latter to send it on to Fairbridge & Arderne if he approved of it.

Cross-examined: He was not present when the power of attorney was signed.

A. G. Syfret said he acted for many years as defendant's attorney. Defendant saw Van den Heever.

Mr. Graham objected to any statement made by Van den Heever to witness.

Mr. Searle contended that *prima facie* proof had been given that Van den Heever was acting as plaintiff's attorney, and their evidence would be confirmatory.

De Villiers, C.J., ruled that the evidence was not admissible if objected to.

Mr. Graham ultimately withdrew his objection, and consented to the evidence being given for what it was worth.

Witness said he saw Van den Heever in August after defendant had written to witness about the matter. Van den Heever came and told witness that he had lost the transfer of Thwaites's property, and asked witness to refer to the bond, as he wished to trace the transfer at the Deeds Office. Witness had the bond as agent for the mortgagee. He gave him the reference, and had several conversations with him on the subject of paying off the bond, and witness clearly understood from him that he was acting for plaintiff. Mr. Thwaites had told witness that the payment of the bond rested with the purchaser.

De Villiers, C.J.: Did Mr. Thwaites communicate to you the letter he received from Dampers written by Van den Heever? —Yes.

Witness said he had had several interviews with Messrs. Fairbridge & Arderne, and it was then that he heard for the first time that Van den Heever was not plaintiff's agent.

Cross-examined: Witness had received a letter from defendant asking him to forward an enclosure to Fairbridge & Arderne if he approved of it. Witness could not say whether he delivered it or not.

This closed the case for the defendant.

Mr. Soarle: The question is which of the two innocent parties should suffer. The evidence supports the view that Van den Heever was acting as agent for the plaintiff. He was authorised to receive the money. No communication took place between Van den Heever and the defendant, and no

charges were made by the former. All the transactions with Van den Heever were between him and the plaintiff.

Mr. Graham was not called upon.

The Court gave judgment for the plaintiff with costs.

De Villiers, C.J., said: It is obviously the duty of the person who sells a property to pay any mortgage bond on the property. He is bound to deliver over the property without encumbrance, and until he has paid the mortgage bond he can not pass transfer. If, therefore, the seller hands over the money to a third person for the purpose of paying the mortgage, *prima facie* that third person is his agent for the purpose of making the payment. In the present case, therefore, Van den Heever, to whom the money was paid by Thwaites must *prima facie* be presumed to have been Thwaites's agent. He might have been Van der Westhuizen's agent also to take transfer, but the property was not in a fit state for transfer until the seller had freed it from encumbrance, and for that purpose presumably he would employ an agent. Therefore, *prima facie*, Van den Heever was agent for the defendant, and it lies upon the defendant to prove that Van den Heever must be looked upon as agent for the plaintiff. One would have thought, at all events, that the plaintiff would have called Van den Heever to support his case, for Van den Heever could have given direct evidence as to his agency. But curiously enough Mr. Searle has said that the other side should have called him. That would have been rather an inversion of the rules of evidence. It lies upon the defendant to prove that agency, and the best evidence he could have called was the person himself, who was alleged to be plaintiff's agent. Then the defendant further relies upon a conversation between the defendant's son and the plaintiff. But the plaintiff's version of that conversation is quite different. Even supposing we could accept the version of the defendant's son that does not clearly prove Van den Heever's agency. The mere giving of advice does not necessarily constitute Van den Heever plaintiff's agent. If one looks at the correspondence between Van den Heever and Van der Westhuizen there is nothing to indicate that Van der Westhuizen knew that the money had ever been paid to Van den Heever. One of the letters written by Van den

Heever admits that the payment was made on April 21, 1898, and yet in a subsequent letter of September 13 he said: "I shall also communicate with Thwaites re the small bond." If Van der Westhuizen knew that Van den Heever had written a receipt for the bond his suspicions would have been aroused. If there had been any intention on the part of Vander Westhuizen to make Van den Heever his agent to pay the debt of another person then he would have paid the money and given a cheque only for £400, and would have paid the £400 to Van den Heever for the purpose of settling the bond. In my opinion the defendant has not satisfied the Court that Van den Heever was plaintiff's agent for the purpose of paying the debt, and in the absence of such proof, the judgment of the Court must be for the plaintiff, with costs. In my opinion the Registrar ought to communicate with the Law Society, and request the society to look into the case. As Van den Heever has not had an opportunity of giving his version of the case, I would not wish to comment too strongly upon the evidence. At all events this is a case calling for full inquiry by the Law Society. As an officer of the Court I think this alleged conduct of Van den Heever ought to be inquired into, and in the case of further proceedings against him I have no doubt that the Law Society will know how to do its duty. There will be the further question also, whether Mr. Van der Westhuizen or Mr. Thwaites should not set the criminal law in motion, but that is a matter for the public authorities to consider.

Judgment was accordingly entered for the plaintiff, with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

BRISLEY V. BRISLEY'S { 1899.  
EXECUTOR. { May 30th

Matrimonial domicile—Proclamation of July 12th, 1822—Community of good-will—Election.

*B. who was domiciled in this Colony, married his wife in England both intending to reside in this Colony, but no ante-nuptial contract was executed. After so residing in this Colony for 14 years, B. died leaving a will by which, after claiming to take the*

*benefit of the Proclamation of July 12th, 1822, he bequeathed their joint property to his children subject to a usufruct in favour of his wife.*

*Held, that the law of the matrimonial domicile, viz., of this Colony, must regulate the right of the parties, and that the widow was entitled to elect whether she would claim her half share of the community or take under the will.*

This was an action for a declaration of rights.

The plaintiff's declaration set forth:

1. The plaintiff is Ella Marie Brisley (born Gahagan), widow of the late George Charles Brisley, of Umzimkulu, in the division of East Griqualand. The defendant is Marnis Peter Hauman le Roux, in his capacity as executor testamentary of the said late George Charles Brisley.

2. The said Brisley was born in England, but came to South Africa and settled there in or about the year 1864. Being then domiciled in the Cape Colony he went to England on a temporary visit, and whilst there, still being domiciled as aforesaid, he married the plaintiff without any marriage settlement or ante-nuptial contract, and thereafter returned with the plaintiff to East Griqualand, where they continued to reside until his death. The said marriage was entered into by the parties thereto with the full intention of thereafter proceeding to this colony to reside there permanently.

3. The plaintiff contends that the said marriage was in community of property.

4. The said Brisley died at Umzimkulu, on or about the 9th day of October, 1898, leaving a last will and testament executed by him on or about June 1 1898; and leaving the plaintiff and certain children of the marriage him surviving, who are still minors.

5. Under the said will the testator claimed to take advantage of the provisions of the Proclamation of Lord Charles Somerset of July 12, 1822, and, as a natural born subject of the United Kingdom of Great Britain and Ireland, to dispose of the whole of the property belonging to himself and the plaintiff, on the ground that he had the right of testamentary disposition given by the law of England.

6. Under the said will the testator directed *inter alia* that the estate should not be divided until his youngest child attained majority; the defendant and one John Randles, of Natal, were appointed executors testamentary, and the defendant and the said Randles were together with the plaintiff appointed guardians of the minor children.

7. The defendant has taken out letters of administration as executor, and letters of confirmation as guardian, but the Master of this Honourable Court has refused to confirm the appointment of the said Randles as executor on the ground that he has not come into this colony to perform the said office.

8. The plaintiff contends that she is now entitled to claim a clear half of the estate of herself and her husband, on the ground that the marriage was one in community of property, the matrimonial domicile being this colony, and that therefore the said Brisley could not by his sole will dispose of more than one half-share of the estate.

9. The defendant denies the above contention, and claims to deal with the whole estate in terms of the said will.

The plaintiff claims: (a) An order declaring the rights of the plaintiff under her marriage with the said late George Charles Brisley, and in particular that she is entitled to a half-share of the joint estate of herself and her said husband, by virtue of the community of property existing between them; (b) alternative relief; (c) costs of suit.

The plea denied that Brisley was domiciled in the Colony at the date of the marriage, or that the parties intended to reside permanently in the Colony. It denied the allegation in the third paragraph of the declaration that the marriage was in community, and prayed that the claim might be dismissed.

In reconvention the defendant alleged that he was entitled to deal with the whole of the estate in terms of Brisley's will, both by reason of the fact that Brisley was domiciled in England at the date of the marriage, and by reason of Lord Charles Somerset's Proclamation. He said further that if the Court held that the marriage was in community, the plaintiff should nevertheless in law elect either to permit the entire estate to be dealt with under the will, or to renounce the benefits of the will, and claim one half of the estate by virtue of the marriage. He prayed accordingly.

Mr. Searle, Q.C., and Mr. Benjamin appeared for the plaintiff.

Mr. Innes, Q.C., and Mr. Close for the defendant.

The allegations in the declaration as to domicile were admitted.

Mr. Searle: We admit that the plaintiff should make her election. The meaning of the words "entered into the marriage state within this settlement" in the Proclamation of 1822 (July 12th), has not been anywhere definitely laid down. They were referred to in *Blatchford v. Blatchford's Executors* (R.L., p. 3) and in *Trustees of Clarence v. Clarence's Curator and Tutor Dative* (3 Searle, p. 122, at p. 128), but there was no decision upon the point. The *dicta* pronounced support the plaintiff's contention as far as they go. There is an implied contract that if the husband is domiciled in the Colony, the property of the marriage is to follow the law of the Colony. See judgment of Cloete J. in *Clarence's case*. In that case it is true that the marriage took place in the Colony, but there should be no difference in the result if it takes place outside the domicile. That fact cannot overturn the law that the property must be governed by the matrimonial domicile. If that be so, the plaintiff is entitled to half of the estate. As to election, *McMann v. Porell's Executors* (13 S.C.R., p. 27) governs the case.

Mr. Innes: The law of the Colony regulates the property of the spouses because Brisley was domiciled in the Colony. But the law of the Colony includes the Proclamation of July 12th, 1822, and that Proclamation precludes community of property. Creditors might possibly take advantage of the community, but the spouses themselves could not.

Considerable light is thrown upon the preamble to the Proclamation, as regards the "expectations" referred to therein by Cloete, J., in *Dwyer v. O'Flynn's Executors* (Searle 3, p. 16, at p. 27.) He had referred to the correspondence on the subject and found that the British settlers were "surprised, and perhaps disappointed, to find that according to the *lex loci*, women and children had a right to claim certain proportions of the common estate. This was not known to them before, and they considered it a grievance, whether reasonably or not I will not say. They applied for relief, and in answer to their application this Proclamation was issued, &c."

The words "his property" in the proviso have the same meaning as "their property"



in the enactment, the word "divided" refers to division between husband and wife, the word "administered" refers to division amongst children. This view is supported by *Cuffin v. Heurtley's Executors* (1 M., p. 178, per Menzies, J., at p. 184). "His property must be deemed in law to mean the whole goods in community at the dissolution of the marriage. See also Cloete, J., in *Clarence's case*. The Proclamation only applies to marriages which take place within the Colony. *West v. Carpenter* (R. 1, p. 434); *Chicell v. Carlyon* (7 Sheil, p. 83); *Blackford's case* was not decided upon the terms of the Proclamation, but upon the common law. *Klingenberg v. Ruthven* (R. 2, p. 76).

Mr. Searle: The onus is on the defendants of showing that the Proclamation takes the case out of the ordinary principle of law. The Proclamation was really intended to apply to persons who married before they came out here. That was practically decided in *Klingenberg v. Ruthven* (R. 2, p. 76) and in *Van der Byl's Assignee v. Van der Byl* (J. 3, p. 170).

De Villiers, C.J.: The principle is well established in this Colony, that in the absence of an ante-nuptial contract, the law of the matrimonial domicile constitutes a tacit contract between the parties. The marriage of Mr. and Mrs. Brisley took place in England, but at the time of the marriage he was domiciled in this Colony, and their intention was to reside in this Colony. They executed no ante-nuptial contract before marriage, and they resided in this Colony after their marriage. Their marriage, so far as it affects their respective rights of property, must be regarded as having taken place in this Colony. If they had been married here, the marriage would have created a community of goods, even although the husband had claimed the benefit of the Proclamation of 12th July, 1822. That Proclamation provides that in case any natural born subject of the United Kingdom shall marry here without ante-nuptial contract, his property shall be administered according to the colonial law. I agree with Mr. Justice Watermeyer, *Blackford v. Blackford* (1 Ros. 11), in the view that "his property" means property which ordinarily in this Colony would be property in community under the husband's control" and that the enactment is declaratory of the preexisting law of the Colony. When once the ubiquity of the law of the matrimonial domicile is admitted, it makes no difference

whether the ceremony of marriage was celebrated in this Colony or not, provided only that this Colony is the place of the matrimonial domicile. I have already stated that the intention of the parties at the time of the marriage, was to reside in this Colony and, as the husband was himself domiciled here at the time, there can be no doubt as to the Colony being the place of their matrimonial domicile. The husband by his will claimed the right to take advantage of the Proclamation and to dispose of the joint property as if it all belonged to him. His widow now claims her half and to this she is entitled but if she elects her half, she cannot of course take the benefit of the provisions in her favour. Judgment must be given accordingly, but the costs must come out of the estate.

Buchanan, J.: I fully concur. I think the main object of Lord Charles Somerset's Proclamation of 1822 was to quiet the minds of the English settlers who came to this colony from England with regard to their property. Maasdorp, J., also concurred.

Judgment was accordingly entered for the plaintiff in terms of her declaration, adding the words "She having elected to claim nothing under the will." Costs to be out of the estate, including the expenses of both plaintiff and defendant.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton: Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

#### IN THE ESTATE OF JONES BROS

Mr. Searle, Q.C., applied for the appointment of Mr. G. W. Steytler as provisional trustee in the insolvent estate of Messrs. Jones Bros., hotelkeepers, Clifton-on-Sea. The petitioner was Mr. Saul Solomon Blumenthal Mills, and the petition showed that, the estate had been placed in voluntary sequestration by an order of the Court dated May 29. The petitioner was a creditor to the amount of £100 for rent in arrears for two months. The assets were furniture, liquor, &c., and the goodwill of the hotel was very valuable.

The Court granted the application.

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice Maasdorp.]

## PROVISIONAL ROLL.

HOOKE V. BAKER. { 1899.  
{ May 31st.

Mr. Buchanan asked for provisional sentence on a mortgage bond for £600 and interest from August 23, 1898, at 6 per cent. The bond had become due by reason of non-payment of interest.

The order was granted.

FREEMAN AND CO. V. RASMUSSEN.

Mr. Maskew asked for a decree of civil imprisonment on an unsatisfied judgment for £11.

Granted.

OSMOND V. SNYMAN.

Mr. Graham, Q.C., applied for a postponement of this case, as the defendant, who claimed to have a good and substantial defence, was absent in Pondoland at the time of service.

Mr. Maskew opposed the application, and asked for judgment for £1,346 on a bond which had become due and payable by reason of the non-payment of interest.

The Court ordered the matter to stand over till the 12th inst.

STANDEN V. VENTER.

Mr. Maskew asked for provisional sentence on a mortgage bond for £205, with interest at 9 per cent. from March 1, 1898.

Granted.

DE WET V. BRITZ.

Mr. Upington asked for provisional sentence on a promissory note, dated at Wellington, February 4, 1899, for £262, payable on May 14.

Granted.

COLE V. KORTE.

Mr. Close asked for judgment under Rule 329 for £108, being balance of account due for goods delivered.

Granted.

VERSTER V. SCHELHASE.

Mr. Upington asked for judgment under Rule 329 for £326, being balance of account due for goods delivered.

Granted.

NOAH V. JOHNSON.

Mr. H. Jones asked for judgment under Rule 329 for £10, rent due in respect of two cottages, and also that defendant be ejected from the said premises by the 15th instant.

Granted.

SMITH AND CO. V. MARAIS.

Mr. Buchanan asked for judgment under Rule 329 for £25, for goods sold, interest due, and costs of suit.

Granted.

## GENERAL MOTIONS.

BEAUFORT WEST MUNICIPALITY V. MADDISON.

Mr. Graham, Q.C., for the defendant, applied for removal of trial to Circuit Court.

Mr. Innes, Q.C., appeared for the plaintiff.

Mr. Graham stated that the petitioner was a storekeeper at Beaufort West. The action was for a declaration as to the boundary of Mr. Maddison's property. The question was whether the river which bounded his property and certain municipal ground had not changed its course.

Mr. Innes contended that this was really a test case, as the properties of several other people were concerned in the same question.

The Court held that the balance of convenience was in favour of the trial taking place in the Supreme Court, and refused the application accordingly, costs to be costs in the cause.

IN THE MATTER OF THE MINOR CHARL CHRISTIAN PRETORIUS.

Mr. Buchanan applied for an order authorising the Registrar of Deeds to register certain partition transfers.

The petition set out that certain farms in the Hope Town district were held by the minor under the deed of transfer, which showed that each of the minor children should have one-tenth of the four farms. The co-owners of the farms had agreed upon the partition of the property, whereby the minor child, Charl Christian Pretorius would get 1,515 morgen on one farm, and 385 morgen on another farm, making in all

1,900 morgen. The total number of morgen in all four farms was 15,000, so that the effect of the partition was that the minor really got one-eighth share instead of one-tenth. The major co-owners were willing to bear the expense of the partition, and the Magistrate at Hope Town had reported that it would be to the interest of the minor.

The Court allowed the order.

QUEEN V. LIEBENBERG. } 1899.  
} May 1st.

Bail—Charge of murder.

This was an application for the admission of the defendant to bail.

It appeared that he had been originally arrested on a charge of assault with intent to do grievous bodily harm, and on April 12 the Resident Magistrate of Richmond admitted him to bail in the sum of \$1,000. On May 21 the charge was altered to a charge of murder, when the petitioner applied for bail on certain terms, which the Magistrate refused to allow. He had not yet been indicted, as the papers had not yet come before the Solicitor-General.

Mr. Graham, Q.C., for the applicant, the defendant.

Mr. Ward for the Crown, said he would not oppose the granting of substantial bail.

The Court allowed the applicant to bail in £1,500 on his own surety and in two sureties of £250 each.

IN THE MATTER OF THE PETITION OF HELENA O'KELLY, SISTER SUPERIOR, AND ON BEHALF OF THE COMMUNITY KNOWN AS THE POOR SISTERS OF NAZARETH.

Mr. Benjamin applied for a rule *nisi* under the Derelict Lands Act to be made absolute.—The order was granted.

ELLIOTT BROTHERS V. LE GRANGE.

Mr. Benjamin applied for leave to attach certain money in the hands of one Wessels to found jurisdiction and also to sue by edictal citation. The petitioners, it appeared, were agents at Sterkstroom, and held a promissory note from defendant, who had once lived at Queen's Town, but had lately disappeared, and was supposed to have gone to Johannesburg. The petitioners had ascertained that a Mr. Wessels was about to pay the defendant £120, being an account due, and they now asked for leave to attach this amount in part settlement of the promissory note.

The Court granted leave, and further granted the prayer to sue defendant by edictal citation returnable on July 13, personal service if possible; if not, one publication in the "Queen's Town Free Press."

METCALFE V. METCALFE.

Mr. Benjamin applied for a decree of divorce. An order calling upon defendant to return to his wife, or in the event of non-compliance, to show cause why a decree of divorce should not be granted, was issued on February 20, but had not been complied with.

Granted.

IN THE ESTATE OF THE LATE DAVID DU PLESSIS.

Mr. Searle, Q.C., applied for a rule *nisi* to set aside a certain codicil on the ground that it was not signed by the testator to be made absolute.

Granted.

IN THE MATTER OF THE MINOR CONSTANCE ASHLEY.

Mr. Benjamin applied for authority to the Master to make certain payments towards the education of the minor.

Granted.

LAKE V LAKE. } 1899.  
} May 31st.

This was an action for restitution of conjugal rights, or in the alternative, for a decree of divorce.

Mr. Buchanan appeared for the plaintiff.

Florence Edith Lake, the plaintiff, said she was married to defendant on February 21, 1890, at Greenwich, England. They lived for three years in England, during which time a child was born which was now eight years old. They came to the Colony in 1893, when defendant became registrar to Mr. Justice Hopley at Kimberley. Witness went to England to fetch her child, returning in 1893, the means to do so being provided by her parents. She went to Mafeking, where her husband joined her. On 9th December, 1893, her husband, who was in debt, left her, and said he would go to the Transvaal, and that he did not think it possible to support her. He made all his arrangements without her knowledge, and had not supported her since. She had only received one letter since, in which he said he

had no wish to hear from her again, and it was unnecessary for them to correspond. He was now at Herschel, in Cape Colony.

The Court granted the decree, returnable by July 12; personal service to be effected.

[Plaintiff's Attorneys, Messrs. Findlay & Tait].

ALPORT'S EXECUTORS V. ALPORT. { 1899.  
{ May 31st.

Married woman—Suretyship—*Senatus consultum velleianum*—Renunciation—Notarial instrument—*Authentica si qua mulier*.

*A. being indebted to B, induced his wife to whom he was married out of community, to pass a bond on her property to secure the debt. She signed a power authorizing the passing of the bond and the renunciation of her benefits, but the power was not notarial, and there was no evidence that she understood her rights as a married woman, whilst she swore that she was wholly ignorant of the nature of the benefit which she renounced. Held, in an action on the bond brought against her by B's executors that she was entitled to the privileges of the senatus consultum velleianum and of the authentica si qua mulier.*

This was an action instituted by the executors of the late Mr. P. J. Alport and Sir J. C. Molteno against the defendant, who was the late Mr. Alport's daughter-in-law.

The action was instituted on a mortgage bond for £265, together with interest at the rate of 6 per cent, from July 7, 1885. The defendant had by virtue of the bond become surety for and co-principal debtor with her husband, Arthur Cuthbert Alport, for the above sum, and had renounced all the legal exceptions. The sum was originally owing for goods sold and delivered, and money advanced to her husband, and he had failed to meet the debt.

The defence was twofold. The defendant denied all but the formal paragraphs, and her special defence was that she admitted that in or about July, 1885, she signed a certain document, which she now, for the

first time, however, discovered to be a power of attorney to pass the bond. The document was signed at her husband's request, and she maintained that she was wholly ignorant of its contents, and she denied that she at any time renounced her rights. She put the plaintiffs to proof that the amount claimed was really owing by her husband. There was an alternative plea to the effect that about 1887 the late Mr. P. J. Alport was on a visit to Beaufort West, and whilst there saw defendant and conversed with her about the said document, and upon her asking him about the nature of the document, Mr. Alport told her he released her from any liability she might have incurred thereby. She therefore prayed that the claim might be dismissed.

Upon these pleadings action was joined.

Mr. Molteno appeared for the plaintiffs.

Mr. Graham, Q.C., and Mr. Buchanan for the defendant.

Charles Augustus Alport said he had for eight years managed the business of P. J. Alport & Co., Beaufort West. Defendant was his sister-in-law, and her husband was his brother. The account produced was a true account of his brother's liability to the firm.

Cross-examined: Witness was still manager in the firm. His brother had been in the firm for twenty-five years as clerk. He had been asked to leave the firm at the end of last year, after the death of old Mr. Alport. The account produced was an extract from the firm's cash-book. Witness never made a demand upon his brother for the account. Witness had instructions to enter the bond in 1885, and after that forgot all about it. Quite recently the late Mr. Alport wrote off an amount of £1,070 owed by witness to the firm. Mr. Alport had promised to do so in 1897. The entries in the cash book were all in witness's handwriting. Witness kept the cash book, and Mr. Alport kept the journal and ledger in Cape Town. Witness's brother had recently paid off £100 on another account. The bond was found among Mr. Alport's papers at Claremont.

Re-examined: The amount credited by Mr. Alport to witness came out of his private account. The late Mr. Alport left witness's brother £2,000, and left witness £3,000 besides the residue.

Mr. Molteno was allowed to reserve the right to call further evidence.

Ellen Esther Alport, the defendant, said she remembered signing a certain paper in 1885,

at her husband's request, in her house at Beaufort West. No one was present but her husband, and she did not know what she was signing. He said that all the business employes had been asked to sign similar documents. Witness had never paid any interest on the bond, nor had she been asked to do so. She was quite certain that her husband only was present. The transfer deeds of the property which she purchased in 1880 had always been kept in the safe at the store. She paid £700 for the property. She used to see Mr. Alport, when he came down in September each year. Witness spoke to him about the paper, and asked him whether she owed anything on the paper. He said: "Don't trouble about that. You will never be asked to pay; I will see that it is cancelled." She had no knowledge that in signing the paper she was renouncing any rights. Until Mr. Alport's death she never heard of the document again.

Cross-examined: The late Mr. Alport was very good to witness and her husband, and had at times assisted her with money. He had also paid for her child's education. Witness had never had any communication with Mr. Alport except as to the education of her son. She always understood that her husband paid his accounts at the store. When Mr. Alport was speaking to her she had no knowledge that she or her husband was indebted to the firm. Witness had not had any communication with the executors about the estate. She denied that she managed all her husband's affairs.

Re-examined: Her husband used to purchase articles from the store every month against his salary.

Arthur Cuthbert Alport said he had been twenty-five years in the employ of Alport & Co. He could not remember the document in question, nor could he remember taking it to his wife to sign. No demand for interest on the debt had ever been made.

Cross-examined: Mr. P. J. Alport was a very precise man of business. Witness could not remember any bond being passed. His wife was an excellent business woman, and had carried on most of the correspondence with Mr. Alport.

Re-examined: A letter of demand was sent to witness after Mr. Alport died.

For the plaintiff,

John Charles Molteno, one of the executors in the estate of the late Mr. Alport, said that he discovered the bond in Mr. Alport's deed-box. The bond had been

brought up year after year in Mr. Alport's ledger. It first appeared in the books in 1885.

Cross-examined: In the books produced the bond was not entered in the name of anyone. No interest had been paid on the bond during Mr. Alport's lifetime.

Charles Augustus Alport, re-called, said he had no recollection of the power of attorney being signed. The firm was being liquidated now.

After argument,

De Villiers, C.J.: The executors of Alport acted within their rights, indeed within their duty, in bringing this action. They found the bond among the papers in his estate, and the heirs might have had a just ground of complaint if an action had not been instituted to test the validity of the bond. By that bond the defendant had mortgaged her property as a security for the debt of her husband, and she is entitled to the benefit of the *senatus consultum* unless she had not only renounced the benefit of it, but understood what she was renouncing. If the renunciation had been effected by means of a notarial instrument the presumption would have been that she understood her rights, and deliberately renounced them. Other instances in which a similar presumption might arise were mentioned in *Oak v. Lumsden* (3 Juta, 144). Even if there was no notarial instrument, evidence would be admissible to shew that she knowingly renounced her right to take advantage of the law which protects her. What evidence is there in the present case that she knew what her privilege was? One of the witnesses to the power of attorney authorising the passing of the bond, says that he cannot remember the circumstances under which the power was signed and he does not pretend to state that any explanation was offered to the defendant of the *senatus consultum* which she was supposed to renounce. The other witness was not called at all on behalf of the plaintiffs. The defendant herself emphatically states that she was ignorant of her rights and of the nature of the privilege which she in form renounced. She had only recently been married, and although it may be true that she is now a good woman of business, she probably then understood very little of business affairs, and certainly did not, in my opinion, know anything about the *senatus consultum*. We are not now concerned with the policy of the law. It may well be that in course of time when the "new woman" has obtained

her full rights she will also be deprived of the privileges which the law has devised to protest her against any possible imposition, but so long as those privileges legally exist the Court must uphold them. It has been said that it is a great hardship for the executors to have to meet such a defence as the present, but they cannot claim any greater right in respect of the bond than the deceased himself would have enjoyed. The judgment of the Court must be for the defendant with costs.

Buchanan, J., concurred. He wished to emphasise the remark that the executors would not have been justified in not testing the case in court.

Judgment was entered accordingly for the defendant with costs.

[Plaintiff's Attorneys, Messrs. Treigold, McIntyre & Bisset; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

REGINA V. WOLPERT AND } 1899.  
ROBINS. } May 31st.

Magistrate's jurisdiction—Culpable insolvency—Punishment—Ordinance 6 of 1843, section 71—Act 38 of 1884, section 9.

*A Magistrate cannot in sentencing a prisoner for the crime of culpable insolvency, allow him the option of a fine, even where the case has been remitted under Act 43 of 1885.*

*Where a Magistrate convicted two prisoners of culpable insolvency, and sentenced them respectively to a penalty of £25 fine or four months imprisonment and £10 fine or two months imprisonment, the sentences were set aside, and the cases remitted to him to pass such sentences of imprisonment, not exceeding the periods of four months and two months respectively, which would have been passed if he had not given the prisoner the option of a fine.*

This was an argument upon a case reserved by the High Court for the consideration of the Supreme Court in terms of Act 35 of 1896, section 30.

The case was stated by the Judge President in the following terms:

The accused were charged before the Resident Magistrate of Kimberley, with the crime of culpable insolvency in contravention of Section 71 of Ordinance 6 of 1843, as amended by section 9 of Act 38 of 1884. The Magistrate having taken a preliminary examination committed the accused, and the case was remitted by the Crown Prosecutor under Act 43 of 1885, when they were convicted and sentenced to pay certain fines, or in default of payment to be imprisoned as appears from the record forwarded herewith.

Under the Ordinance the only competent sentence is one of imprisonment for a period not exceeding six months. The Legislature does not seem to have contemplated the imposition of fines on persons *ex hypothesi* not possessed of any means. The question is, whether in view of the terms of the Act of 1885, a remittal under that Act gives the Magistrate a discretionary power of imposing a fine.

If so, he would have a discretion which apparently would not be possessed by a Judge after conviction on a similar charge by a jury. It can scarcely be suggested that in a case like the present a Magistrate could impose any penalty provided by section 1 of Act 43 of 1885, as in that case he might impose a more severe sentence than the maximum laid down in the Ordinance constituting the offence.

The question has been reserved partly because of its importance, partly because it has been already discussed, but not decided, in the case of *Regina v. Wallace* (9 E.D.C., 49).

Should the Supreme Court be of opinion that it was not competent for the Resident Magistrate to impose a fine, presumably either the pecuniary alternative should be struck out, or the case remitted to the Resident Magistrate to impose a sentence in accordance with law.

I am informed that the fines have been paid.

The record sheweth that the sentences imposed were respectively £25 fine or four months imprisonment with hard labour, and £10 fine or two months imprisonment with hard labour.

Mr. Ward for the Crown: Under Act 43 of 1885, section 1, a Magistrate is authorised in remitted cases to impose a fine or sentence to imprisonment; that limits the sentence which he may pronounce, but it applies only

to those cases where no particular punishment for the offence in question has been laid down. *Regina v. Sampson and Bacon* (6 Juta, p. 277); *Regina v. Wallace* (9 E. D. C., p. 49.)

[De Villiers, C.J.: We may take it for granted that the statutory punishment for the offence remains, but the question is whether the Court should now strike out the part of the sentence which inflicts the fine or remit the case to the Magistrate for him to pass a fresh sentence.]

Mr. Ward: The illegal part of the sentence should be struck out; that is what the Court has often done in previous cases.

[De Villiers, C.J.: This case differs from other cases inasmuch as that course may make it worse for the prisoners. If the case is remitted to the Magistrate, he may consider that if he is bound to pass a sentence of imprisonment that he should make the term lighter.]

Mr. Ward: If the Court thinks it fit to remit the case, there is no objection on the part of the Crown.

Mr. Gardiner for the prisoners: Act 43 of 1885, to a certain extent repeals section 71 of Ordinance 6 of 1843. In *Regina v. Davis* (1 Leach, p. 271), it was held that a penalty laid down in a subsequent statute repealed that imposed in an earlier one. *In re Baker* (2 H. and N., p. 219). Even under the ordinance there is sufficient discretion in the Court to inflict a fine.

Culpable insolvency is a species of fraud and *Van der Linden* (2 6, 4) says that although a statute provides the punishment of hanging for fraud yet the general rule is that the punishment is discretionary. See also *Regina v. Kiviit* (1 Buchanan's App. Ca., p. 173.)

De Villiers, C.J., said: Under the 71st section of the Insolvent Ordinance the punishment which can be inflicted upon a person found guilty of culpable insolvency is that he be imprisoned with or without hard labour for a period not exceeding six months. Clearly then it was the intention of the Legislature in passing this statute to punish a culpable insolvent more or less without the option of a fine. Whatever the reasons for it, I think it is quite clear that the intention of the Legislature was that a person found guilty of culpable insolvency should not be allowed the option of a fine. Then came the Act 43 of 1885, which increased the jurisdiction of the Magistrate, but it never was intended by that Act to alter the power of a Magistrate in

sentencing prisoners. Under that Act certain penalties were imposed, and the Magistrate is bound by those penalties only and must not exceed the penalties there prescribed. The Magistrate, therefore, in my opinion, had no more power to inflict a penalty with the option of a fine than a judge sitting on a Circuit Court would have that power. The Magistrate in the present case has given the option of a fine, and it is very difficult now to know whether he might not have been influenced in inflicting the alternative sentence of imprisonment, as to the period of that imprisonment, by having given the option of a fine. The sentence of the Magistrate must be set aside, and the case remitted to the Magistrate to pass such sentence of imprisonment, not exceeding the periods of four months and two months respectively, which would have been passed if he had not given the option of a fine.

Buchanan, J., concurred, and added that the only reason why the Court agreed to send the case back to the Magistrate was to the interests of the prisoners, and not to their prejudice.

Maasdorp, J., also concurred.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

LIQUIDATORS OF CAPE OF  
GOOD HOPE PERMANENT  
LAND, BUILDING AND IN-  
VESTMENT SOCIETY V. STAN-  
DARD BANK. 1899.  
June 1st.

Building society—Borrowing powers  
—Pledge of bonds.

*The directors of a Building Society at a time when they were alleged to have exceeded their borrowing powers, pledged certain bonds to their bankers as a security for a further loan.*

*Held, in an action brought by the Liquidators of the Society to have the pledge set aside, that the bank-*

*ers are entitled to the security of the bonds at all events for such of their advances as had been applied in payment of the debts and liabilities of the society which were properly payable.*

This was an action for the delivery of certain mortgage bonds or their proceeds.

The declaration was as follows :

1. The plaintiffs are George William Steytler and Harry Gibson, who sue in their capacity as the official liquidators of the Cape of Good Hope Permanent Building, Land, and Investment Society. The defendant is the Standard Bank of South Africa (Limited), a banking institution carrying on business in this colony and elsewhere.

2. The said society was established in the year 1877, and consisted of an association of persons subscribing to a common fund to be employed in making advances to such of the members as desire to obtain them on the security of landed property, and was governed by certain rules, printed and published.

3. The 13th, 22nd, and 70th of the said rules provided as follows : Rule 13—"That the affairs of the society shall be conducted by a Board of Management of not less than six directors, of whom two shall be appointed trustees. The directors' meetings shall be held fortnightly, or oftener if required." Rule 22—"That the Board of Directors shall have power to borrow any sum for the purpose of the society to advance to their members, either from their bankers or any other source, not exceeding two-thirds of the amount secured to the society by mortgage from its members." Rule 70—"The directors may receive from time to time deposits from shareholders and others of not less than 2s. 6d., upon which interest will be allowed at such rate as the directors may decide, and on the conditions set down in Rule 64."

4. In or about October, 1897, the directors of the said society, appointed under its rules as aforesaid, borrowed, on behalf of the said society, from the defendant bank a sum of £3,500, and pledged as security for the above advance and to cover any future advances the following mortgage bonds belonging to the said society : Bond by William Stephans, amounting to £1,300; bond by C. R. Davison, amounting to £1,000; bond by F. Muszlak, amounting to £1,550.

5. At the date of the said advance and pledge the directors had exceeded the borrowing powers conferred on them by the rules of the society as aforesaid.

6. Thereafter the defendant bank made further advances by way of overdraft, and on or about April 20, 1898, the secretary of the said society, one W. J. Hancock, acting without the knowledge or consent of the directors thereof, deposited with the bank as security for the overdraft of the society the following bonds : Bond by R. Dickson, amounting to £700; bond by H. S. Fell, amounting to £800; bond by S. E. and G. Pallett, amounting to £1,700; bond by J. C. Jacobs, amounting to £950; bond by J. F. S. Slate, amounting to £600.

7. The overdraft aforesaid was caused by the defalcations of the said Hancock, who appropriated the amounts advanced by the bank as aforesaid to his own purposes, without the knowledge or consent of the directors.

8. As soon as the directors became aware that the said bonds had been deposited by the said Hancock they gave notice to the defendant bank, and repudiated his acts, and refused to be bound thereby.

9. Thereafter, on or about 21st July, 1898 the said society, being unable to meet its liabilities, was placed under liquidation by this Honourable Court, and the plaintiffs were appointed the official liquidators.

10. Thereafter the plaintiffs called upon the defendant bank to deliver up the bonds aforementioned, which had been deposited with it, but the defendant bank refused so to do.

11. Thereafter it was agreed between the plaintiffs and the defendant bank that the said bonds should be handed over to the plaintiffs for realisation, and that the proceeds should be handed over to the defendant bank, to be held by it pending the result of an action to determine whether the said bank had any valid pledge in respect thereof, and in pursuance of the above agreement the defendant bank now holds the proceeds of such of the said bonds as have been realised.

The plaintiffs claim : (a) That the alleged pledges of mortgage bonds of the said society, amounting to the sum of £8,600, to the defendant bank be declared to be illegal and of no force and effect, and that the defendant bank be ordered to deliver up the said bonds or the proceeds thereof to



the plaintiffs, as being portion of the assets of the said society : (b) alternative relief : (c) costs of suit.

For a plea to the declaration the defendant says as follows :

1. The allegations in the first paragraph are admitted.

2. The objects of the society are not duly and sufficiently set out in the second paragraph. The said society was established in the year 1877, and was registered in or about the month of August, 1897, as a company with limited liability, under the Companies Act of 1892. The objects of the society were making advances to members on the security of landed property, receiving money on deposit at interest, purchasing landed property, erecting buildings, and generally investing the surplus funds of the society. Previous to the month of August, 1897, it was governed by certain published rules : and after that date it was subject to a certain memorandum of association and to certain rules and articles thereunder.

3. The third and fourth paragraphs are admitted, but the defendant refers this honourable Court to the matters set forth in the sixth paragraph hereof for further particulars as to the pledge of the bonds in the said fourth paragraph of the declaration referred to.

4. The allegations in the fifth paragraph are denied.

5. As to the sixth paragraph, the defendant admits the fact that further advances were made by it as stated to the society, and also the fact that the bonds therein referred to were deposited by the said secretary as security for the society's overdraft ; but it denies that the said secretary, in so dealing with the said bonds, acted without the knowledge or consent of the directors. It refers this Honourable Court to the matters set forth in the seventh paragraph hereof.

6. In or about the month of October, 1897, the current account of the society with the defendant bank was overdrawn. The said society, through its secretary, applied for a continuance of credit and for further banking facilities, in order to obtain money for the due purposes of its business. The defendant agreed to afford such facilities and such credit in consideration of the pledge of the bonds referred to in the fourth paragraph of the declaration. The said bonds were duly deposited in pledge by the said secretary, whose action was thereafter confirmed by a resolution of the directors,

duly communicated to the defendant. And in consideration of the said deposit and pledge of the said bonds, the defendant allowed such overdraft to continue, cashed cheques duly drawn by the society for large amounts, and generally afforded further banking facilities as aforesaid.

7. Thereafter, in or about the month of April, 1898, the society, through its secretary, desired for the purposes aforesaid a still further continuance of credit and a further increase of its overdraft with the defendant bank, and the defendant agreed to afford additional banking facilities in consideration that the bonds referred to in the sixth paragraph of the declaration should be pledged to it. The said bonds were thereupon duly deposited by way of pledge by the said secretary, who was acting within the scope of the authority committed to him by the said directors : but before a resolution of the said directors was passed confirming the secretary's action, the society was discovered to be in financial difficulties, which resulted in its being placed under liquidation as in the declaration set forth.

8. In consideration of the said deposit and pledge in the last preceding paragraph referred to, the defendant allowed the said overdraft to continue, cashed further cheques duly drawn by the society, and generally afforded to it additional banking facilities.

9. The balance of money advanced by the said bank to the said society as aforesaid, and which was so advanced and paid in respect of cheques duly drawn by the society upon the defendant bank, and cashed by it in consideration and under security of the various pledges and bonds hereinbefore referred to, amounts to the sum of £7,420 16s. 6d. Portion of the moneys so advanced by the defendant bank to the society was advanced by the latter on loan to its members upon securities which are held by the plaintiffs for the benefit of the creditors and shareholders of the said society ; the remainder of the said moneys was utilised for the payment of amounts properly payable by the said society, and the said society has received the full benefit of the said payments.

10. The defendant denies the allegations in the seventh paragraph of the declaration.

11. As to the eighth paragraph, defendant denies that the said directors repudiated the acts of the said Hancock as soon as they became aware that the bonds therein referred to had been deposited by him.

12. The ninth, tenth, and eleventh paragraphs are admitted.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

For a claim in reconvention, the defendant (plaintiff in reconvention) says as follows :

1. It asks leave to refer this Honourable Court to the matters set forth in the plea in convention.

2. There is due and payable to the said bank the sum of £7,420 16s. 5d., being the amount of the overdraft referred to in section 9 of the plea in convention.

3. The moneys so advanced as aforesaid constitute an advance made by the said bank to the said society within the scope of the rules and regulations of the said society, and the said society received the full benefit of the said moneys, which were devoted to the payment of amounts properly payable by the said society.

4. All things have happened, all conditions been fulfilled, and all times elapsed to entitle the said bank to be paid the said sum of £7,420 16s. 5d., yet the defendants in reconvention unlawfully contend that no part of the said amount is payable by them to the said bank.

The bank (plaintiff in reconvention) claims: (a) An order declaring that the said amount of £7,420 16s. 5d. with interest *a tempore morae* is a debt legally due to the said bank, and granting judgment against the defendant or the said amount subject to the order hereafter referred to; (b) an order declaring that the said bank is entitled to retain and realise all the said bonds, and to apply the proceeds thereof, as far as they will go, to the payment of the said claim of £7,420 16s. 5d., with interest; (c) alternative relief; (d) costs of suit.

The replication admitted the establishment and registration of the society and its objects as set forth in paragraph 2 of the plea. It also admitted that the current account was overdrawn in October, 1897, and the overdraft at date of winding up was £7,420 16s. 5d. It was otherwise in general terms.

The plea in reconvention alleged that the advances made by the bank were illegally made inasmuch as the directors had at the time exceeded their borrowing powers.

It alleged further that Hancock had no authority to pledge the bonds enumerated in paragraph 6 of the declaration, and that the bank had consequently no lien on the proceeds of the bonds, but that any claim which it might have was hereby a concurrent claim.

Mr. Searle, Q.C. (with whom was Mr. Macgregor), appeared for the plaintiffs. Mr. Innes, Q.C. (with whom was Mr. Gardiner), for the defendants.

Mr. Searle, in opening the case for the applicants, stated that in October, 1897, the directors of the society borrowed £3,500 from the bank, and pledged three bonds belonging to the society for the amount. At the date of the advance, the borrowing powers of the society had been exceeded by the directors, and thereafter further advances were made by way of overdraft by the bank to the society, and on April 20, 1898, the secretary, Hancock, deposited with the bank certain five bonds, amounting to £4,750. The plaintiffs called upon the bank to deliver up the bonds, but the bank refused to do so. In April, 1898, the society desired further facilities, and the defendants agreed to continue these facilities on the condition that the five bonds were pledged, the balance of money advanced by the bank in consideration of the bonds being £7,420. There was a further claim in reconvention for judgment for £7,420, the defendants to retain and realise the bonds, and to apply the proceeds to the payment of the claim. Two points would therefore arise for the consideration of the Court, one raising the broad issue as to the powers of the directors to incur the liability of the overdraft, and secondly, in regard to the five bonds whether there was any pledge at all, and whether the bonds should not be handed up.

De Villiers C.J.: Can the money which Hancock obtained from time to time be traced?

Mr. Searle said he believed it could be traced. The money went no doubt to pay other depositors and shareholders from time to time.

De Villiers, C.J., asked whether in any case the plaintiffs could recover any more than the excess of the amount borrowed over the borrowing powers of the directors. He found that at one time the two-thirds of the deposits was only exceeded by £5,000, and in any case, as far as the directors were concerned, they would only

be liable for the difference. Indirectly the liability of the directors came into play in the present case.\*

Mr. Searle said that no doubt if the plaintiffs succeeded, the bank could claim against the directors.

De Villiers, C.J.: Therefore everything depends upon whether the directors are liable for the defalcations.

Mr. Searle: The point now is whether the bank is entitled to any preference in respect of the amount advanced on the bonds.

De Villiers, C.J., said he would simply throw out the suggestion whether it would not be advisable to come to some compromise in the matter, that the directors should pay over to the liquidators such a sum of money as would appear from the books to be in excess of the borrowing powers. That would be about £5,000, and could be paid over to be distributed *pro rata*.

Mr. Searle said that according to the liquidators' report on March 30 it would be about £8,000.

De Villiers, C.J., said that the case would be such a complicated one that he did not see how it was going to be unravelled without some settlement such as he had proposed. If the directors were personally liable it would practically result in their paying the defalcations of Hancock, and yet the Court might be of opinion that they should not be liable for the defalcations of Hancock, in which case there should be a *pro rata* settlement.

(By consent the accounts produced and evidence given in the case of *Langford v. Directors of Cape of Good Hope Building Society* were admitted as evidence).

Mr. Harry Gibson, secretary of the South African Association, said he was one of the official liquidators of the Cape of Good Hope Permanent Land and Building Society. The amount of defalcations as at present known was £61,000, and the amount of the assets was £57,000. The excess of the deposits and the overdraft over the borrowing powers at the date of liquidation was £8,717 2s. 4d. He had prepared a statement showing the various accounts of the society from the year 1878 to 1897. It was clear that in October, 1897, the directors had

exceeded their borrowing powers by close on £10,000. At that time there was no overdraft shown in the books, and the general liabilities of the society were then almost *nil*. According to the books on April 30, there was a credit balance of cash in hand at the bankers of £2,697, but as a matter of fact, the actual overdraft at the bank was £2,724, the pass-book having from time to time been falsified by Hancock. The latter drew money by cheques signed by two directors and himself, and in some cases he simply used the money of one depositor to pay another. In the case of an amount of £780 paid in by Mr. Wallwork, the amount was never passed through the books at all, for the reason that there was no account to enter it to. In October, 1897, the date of the first pledge of bonds, the books showed a balance in hand of £2,028, although the actual overdraft at the time was £4,415. There had been previous overdrafts but they had been settled. It was clear from the balance-sheets that were made up that the directors for years past had exceeded their borrowing powers.

The minutes showed a confirmation by the directors on 7th October, 1897, of part of the overdraft, and on the 21st October, 1897, a formal resolution was passed and a cession of bonds executed by the trustees. There was no minute to be found dealing with the second transaction.

Cross-examined: The bulk of Hancock's defalcations were manipulated in the office of the society from deposits paid in, and then the bank accounts were manipulated to cover. Some of the cheques went to pay ordinary expenses of the society, some went to pay withdrawing members. The bulk of cheques went to depositors and withdrawing shareholders.

Re-examined: At the date when the society went into liquidation the amount of the deposits should have been well over £100,000, and the books only showed £41,361. The defalcations consisted principally of deposits embezzled by Hancock. If there had been no defalcations, there would have been no deficiency. The bank pass book was altered twice, once to show to the directors, and then to show to the bank.

Mr. William Edward Moore, formerly the chairman of the society, said that in regard to the first pledge on bonds the bonds were pledged by resolution of directors while he was in Natal, and when he returned he

NOTE.—An action (*Langford v. The Directors Cape of Good Hope Building Society*) had been already instituted and part heard on May 16, in which one of the depositors of the society sued the Directors personally for the amount of his deposit. That case will be reported when judgment has been delivered.—*Rep.*

signed the usual form. No authority had ever been given to the secretary to pledge the bonds, which were from time to time examined by the trustees. After Hancock's departure he discovered from Mr. Orpen that the bonds had been taken to the bank by Hancock. He told Orpen he would call a meeting of directors to authorise the pledge in order to enable them to get a further overdraft. He did not then know of the existing overdraft. The auditors next informed the directors of the embezzlement, and no further attempt was made to obtain a fresh advance.

This closed the case for the plaintiffs.

For the defence,

Mr. Ernest Orpen, sub-manager of the Cape Town branch of the Standard Bank, said that Hancock handed the second lot of bonds pledged to witness. Hancock handed over five bonds and said, "Let us have an acknowledgment as soon as possible." Subsequently witness was sent up to the Building Society to see why the pledge of the bonds had not been completed, and from there he went to see Mr. W. E. Moore and asked him for a resolution completing the pledge. Mr. Moore promised to call a meeting of the Board to complete the documents in regard to the pledge of the bonds.

The Chief Justice: Do you say that creates a pledge?

Mr. Innes: Well, it is a relevant fact that we must have.

Witness, continuing his evidence, said that two hours later Mr. Moore came down to see him, and said that if necessary he would pay in a thousand pounds to the credit of the society himself.

Cross-examined: Witness was aware that he had to get the documents completed.

Mr. Patrick C. Grant, of O'Flaherty, Grant & Co., accountants, produced a statement tracing each cheque drawn against the society from October, 1897, and showing how each one figured in the books of the society. There was an amount of £402 which he was unable to say had been expended for the benefit of the society.

Cross-examined: The statement put in was made up from the books of the society as kept by Hancock.

The evidence of John Whitfield Harsant, taken on Commission, was put in. He stated that he was manager of the Standard Bank in Cape Town. The account of the Building Society with the bank was opened on 31st July, 1890. Since then advances have been made to the society from time to time

With one exception all advances were by cheque. The society first arranged for an overdraft in March, 1893. Again in February, 1896, there was another overdraft for £1,000. All communications with the society were through the secretary. In August, 1897, the overdraft began to assume a permanent character and witness wrote to Hancock, the secretary. The latter handed him bonds for £3,850, he arranged with Hancock that the limit of the overdraft should be £3,500. The bonds were forwarded to the bank's solicitors and a deed of pledge and cession were drawn up. Witness received a resolution of the Directors dated 25th October, 1897. The overdraft fluctuated from August, 1897, to the 14th March, 1898, when it was £2,700. On the 25th March, 1898, it was £5,313. (Correspondence between witness and Hancock was put in).

On the 20th April, 1898, Hancock came to the bank and handed in the mortgage bonds referred to in paragraph 6 of the declaration as security for increased facilities up to £1,000. The bonds were forwarded to the directors for the purpose of having the usual deed. Further correspondence ensued. Before the deed of cession was signed by the directors Hancock's fraud was discovered.

Witness saw the balance sheets of the society from time to time and took notes of the mortgages held by the society. He looked at the amounts in order to see that the directors had not exceeded their borrowing powers. He was acquainted with Rule 22. When the society was put under the Winding-up Act it was arranged that the bank should hand the bonds over to the liquidators without prejudice to its own rights.

Cross-examined: Witness had acquainted himself with the rules of the society. Beyond looking at the balance sheets and discussing with the secretary the prospects and position of the society he made no enquiries as to its financial position. He was in constant verbal communication with the secretary relative to the overdraft. The overdraft of £5,000 was occasioned by cheques, drawn in the ordinary course of business, signed by two directors and the secretary. Special enquiries were made of the secretary as to how this £5,000 was to be settled. Witness wrote the letters of the 13th May after obtaining information from Mr. Orpen: he was informed after that that the directors refused to complete the cession. Witness was aware of what became of the money advanced by the bank: the latter

portion of paragraph 9 of the plea referred to investigation made by the bank of the accounts of the society: he based his knowledge also upon the cheques drawn on the bank by the society and paid. As far as he knew none of that money was taken by Hancock.

Re-examined: There was nothing exceptional in his dealing only with the secretary. All societies dealt with the bank through their secretaries.

De Villiers, C.J.: Mr. Searle, the Court will hear you now only on the question of the first set of bonds.

Mr. Searle: The claim in convention and the claim in reconvention are brought on distinct grounds. The position taken up by the Bank is that it is entitled to keep the bonds because they have been pledged to them, but in the claim in reconvention it relies on the doctrine of sub-rogation, alleging that the proceeds have been applied to the benefit of the society. There is clear authority for the doctrine that when directors have exceeded their borrowing powers there can be no valid pledge of their securities to a creditor. *Wurzburg on the Law relating to Building Societies* (3rd ed., p. 95), referring to *Ex parte Watson* (21 Q.B.D., p. 301). It has been decided also that a loan by way of an overdraft is on the same footing as an ordinary loan *Wurzburg* (pp. 70, 91), and so is a deposit. *Re Guardian Permanent Benefit Building Society* (23 Ch.D., p. 410, at p. 450); *Agnew v. Murray* (9 App. Ca., p. 538), did not over-rule that case: it only over-ruled the finding that there was an illegal borrowing and did not over-rule the principles laid down. The society in question in the present case is in the same position as a society under Act 6 and 7, Will IV, c. 32 in England. *Chapman v. Brunswick Building Society* (6 Q.B.D., p. 696). There was no proof in that case that the proceeds had gone to the benefit of the society.

[De Villiers, C.J.: Have you any decision to show that the bank cannot be in any better position than any other creditor?]

The authorities are not definite upon that point. The debt must be a valid debt. Amounts paid to people who have been engaged in illegal transactions are not valid debts. *In re The Wrexham, Mold and Conwys Quay Railway Co.* (15 T.L.R., p. 209); *Blackburn Building Society v. Carliffe Brooks & Co.* (22 Ch.D., p. 71). The transactions in question were illegal borrowings and could not be considered as debts of the society. The case went on appeal (9

App. Ca., p. 857) and again came before the Court of Appeal in another form. *Baroness Wenlock v. River Dee Co.*, (19 Q.B.D., p. 155).

The directors borrowing powers have been exceeded ever since 1879. Probably all the deposits repaid out of these loans were deposits made at a time when the borrowing powers had already been exceeded. In some cases the money was used to replace money borrowed from the depositors. Per De Villiers, C.J., in *In re Cape of Good Hope Permanent Building Society* (8 Shiel, p. 360): *Wurzing* (p. 98). The bank knew the rules of the society and nevertheless allowed the secretary to go on borrowing. The proper principle to apply is to enquire whether each individual person whose debt was paid was a person who had a legitimate debt which he could enforce. That cannot at present be ascertained and therefore the defendant's claim is premature.

Mr. Innes: In *In re Cape of Good Hope Permanent Building Society* (8 Shiel, p. 360) the Court decided that the directors had exceeded their borrowing powers, but that decision was not necessary to the decision of the case. Upon the construction of Rule 22 and Rule 70 it is a question whether the original members of the society meant to apply the rule as to two-thirds to the case of deposits. If so meant, why was it done in two different rules. It was very inconvenient; the society was a small one and how was it to make advances at all if the amount of the deposits was to be limited.

[De Villiers, C.J.: That argument would apply to Building Societies in England, where that rule is laid down by statute.]

There it is a mandate imposed by statute, but not a rule which people would voluntarily have chosen.

[De Villiers, C.J.: This society was apparently modelled on the English Societies.]

That does not appear quite clear. But for Rule 22 there would be no limit to the borrowing powers under Rule 71. The English Building Society Act of 1874 draws a distinction between deposits and ordinary loans. A great inconvenience would result from the inclusion of deposits among ordinary loans: the position of the society would vary every day; therefore the two-thirds limit can not be intended to apply to deposits. Section 14 of the Building Society Act of 1894 (57 and 58, Vict. C., 47) *Wurzburg* (Appendix, p. 325) was put in to remedy this very point of the inconvenience of a rigid application of the rule laid down in the Building Society Act of 1874 (37 and 38,

Vict. C., 42). In order to construe the Rule, the Court will look only to its words, but the conduct of persons who have put a construction upon it would also be looked to *quantum valeat*.

[De Villiers, C.J.: If there is any ambiguity the Court would look to the previous construction by persons interested. But is there any ambiguity?]

Sections 22 and 70 alone import ambiguity. *Hill's case* (9 Eq., p. 645) is against my contention that the taking deposits does not constitute a loan, but in that case there were not two rules as here, here there is one rule regulating borrowing from outsiders, and another rule dealing with getting money from members by deposits.

[De Villiers, C.J.: Was not leave to make calls refused in the previous case, because it was found that deposits were borrowing?]

That was not expressly argued or decided, and the Court in its discretion refused the calls as not being then necessary, that was one reason for refusing them, but not the only reason.

As to the second set of bonds, if the directors expressly authorised their pledge by the secretary it is a valid pledge, and the Court will order cession. In dealing with the secretary in this instance the bank followed the usual course except in one particular, and so was entitled to look upon him as binding the society. If the Court decides that the borrowing was altogether illegal, and that the loans (including the deposits) exceeded two-thirds of the mortgages, then the bank is entitled to so much money as the society received to its own benefit. *Durham County Building Society re Davis' case* (12 Eq., p. 516); *Wilson's case* (12 Eq., p. 521); *Cook v. Youghal Railway Co.* (4 Ch. App., p. 748); *In re German Mining Co.* (4 De G. M. and G., p. 13) are leading cases on the question. *Brice on ultra vires* (2nd ed., pp. 770, 772, &c.)

Mr. Searle: *Watson's case* is commented by Wurzberg and differentiated from Blackburn's. The onus is on the defendant of showing that any amount was beneficially expended by the society.

De Villiers, C.J.: Upon the pleadings, as they stand, it is impossible at this stage to give a decision, which shall finally settle accounts between the parties. The Court has been asked to lay down certain general rules for the guidance of the bank in proving for the amount of the bonds, but the case is not ripe for such a course. The declaration

prays that certain pledges of bonds amounting in value to £28,000 made by the secretary of the society with the defendant bank, may be declared to be illegal. There are two sets of bonds. The first set, consisting of three bonds was pledged in October, 1897, to secure a loan made by the bank. Everything was done in due form. The form of pledge was duly signed by the directors, but the objection now raised is that, as the society had, at the date of the pledge, exceeded its borrowing powers, the society could not incur a further valid debt in favour of the bank, or pledge its bonds to secure such a debt. In view of another important pending case it is not advisable now to express any opinion on the point whether the borrowing powers had been exceeded. For the purpose of this case the Court may assume that the plaintiffs are right in saying that the pledge was made at a time when the directors had exceeded their borrowing powers. The liquidators do not deny that a portion of the money borrowed from the bank on the security of the pledge was applied in payment of debts and liabilities which were properly payable by the society. To that extent at all events there has been no addition to the liabilities of the society. To hold that the society is entitled to set up the defence that the loan was *ultra vires*, although in the result the loan added nothing to the liabilities of the society would be a direct infringement of the rule that "no one shall gain profit to the detriment and injury of another" *Digest* (50, 17, 206). The liquidators are not yet in a position to state what portion of the loan was applied in payment of the proper debts of the society, but as some portion has been admittedly so applied, the bank is entitled to that extent at all events to avail itself of the security given to them. The plaintiff are not therefore entitled to have the first set of bonds set aside. In regard to the second set they were delivered to the bank by the secretary on the very day on which he absconded. There is no proof whatever that he had any authority to pledge the bonds. The bank afterwards sent to the directors of the society a form of pledge for their signature, but they refused to sign it. The bonds are in favour of the directors and without their authority no valid pledge could be made. The claim for the delivery of the second set of bonds, five in number, must therefore be allowed. The bank by its claim in reconvention asks for judgment for the sum of £7,420, but the Court has not

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

JOHNSTON V. KRUKENBERG. { 1899.  
June 2nd.

sufficient information before it to judge as to the exact amount which may be legally recovered by the bank. There is a further claim for an order declaring that the bank is entitled to retain and realise all the bonds. The second set of bonds the bank has been ordered to restore but as to the first set of bonds the bank retains its lien on them. In the ordinary course the bank would have to prove its claim and set a value on its security but I understand that, in the present case, no question arises as to the value of the bonds or as to the proper party to realise them. By arrangement the bank has recovered the amount of the bonds and holds it as a deposit pending the result of the present action. The proceeds of the first set of bonds the bank will continue to retain until the amount of the dividend to be awarded to the bank is decided upon. For that purpose the bank will prove its debt and if it is dissatisfied with the award there will be a further opportunity of appealing to the Court. For the present the Court will give judgment for the plaintiffs in respect of the five bonds and absolution from the instance in respect of the claim in reconvention: the defendant bank to pay the costs.

Buchanan, J., concurred. He remarked that, of course, it was a hard case, but on reading the 22nd section of the Act of Incorporation, he had come to the conclusion that the words "or any other source" included deposits, and that the deposits must be reckoned in ascertaining the two-thirds which the society was entitled to borrow.

Maasdorp, J., said he did not at present wish to express an opinion on the point as to whether the receipt of deposits should be considered as borrowing and preferred therefore to leave it an open question.

(Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.)

This was an action instituted by the plaintiff, one Lawrence Johnston, resident at Kenilworth, against defendant, to recover the purchase price of certain lands sold to defendant at Kenilworth. The sale took place, according to the declaration, on January 5. Plaintiff had tendered transfer of the land and buildings thereon, but defendant failed to take transfer, or make payment of the price.

The plea was a simple denial that there was any sale at all, and upon these pledges issue was joined.

Mr. Molteno appeared for the plaintiff; Mr. Buchanan for the defendant.

Lawrence Johnston, contractor, resident at Kenilworth, said he was the owner of the property in suit. He first saw defendant or the day of sale. Witness's wife gave witness a message from Krukenberg, and he accordingly stopped at home on January 5. On the 1st and 2nd January, he had had communications with the defendant about the sale of the land. He offered to sell the land for £675, and asked defendant to make up his mind at once, as someone else wanted the property. On the 5th defendant said he had not got £675, but he would give £600 and a good milking cow as the purchase price. He told defendant to pay the money to Messrs. Arderne. Defendant agreed that plaintiff should remain in possession for six weeks. Witness bought other property at Rondebosch on the same day of the sale. He told the cottagers on the property that the rent, after the following Saturday, was to be paid to the defendant, and the defendant, who was with him, said, "Yes, that is so." Witness was prepared to accept £600 and a good milking cow as payment. He took defendant over the property, and showed him the boundaries. The next morning witness's wife came and said defendant had called for the papers. Witness told his wife to tell defendant to go and pay the money to Messrs. Fairbridge & Arderne, and get the papers from them. The occupiers of the cottage had left on defendant's notice, and the house had since been empty at the dis

posal of the defendant. Witness had received a summons for payment of the purchase price of the land he had agreed to buy at Rondebosch.

Cross-examined Witness denied that either Otto, Byle, or Rincello were present at the sale. Witness denied that defendant said he would have to raise the £500 by loan. Defendant never said: "Don't go so fast. I haven't bought the property yet." He closed the sale three times so as to be sure the property was his, and called in a witness, and told him it was his. Witness was not very anxious to sell the property. Defendant begged him to sell it.

Alice Johnston, wife of the previous witness, gave corroborative evidence.

Arthur Hermanns van der Venter, Johannes Style, Pieter Talliard, and others gave corroborative evidence.

Plaintiff, recalled, said he did not ask Byle to be on his side, and that he would give him something.

The defendant, Krukenberg, said that he never bought the property in question, but told plaintiff that he would try and raise the money on loan. Witness never saw the plaintiff on January 5 at all.

Byle, Michael Otto, Mrs. Talliard, Louis Talliard, and others gave evidence of a similar nature in support of the defendant.

Byle stated that a certain statement put in was not signed by him, plaintiff asked him to sign it, but he refused. Plaintiff told witness what to say.

After argument,

De Villiers, C.J. said: This case is certainly not free from difficulty. But the principle in all cases of a like nature is that it lies upon the plaintiff clearly to establish his claim. Here is a contract for the sale of a piece of land for a considerable sum (£500), and it might reasonably have been expected that the parties would see that the contract was reduced to writing. There is no doubt that in the present case there are certain circumstances which tend to confirm the plaintiff's story. The fact that on February 5 he bought a piece of land at Rondebosch does appear to support his version, but it is not conclusive, for a man might well believe that the sale was certain, and in that belief might purchase another piece of property before the sale of his own piece of land had been finally decided. Then there is another circumstance which tends in favour of the plaintiff, and that is the fact that the tenants of the house

left shortly after the alleged conversation took place in the plaintiff's house. But neither is that conclusive evidence in favour of the plaintiff. On behalf of the defendant several witnesses have been called to prove the very opposite to what has been sworn to by plaintiff's witnesses, and between the two it is exceedingly difficult to arrive at a conclusion as to which is speaking the truth. The evidence on either side has not been such as to impress me very favourably. In this state of things the Court has to try and discover something about the character of these people. Now, on this point there has been one piece of evidence which has had great influence on my mind. The boy Byle was called, and said that he was asked by the plaintiff to give evidence in a certain way, and that he would be paid for doing so. This the plaintiff denied, but in doing so did not tell the Court that he had asked Byle to come to his house and sign a certain document. It was only on being recalled that the plaintiff mentioned this document. That document has been put in, and is alleged to have been signed by Byle. Byle denies this, but the plaintiff swears positively that Byle signed it. Now, in my opinion, Byle never did sign it. I am of opinion that plaintiff himself signed it. Plaintiff was given the opportunity of reconsidering his answer, but again stated that he had not signed it. I am satisfied that the signature, "F. Byle," was written by plaintiff himself. The "F" is a most peculiar one, such as I have never seen before, and at the heading of this document are the words "February, 1895," which the plaintiff swears positively are in his handwriting. Now the man who wrote the "F" in "February" is the man who wrote the "F" in "F. Byle." Then the "B" in "Byle" and the "yle" are certainly in plaintiff's handwriting, and not in that of the boy Byle's. Well, if the plaintiff tried to bolster up his case by writing the boy's signature in contempt of Court, that must throw great discredit upon his whole evidence. I am satisfied that plaintiff would not scruple to use every influence with his witnesses to induce them to give his version, and seeing that the principle is that the plaintiff must establish his case clearly, and seeing that he has not done so, and under all the circumstances, the Court must give absolute from the instance with costs.



Buchanan, J., concurred, and said that he was not satisfied with the way in which the witnesses on either side had given their evidence, and if possible he should like each side to pay their own expenses.

Maasdorp, J., also concurred.

Judgment was entered as follows: Absolution from the instance with costs, not including expenses of witnesses.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

## SUPREME COURT

[Before Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP].

PALMER V. MOLTENO. { 1899.  
{ June 8th.

Election Petition—Withdrawal of claim to seat—Counter petition—Act 9 of 1883, section 43.

*P. filed an election petition against M., and claimed the seat. Subsequently he applied for leave to amend his schedule of particulars, and it was then stated on his behalf that he intended to abandon his claim to the seat. Shortly afterwards he communicated such intimation to M. in writing. M., however, objected to the withdrawal of the claim and filed a counter-petition charging P. with corrupt practices.*

*An application by P. for leave to withdraw the claim to the seat, and for an order expunging the counter-petition, was refused.*

This was an application by G. M. Palmer for leave to withdraw that part of his election petition in which he prayed that the seat should be awarded to him, and for an order removing from the record the counter-petition filed by the respondent on the 29th inst.

It appeared from the affidavits that upon the 4th May last the petitioner applied to the Court for leave to amend his schedule of particulars, and during the hearing of the argument upon that application it was stated by the petitioner's counsel that he did not intend to go on with his claim to the seat, and that the respondent would be informed of this in writing. On the 9th May the respondent was communicated with in writing to that effect, but he objected to the withdrawal of the claim, and on the 29th May he filed a counter-petition, charging the petitioner with corrupt practices.

Sir Henry Juta, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the applicant, and Mr. Searle, Q.C. (with whom was Mr. Currey), appeared for the respondent.

Sir H. Juta: If no claim is made to the seat by the petitioner there can be no counter-petition. Upon the 4th May, the date of the statement made in Court, no counter-petition had been filed. No objection was taken then by the respondent, and it was believed that he consented. The schedule now annexed by him alleges treating of certain persons whose numbers and names are unknown.

Mr. Searle: The application on the 4th of May was one for an amendment of the schedule of particulars of bribery and treating, the claim to the seat was not formally withdrawn. *Aldridge v. Hirsch* (1 C.P.D., p. 410) is directly in point. The respondent is not to be prevented from bringing recriminatory charges by the petitioner abandoning his claim to the seat. A similar case is reported in *Days Election Cases* (1892, 1893, p. 8). See also (p. 2): *The Stepney case*. The words of the English Act on these points are almost exactly the same as those of our own Act 9 of 1883. The only possible difference may be that in England the public prosecutor may still prosecute whilst here, under section 12, prosecution cannot take place after six months; that is important because the real objection is that the rights of the constituency are affected.

[Maasdorp, J.: Could any voter object to the withdrawal and take up the claim, insisting upon the petitioner being declared elected?]

If the petition were withdrawn any voter could take it up and pray for a declaration of the petitioner's election. But here no fresh petition has been filed; the original petition has not been withdrawn.

*Stepney v. Tillett* (6 L.R., C.P., p. 147).

Sir H. Juta : There is no authority for the contention that the claim can not be withdrawn at a time when no recriminatory charges have been filed. The original schedule upon which the seat was claimed has been removed and another one substituted which deals only with charges of treating and bribery. It is impossible for us now to claim the seat. The respondent did not object to the removal of the original schedule, and that practically constituted an agreement to its withdrawal. The schedule is the life and essence of the petition. No voter could come in now and claim the seat for the petitioners without filing a fresh schedule.

Mr. Searle referred to Act 9 of 1883, section 8, sub section 6.

[De Villiers, C.J. : Is there any case where the claim for the seat has been withdrawn and the recriminatory charges have nevertheless been enquired into ?]

Although in the *Steyney* case the claim was abandoned, it is said in *Days Election Cases* that the charges might have been gone into ; it is not clear from the report that they were gone into.

The Court refused to allow the petitioner's claim for the seat to be withdrawn, and allowed the respondent to file his counter-claim.

De Villiers, C.J., said : It is to be regretted that when the applicant made his application on the 4th May last he did not proceed further than he did. In the notice of motion then given he asked that the respondent should be called upon to show cause why the applicant should not be granted leave to amend the schedule of particulars annexed to the petition, and for the fixing of a date for the trial. That was all—leave to amend the schedule of particulars. If the applicant had gone further, as he probably intended to do, and had then asked for leave to withdraw his claim for the seat, the Court would have been in a position on the 4th of May last to make such an order as would enable the constituents who were interested in this matter to express an opinion before the Court came to a final decision. But no such application was made, and accordingly the respondent in the meanwhile filed his counter-claim, in which he made certain personal charges against the applicant. Under all the circumstances it is impossible for the Court now to refuse to allow the counter-claim. The principle upon which the Court has acted in all these

cases is not to allow any stifling of an inquiry. That is the principle upon which the Court acted in this matter on the 4th of May. On that date very strong objection was made to the petitioner being allowed to proceed. It was then stated on affidavit that inasmuch as a Special Court had sat to hear election petitions, and as no attempt had been made to bring on the petition during the sitting of that Court, although all the allegations contained in the amended schedule, except one, were contained in the original schedule, and as the petition had not been brought forward during the time for the hearing of ordinary cases, the petitioner should not be allowed to proceed. But notwithstanding this very stringent objection, the Court allowed the petitioner to proceed in order that a full investigation might be made into the circumstances connected with the election. Now the question arises whether the Court should allow the counter-claim to be proceeded with. In my opinion, seeing that the claim for the seat still stands and has not been expunged, the Court is not now in a position to refuse to allow this counter claim to be proceeded with. This is a matter also in which the Court must refuse to allow an inquiry to be stifled. If the respondent has such evidence to bring forward as was alleged on affidavit he ought to be allowed to bring it forward, more particularly bearing in mind that the time for bringing criminal proceedings has lapsed. Then comes the question whether the Court should allow the claim for the seat to be withdrawn. In my opinion, seeing that the constituents have had no opportunity of expressing an opinion the claim for the seat must stand, and if the petitioner can succeed at the trial in showing that he has a majority then he ought to be allowed to show it on this petition, notwithstanding that his counsel has stated that he does not intend to proceed with the claim. The Court refuses to allow the claim for the seat to be withdrawn, and allows the respondent to file the counter-charges, which he proposes to do, costs to be costs in the cause.

Buchanan, J., in concurring, said it was very doubtful, if the claim for the seat were withdrawn, whether the counter-claim could be proceeded with.

Maasdorp, J., also concurred.

De Villiers, C.J. : I have said nothing about particulars. Of course particulars must be given.

Mr. Searle : We will supply them at once.  
 Sir Henry Juta said it was impossible now for the petition to be heard on the 13th, as originally fixed, as the petitioner would require time to meet the counter-charges.

The Court intimated that it would fix the date of the trial later.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, V. A. Van der Byl.]

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

COLLIE V. CABRITA. { 1899.  
 June 5th.  
 .. 13th.

This was an action for the recovery of £101 under an agreement to erect a certain windmill, pump and tank and to lay down piping in connection therewith : also £17 for work and labour done in connection with the sinking of two Abyssinian spikes. The defence was that the work had not been properly carried out and claimed £10 damages in reconviction.

The plaintiff replied that the defendant, after the erection of the pump, grossly neglected the machinery, in consequence of which it became damaged.

Mr. Graham, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff and Mr. Close appeared for the defendant.

James Collie, the plaintiff, said he was a plumber, and was qualified to follow his occupation by examination. He had lectured on plumbing and sanitation at Gordon's College, Aberdeen. He did the plumbing work for the Mount Nelson Hotel. In November, 1897, he saw defendant with regard to the erection of a windmill and pump on defendant's property. Defendant wanted a windmill and pump erected at Claremont. Prior to entering into the contract plaintiff had not seen defendant's property, so he knew nothing about its water-bearing properties. In December, 1897, a written contract (put in) was entered into between the parties. The contract was drawn up in Mr. Du Preez's office. Witness erected the pump and laid down twenty feet more of piping than was provided for in the contract. Before the contract was signed defendant said he would like to have Abyssinian tube spikes provided, but witness advised him to have a well dug, as the points were unsuitable. Nothing more was

said on the matter until after the contract was signed, when defendant said he would not have a well, but the spikes, and authorised witness to procure the spikes, and proceed to carry out the contract. Witness believed that he showed a copy of the specification to defendant, as he had a press copy of the specification in his letter-book. The pump erected by plaintiff was a Deeming pump, and the windmill was made by Perkins. The pump was capable of distributing, *vide* the catalogue, 360 gallons an hour, but on a very low average it would distribute 4,000 gallons per diem. The pump supplied by plaintiff was larger than the pump provided for on the specification. The work cost witness about £120, as the labour account was heavier than he had anticipated. He lost upon the contract. A pump of this kind needed careful attention, almost as much attention as a steam engine. At about the end of January or the middle of February, 1898, defendant objected to the water being discoloured. It was usual for the water to be discoloured for the first two months, during which a pump was being worked. Witness completed the work by the end of February, and asked defendant for the first instalment upon the payment agreed upon in the contract. Defendant then said that the work had not been satisfactorily done. Subsequently Mr. Du Preez suggested that an engineer, named Bennett, should be called in as arbitrator, but defendant declined the suggestion, and a few days later witness sent one of his men out to tighten the screws of the mechanism, and asked for an instalment, but defendant declined to pay. On May 12 last witness saw the pump and windmill, when one of the rods was broken. This might have been the result of neglect, as everything was in good condition in September, 1898, when the pump had been working for months. The rod could be repaired in half an hour. When witness last saw the pump it was in a rusty condition, and the bearings were worn, as a result of want of oil. Witness never guaranteed a supply of water, but only to pump up and distribute the water if the water was there. Defendant still declined to pay.

Cross-examined : Witness would swear that he did not visit defendant's farm before the contract was drawn up. He did not guarantee the purity of the water distributed.

William Ingles Perrott, an engineer, said that on February 2 he proceeded to Claremont and inspected defendant's farm and a windmill and pump, which had been properly erected. The wooden shaft which connected the machinery with the mill was split at the bottom and detached from the pump. This could have been caused by neglect. The pump was an ordinary Deeming pump. Both the pump and the windmill were of high-class manufacture. On May 12 he again visited defendant's farm, when the pump presented appearances of neglect. After renewing the packing, witness worked the pump, which worked fairly satisfactorily. It was capable of delivering a minimum supply of water of 4,000 gallons in twenty-four hours, and a maximum of 24,000 gallons.

Thomas O' Riley, in the employ of Messrs. Findlay & Co., of Cape Town, said that during the last eighteen months he had erected thirty-one pumps similar in nature to the pump referred to in this case. The windmill referred to was originally erected at Rosebank Agricultural Show, and worked in a highly satisfactorily manner. In December, 1898, witness inspected defendant's pump and mill. The pump appeared to be in need of oil. As far as he could see the pump and mill had been properly erected. The mill worked nicely, and produced water at the rate of 30 gallons per hour. A moderate breeze was blowing at the time. The pump rod was then in perfect order. The pump was capable of pumping 400 gallons an hour with a nice wind. A tail pipe did not necessarily form a portion of a pump—it depended on what a customer asked for.

Edward Harcombe, an engineer of twenty years' experience, said he had erected two mills for Findlay & Co. at Rosebank Show in 1897, similar to the mill referred to. He visited defendant's farm on May 30 when the mill appeared to have been neglected. The mill had been properly erected. The pump-rod was split at one end, a result possibly of neglect. The damage to the rod could have been remedied easily. The capacity of the pump was a little more than 8,000 gallons a day with a fair breeze.

Cross-examined: He did not test the capacity of the pump. Piping was not an essential part of a pump.

Owen Alfred Algar, also in the employ of Findlay & Co., said that in December, 1897, he sold the pump in question to plaintiff for erection at defendant's farm. Witness's

firm sold more Deeming pumps than any other kind of pump. Witness heard defendant arrange with plaintiff for the purchase of Abyssinian spikes. Plaintiff recommended a well, which he said would cost £10, but defendant declined to have a well made on the ground of expense.

George Vines, a plumber in the employ of the plaintiff, said he was foreman in charge of the work at defendant's farm, which was finished in six weeks. Both windmill and pump were in first-class order, but they required regular attention. A fortnight later witness tightened up the screws and tightened down the packing screws. Defendant's foreman then told witness that it had not been oiled since it had been erected, and he did not intend to oil it, as he would have to climb to do so. He made no complaint as to the working of the pump.

Cross-examined: He put down the second spike to make sure of an ample supply of water.

For the defence.

The defendant said that he declined to accept the pump because it was not in proper order. He told plaintiff that he was prepared to pay as soon as the pump was in proper order. No mention was ever made of sinking a well. He never objected to one Bennett being appointed as inspector. As a result of the contract not being fulfilled he lost £100. No mention was made of paying extra for the spikes. He had actually lost fifty fowls, four cows, about 15 fruit trees, and a large quantity of fruit. Plaintiff visited witness's farm before he undertook the work.

Cross-examined: Du Preez had been his attorney for six years. He was witness's attorney during his insolvency. His objection to the agreement was that he could not get the quantity of water which he desired. He did not know whether this was the fault of the pump or not. After the pump was erected it worked satisfactorily, but there was no water. Plaintiff agreed to supply defendant with clear and pure water. He told plaintiff that the water was dirty.

Re-examined: He had been rehabilitated from his insolvency.

Jacobus Werth, the defendant's foreman, said plaintiff visited defendant's farm before the work was started. He told defendant that when the pump was erected the fruit trees would flourish. The supply of water was defective.

Cross-examined: The fowls might have died from the want of water, but he could

not swear that they died from that cause. They might have died as a result of the pip.

Joseph Muran said the water produced by the pump was muddy and dirty. The pump produced very little water. It took quite twenty-four hours to fill the tank. As a result of the impurity of the water poultry, cattle, and fruit-trees perished.

John Scott, formerly a clerk in the employ of Mr. Du Preez, said he drew up the contract between the parties.

Cross-examined: He believed that he read over the contract to the parties.

Samuel Woodhouse, a gardener, said he visited the farm about March last, when he found that the fans of the mill were hanging loose. The pump did not supply much water.

Cross-examined: The looseness of the fans was a mere trifling detail. He presumed that there was very little water to pump.

William Thomas Olive said that a suction pipe would have to be specially contracted for. The pump referred to in the case was capable of distributing 800 gallons a day.

Charles Bennett, engineer to the Cape Town and District Waterworks Company, said the pump was capable of distributing more than 800 gallons a day.

This closed the evidence.

After argument,

The Court gave judgment for the plaintiff with costs, both in the claim in convention and the claim in reconvention.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendants' Attorney, H. P. du Preez.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MADSON V. W. AND G. SCOTT. { 1899.  
June 6th.

Mr. Searle, Q.C., applied for the appointment of a commission to take the evidence of a witness in the case of Madson v. Scott, an action for the recovery of £1,535 4s. 5d.

Mr. Innes, Q.C., who appeared for the defendants, consented.

The Court granted the application, and appointed Mr. Howel Jones commissioner, costs to be costs in the cause.

The Chief Justice intimated that the action would be set down for June 23, and would be the last case heard during the term.

VAN DER BYL AND OTHERS V. { 1899.  
June 6th.  
VAN DER BYL AND CO. { " 7th.

Mistake—*Restitutio in integrum*—

*Justus error*—Rectification of instrument—Agreement for lease

—Lease—Option to purchase—

Partnership Incoming partners.

*On the death of V., his son, the plaintiff, who became entitled, as heir, to certain premises, but had not yet obtained transfer, agreed with a firm, of which his uncle was one of the partners, to renew a lease of the premises on the same terms on which the firm held it from V. The firm prepared the new lease, and on their representing to him that the terms were exactly the same as those of the old lease, of which they had the custody and which he had never seen, he signed the new lease. In fact, the new lease contained a material alteration in that it gave the firm the absolute option to buy the premises at a certain price instead of a right to buy in case only he wished to sell. All the parties laboured under the common mistake that the old lease gave the firm the option and three new partners were admitted who never saw the new lease but were also led to believe that the option had all along existed. After the lapse of seven years the firm gave the plaintiff notice of their intention to exercise their option, the land being at that time greatly increased in price. The plaintiff raised no objection but, upon being informed soon after by his uncle of the departure from*

*the agreement, he brought an action to rescind the new lease. Held, that as the plaintiff had signed it in the belief, which was mistaken in fact, that it carried out the agreement to embody the terms of the old lease in the new one, he was entitled to relief as against the firm, who being solely responsible for the mistake could not rely upon the error not being justus.*

*Held, further, that the plaintiff was entitled to claim the rescission of the new lease unless the firm were willing to allow a rectification thereof, in which case they should have the option of so doing. Held, further, that, although at the time of action brought, two of the new partners had left the firm they had no greater rights in respect of the new lease than the old partners, in the absence of proof that their position had been in any way altered by reason of the form of the new lease.*

*Held, further, that inasmuch as the plaintiff brought his action immediately on discovering the mistake, the lapse of time, which had not in any way prejudiced the defendants, did not debar him from obtaining relief.*

This was an action for a declaration of rights with regard to an option of purchase under a certain lease of property executed between the parties in October, 1891.

The plaintiffs' declaration was as follows :

1. The plaintiffs are (1) Pieter Gerhard Voltelin van der Byl, a lieutenant in Her Majesty's Royal Navy, residing in England, and (2) St. John Corbet Gore, James Heath, and Alfred Cavendish, in their capacity as trustees of the marriage settlement of the first-named plaintiff and his wife Charlotte Mary van der Byl (born Fleming).

2. The defendants are Adrian van der Byl, Johannes Albertus van Breda, Voltelin van der Byl, Pieter Gerhard van Breda, and Frederick Kilgour Wiener, now or lately

carrying on business together in partnership as merchants in Cape Town under the style or firm of Van der Byl & Co.

3. In or about November 26, 1877, one Pieter Gerhard van der Byl, father of the first-named plaintiff, entered into a written agreement of lease with the defendant firm of Van der Byl & Co., the partners of which firm were at that date the said Pieter Gerhard van der Byl, the said Adrian van der Byl, and one Ludwig Wiener, whereunder the said P. G. van der Byl and the defendant firm hired certain premises at the corner of St. George's and Longmarket-streets, Cape Town, the property of the said P. G. van der Byl, for a period of three years, the said lease to be renewable at the option of the said firm for periods of three years until a whole period of twenty-one years should be completed. A copy of the said lease is hereto annexed marked A, and the plaintiffs crave that it may be considered as herein inserted.

4. The said lease contained the following clause (No. 5): "In case the lessor or his heirs or representatives in time desire to sell the property he will be bound to offer the same to the lessees at the time constituting the firm of 'Van der Byl & Co.' for the sum of £7,000, and if they refuse to purchase six months after notice the lessor or his aforesaid heirs or representatives shall be entitled to sell to others."

5. Thereafter the said lease was renewed from time to time and in or about March, 1890, the said P. G. van der Byl died and the first-named plaintiff acquired the property, the subject of the lease, as heir under his last will.

6. In or about January, 1891, the defendant J. A. van Breda was admitted as a partner in the defendant firm.

7. Thereafter in the year 1891 the first-named plaintiff was requested by the defendant firm to execute a lease for the unexpired period of the lease A, and upon the same terms as the said lease, and in or about October 14, 1891, he signed the lease hereto annexed marked B, which was represented to him at the time by the defendants Ludwig Wiener and Adrian van der Byl, acting on behalf of the said firm of Van der Byl & Co., as being in exactly similar terms and identical with the lease A. The first-named plaintiff signed the said agreement of lease under the *bona fide* belief that the said agreement was in the same terms as the lease marked A and induced thereto by the aforesaid representations made to him.

8. The plaintiffs further say that no consideration was received by the first-named plaintiff for entering into the lease marked B.

9. Thereafter, upon the marriage of the first-named plaintiff, the said property, the subject of the lease, was settled upon his wife, the second-named plaintiffs being appointed the trustees under the marriage settlement.

10. The said lease B was not worded in similar terms to the lease A, but, on the contrary, contained the following clause (No. 5) in lieu of the clause (No. 5) hereinbefore in paragraph 4 set forth:

"During the existence of the lease, the lessees to have the right to purchase at the end of any one year, upon giving six months' notice, for £7,000."

11. The said lease B would not have been signed by the first-named plaintiff but for the representations made to him by and on behalf of the said firm that it was upon the same terms as lease A. And as soon as it came to his knowledge that the lease which he had signed was in different terms, he repudiated the same, in so far as the same differed.

12. In or about January, 1896, the defendants V. van der Byl, P. G. van Breda, and F. K. Wiener were admitted as partners in the defendant firm on the retirement of the said L. Wiener, and the said Wiener ceded all his right, title, and interest in and to the said lease B to the new partners.

13. On or about December 1, 1897, the defendant firm gave notice to the first-named plaintiff that on December 31, 1898, the defendant firm intended to exercise its right of purchase as provided by clause of the lease B.

14. On or about December 31, 1898, the defendants J. A. van Breda and F. K. Wiener retired from the defendant firm.

15. The plaintiff submits that he is entitled to be placed in the same position as under lease A, and the defendants are not entitled to exercise any option of purchase for £7,000 in respect of the property, the subject of the said lease.

The plaintiff claims: (a) A declaration that the defendants are not entitled to exercise any option of purchase for £7,000, or any other amount, in respect of the property, the subject of the aforesaid lease, the clause in the said lease B, whereunder the said option is claimed to be exercised, being null and void for the reasons above set forth; (b) alternative relief; (c) costs of suit.

[A.]—Conditions of lease entered into between Pieter Gerhard van der Byl and Van der Byl & Co., in respect to the property No. 35, St. George's-street, Cape Town, Cape of Good Hope, owned by the aforesaid Pieter Gerhard van der Byl.

1. The lease shall be for three years from the 1st day of January next, renewable by the firm, if so minded, for periods of three years each, until a whole period of twenty-one years shall be completed.

2. Rent shall be payable yearly, and the amount fixed being £520 sterling.

3. The property leased shall be all that was originally purchased by the lessor from Mr. John Dyason, and therefore include the premises under lease to Messrs. Maxwell & Earp; the rent thereof the firm shall be entitled to.

4. All rates and taxes, as also all inside and outside repairs, to be borne by the lessor.

5. In case the lessor, or his heirs' representatives, in time desire to sell the property, he will be bound to offer the same to the lessees at the time constituting the firm Van der Byl & Co. for the sum of seven thousand pounds sterling (£7,000), and if they refuse to purchase within six months after notice, the lessor, or his aforesaid, shall be entitled to sell to others.

6. The store and counting-house, fixtures, counters, desks, and all other furniture to be included in the purchase free of any charge.

We make this contract in good faith, and promise to carry it out.

[B.]—Contract of lease entered into between Pieter Gerhard Voltelin van der Byl, a lieutenant in the Royal Navy, and Van der Byl & Company, of Cape Town.

1. Pieter Gerhard Voltelin van der Byl, hereinafter called the lessor, leases to Van der Byl & Company, hereinafter called the lessees, all that property hitherto in their use and occupation under lease from Pieter Gerhard van der Byl, and situated in St. George's and Longmarket streets, Cape Town.

2. The lease shall take the place of the existing lease and be for the unexpired period thereof ending on 31st December, 1899, and includes the portion now in occupation by lease by Maxwell & Earp.

3. Rent shall be (£520) five hundred and twenty pounds sterling per annum, and be payable yearly and at the expiration of each year.

4. All rates and taxes, also insurance and all inside and outside repairs, are to be paid and borne by the lessor.

5. During the existence of the lease, the lessees to have the right to purchase at the end of any one year upon giving six months' notice for (£7,000) seven thousand pounds sterling and that price includes all fixtures not especially put up by or belonging to Van der Byl & Company.

The plea of the defendants, J. A. van Breda, P. G. van Breda, and F. K. Wiener, was as follows :

1. They admit the allegations in the first second, third, fourth, fifth, and sixth paragraphs of the declaration.

2. At each change in the membership of the firm of Van der Byl & Co., consequent respectively upon the death of the said P. G. van der Byl, the admission of the said J. A. van Breda, the retirement of the said Ludwig Wiener, and the admission of the said V. van der Byl, P. G. van Breda, and F. K. Wiener, the said firm, as newly constituted on each occasion, took over the then existing lease, and became entitled as lessees to all rights thereunder, and in the month of December, 1897, the said firm as then constituted was entitled to exercise all the rights of lessees under the lease dated October 14, 1891.

3. As to the seventh paragraph, they say that, in or about the month of October, 1891, it was agreed between the first-named plaintiff and the members of the firm of Van der Byl & Co., as then constituted that, for divers reasons, which it is unnecessary here to set out, a new lease of the said premises should be entered into in lieu of the lease then current. The document of which Annexure B is a copy, was thereupon drawn up and signed by the said plaintiffs and by the said A. van der Byl on behalf of the said firm. It was so signed and executed by the said plaintiff and the members of the said firm (through the said Van der Byl) in good faith and with a full knowledge of its contents. The said defendants refer this Honourable Court to such proof as the said plaintiff may adduce in regard to his belief respecting the said agreement ; but subject to what is here set out, they deny all the allegations in the said seventh paragraph.

4. They deny the eighth paragraph, and they say that the said plaintiffs received due and sufficient consideration in law for entering into the said lease.

5. As to the ninth paragraph, they have no knowledge as to the facts therein alleged, and they ask leave to refer this Honourable Court to such proof as the plaintiffs may produce with regard thereto.

6. They admit the tenth paragraph, but they say that the said new lease differs in other respects in addition to the differences set forth in the said paragraph.

7. They deny the allegations in the eleventh paragraph, save that they admit that the said plaintiff repudiated on the 12th July, 1898, his obligation under the 5th clause of the existing lease.

8. They admit the twelfth paragraph. The defendants who are therein named took over and acquired for value, with the consent of all the partners in the said firm, the interest of the said Wiener therein, including his interest in the said lease of 14th October, 1891, without any knowledge or notice of the contents of any prior lease or of the circumstances under which the said lease was entered into.

9. They admit the allegations in the thirteenth and fourteenth paragraphs. They say that the said plaintiffs duly accepted the said notice of intention to purchase ; and they further say that the claims of the said J. A. van Breda and the said F. K. Wiener in respect of their interest in the said lease have not yet been adjusted.

10. They deny the correctness of the plaintiffs' contention as set forth in paragraph 15.

Wherefore they pray that the plaintiffs' claim may be dismissed, with costs.

The defendants Adrian van der Byl and Voltelin van der Byl admitted all the allegations in the declaration, and pleaded that the representations were made under a *bona-fide* belief as to their correctness ; that they had since discovered, upon a more exact perusal of the two documents, that the representations were in fact erroneous, and in consequence submitted to the judgment of the Court, tendering their share of the taxed costs up to date, and praying that they might be indemnified from all further costs.

Mr. Searle, Q.C. (with whom was Mr. McGregor), appeared for the plaintiffs. Mr. Innes, Q.C. (with whom was Mr. Benjamin), appeared for the defendants J. A. van Breda, P. G. van Breda, and F. K. Wiener.

Mr. Close appeared for the defendants Adrian van der Byl and V. van der Byl.



Pieter Gerhard V. van der Byl, a retired captain in the navy, said he was the plaintiff in this action. He acquired the property in St. George's-street under his father's will. His father died in March, 1891, when witness was at the Cape station on the H.M.S. Raleigh. He was the heir of all the property under the will. The lease was not mentioned in the will, but he knew of it. The matter of a new lease was first mentioned to witness by his uncle, Mr. A. van der Byl, who asked him to sign it. Witness signed the new lease in the presence of his uncle and Mr. Wiener. Witness had never seen the original lease, but when he signed the new lease he was told that it was exactly similar to the old one. He identified the lease produced.

By the Court: Witness was not an executor under his father's will.

Examination continued: There was an option of purchase of the property for £7,000 given to the firm. This was in the new lease, but was not in the original lease. He first heard that this option was not mentioned in the original lease in June of last year. Mr. A. van der Byl told him of it. If he had known this when the new lease was handed to him, he certainly would not have signed it, as the property was worth considerably more.

Cross-examined: In December, 1897, he received a letter from his uncle referring to the option. Subsequently witness repudiated the new lease on the ground that it was not a faithful copy of the old one. When he signed the new lease, he thought that the option was "hard lines," but he signed the lease upon the understanding that he was simply carrying out the wishes of his father.

De Villiers, C.J.: But why did not you ask to see the old lease before you signed the new lease?

Witness: Because I trusted to my uncle that it was all right. I trusted him as I would trust my own father. He said, "This is a copy all ready for your signature." My uncle believed that it was the same as the old lease.

Adrian Philip Cloete van der Byl, one of the defendants, said he was senior partner in the firm of Van der Byl & Co. In November, 1877, the first lease was entered into by his late brother, who was then senior partner. Witness was one of the executors under his brother's will. He could not remember why the new lease was drawn up. Witness told plaintiff that the lease was on all fours with the old lease, as he took

it in good faith from Mr. Wiener that it was so. Mr. Wiener was present when the document was signed; indeed, he handed it to witness. The old lease was not read through at the time. He could not remember whether it was produced or not. The discovery as to a discrepancy between the two leases was first brought to his notice in March, 1898, and in June he proceeded to England, where plaintiff then resided, and informed him of the matter. At the time he signed the new lease on behalf of the firm he was under the impression that the old lease provided for the option. In 1891 the property in St. George's-street was worth considerably more than £7,000. The rental was a nominal one.

Cross-examined: He read the new lease before he signed it. He knew the terms of the old lease in a general way, and he then thought, and all the members of the firm thought, that there was a right of option under the old lease.

Re examined: The suggestion of the new lease came originally from witness and the firm, not from the plaintiff.

Edward Ridge Syfret, accountant, general agent, and sworn appraiser, said that in his opinion Van der Byl's property in St. George's-street was worth fully £13,500 in 1891. Now it was probably worth £35,000.

George Ebenezer Cosnett, a book-keeper in the employ of Van der Byl & Co., said the new lease was written by him upon instructions given to him by Mr. Wiener. He (witness) witnessed the lease. He could not remember what was said when the lease was signed by plaintiff and Mr. Adrian van der Byl.

By the Court: He drew up the new lease from a rough draft, not from the old lease itself. He believed the rough draft was in Mr. Wiener's handwriting. It did not strike him at the time that there was any difference between the old lease and the new lease.

James William Bam, a clerk in the employ of Van der Byl & Co., said he witnessed the new lease, which was signed in Mr. Van der Byl's office, in the presence of Mr. Adrian van der Byl, the plaintiff, and Mr. Wiener. He could not remember what was said at the time. He did not know who drew up the document; it was handed to Mr. Adrian van der Byl by Mr. Wiener.

For the defence,

Ludwig Wiener said that he was for many years a partner in the firm of Van

der Byl & Co. He retired from the firm in 1895. The original lease between the late P. G. van der Byl and the firm was sent from England by Mr. P. G. van der Byl, it having been drawn up by him in England. When the lease arrived here witness read it, but never saw it again as it remained in the custody of Mr. Adrian van der Byl. Mr. P. G. van der Byl died early in 1891. With regard to the new lease, witness suggested that as the old lease, being merely an agreement between partners, was not stamped, and as Mr. P. G. van der Byl was dead, and the plaintiff had returned to the Colony, it would be as well to have a proper legal document drawn up and stamped. The plaintiff was of course not a partner. In 1891 witness had no idea that the firm had not an absolute right to an option over the property. He had always thought that the firm had such an option, and Mr. P. G. van der Byl seemed to think so too in the course of conversations with witness. Witness suggested to Mr. Adrian van der Byl that the new lease should be drawn up, but he never discussed the matter with the plaintiff. He had not the slightest recollection of drawing up the rough draft mentioned by Mr. Cosnett, nor had he the slightest recollection of the new lease being signed. Up to the time of his retirement he considered that the right to the option was included in both the old and the new leases. When he retired he handed over his share of the lease to the three incoming partners. He first heard of the discrepancy between the old and the new lease in March, 1898, when he offered to act as peace-maker in some friction that had arisen. In 1877 £7,000 was a good price for the property.

Fred. Kilgour Wiener said he had been a partner in the firm since January, 1896. He had been in the employ of the firm before. He knew of the lease. He put £2,500 capital into the firm. He thought the firm had a right of pre-emption, and thought that a valuable option. He first knew of the discrepancy between the two leases at the end of March, 1898.

Pieter van Breda said he had been a partner since January, 1896, had been in the business for many years before. He put between £1,000 and £1,500 into the firm. His evidence was similar to that of F. K. Wiener.

Johannes Albertus Van Breda said he left the firm in 1898. He got twelve months notice under the deed of partnership. He

had been in the business 38 years and became a partner in 1891. He had not seen the old lease. Van der Byl said they had a right of option. It was always considered they had. Witness did not see the new lease. In 1895 Van der Byl gave him notice and a new partnership was entered into in 1896. Witness only heard of the discrepancy in March, 1898, after he had written to Van der Byl.

Cross-examined: Witness did not know of any option before he went into the partnership.

Henry Arthur Bidewell Edwards, estate agent, estimated that the value of the firm's property in 1891 was £8,000. Witness had had experience of the value of property since 1878.

This closed the evidence.

Mr. Searle: Two questions arise; (1) was the lease entered into by the plaintiff under mistake and misrepresentation? (2) What is the plaintiff's remedy and against whom does it lie? There is no conflict of evidence as to the facts. The defence apparently is that the plaintiff has no right as against those of the partners who entered the partnership after the new lease was signed; it is the firm of Van der Byl & Co., however, which is being sued, and the new partners are in the same position as the old ones. Unless they come in as Van der Byl & Co., they have no rights at all under the lease, if they are members of a new firm there is no contract between them and the plaintiff.

[De Villiers, C.J., referred to *Puterson's Executors v. Webster, Steel & Co.* (Juta 1, p. 350)].

That is an authority showing that the cession of a lease by an old set of partners to a new set of partners can not be objected to by the lessor. If the facts of the case show that the real intention of the parties was not to alter the old lease, then the new partners have no rights which are not contained in the old lease.

[De Villiers, C.J.: If the mistake is one which might easily have been remedied, are not third parties who had nothing to do with the contract entitled to recover for any prejudice caused to them by the mistake?]

I can find no authority on that point in the Roman-Dutch law. *Digest* (12, 6, 22); *Mühlenbruch* (2, 3, 388); *Voet* (22, 6, 7), as to mistake generally. Where the *persona* is the same *persona* who made the contract the remedy is *inter se*. As against the firm of Van der Byl & Co. we are entitled to say that they must

rectify the error. In English cases the doctrine that where a man has been negligent in making enquiries he cannot recover in case of misrepresentation in contract has been pushed very far but it is now exploded. *Redgrave v. Hurd* (20 Ch.D., p. 1, per Jessel, M.R.): *Newbigging v. Adam* (34 Ch.D., p. 582, per Bowen, L.J., p. 590). In our law the question was considered in *Logan v. Beit* (J. 7, p. 197) and *Divisional Council of Alireal North v. De Wrt* (J. 7, p. 232). Whatever the rights of a cessionary might be, none of the defendants are cessionaries, and therefore they have none of those rights. There was no negligence on the part of the plaintiff: he trusted Mr. Adrian van der Byl and Mr. L. Wiener whom he had known for so many years. He could not have asked for the old lease without appearing to distrust their word. The reason given for the new lease, viz., that his father was dead and that he should step into his shoes in the lease was to a layman a plausible reason. He was not a business man, and the defendants approached him in the matter. Voet (Bk. 22) discusses *probabilis negligentia* and *negligentia supina*.

[De Villiers, C.T. suggested that the declaration should have claimed a rectification of the lease.]

There would be no object in that, because the lease has expired. The summons as a fact does claim a rectification. The defence pleaded is not negligence on the part of the plaintiff but consideration.

Mr. Innes: The lease, being a lease of an urban tenement, is assignable. On the day it was entered into, the firm of Van der Byl & Co., was constituted in a certain way. On the 3rd January, 1896, it was constituted in a different way; the new partners came in, and the shares of L. Wiener were assigned verbally to them. This was an assignment by the old firm to the new firm. The question really is whether the plaintiff is entitled to a *restitutio in integrum*. In *Saayman v. Le Grange* (1879, p. 10), the Court said it was doubtful whether a rectification of an error in a transfer-deed could be claimed. The declaration asks for *restitutio* only upon one ground, viz.: misrepresentation. There is no authority in our Courts for *restitutio* on the ground of innocent misrepresentation. The equitable rule prevails in England and that is that innocent misrepresentation if material is sufficient defence to liability on a contract induced by such representation. *Anson's Law of Contract* (7th ed., pp. 126, 141). The grounds upon which restitution

can be granted under our law are given in Voet (4, 1, 26) and include fraud and *justus error* but not innocent misrepresentation. *Logan v. Beit* (Juta 7, p. 197). There was no error here in the terms of the contract; all the parties were quite clear as to its terms: the parties actually intended to do what they did do: the mistake was as to the position of the plaintiff at the time.

[De Villiers, C.J., referred to *Anson* (7th ed., p. 267) as to the rectification, by the Chancery Division, of a written instrument in accordance with the true intent of the parties.]

I doubt whether a case of this nature has ever come before the Court of Chancery. It is the very essence of *restitutio* that a man who asks for it should be able to put the parties into the same position in which they were previously. In this case the facts have now been altered; other persons have come into the partnership, and undertaken responsibilities upon the strength of the lease, being an asset of the firm. *Kerr on Fraud and Mistake* (p. 349); *Pretorius Executors v. Burger's Executors* (1878, p. 114.)

Mr. Searle: *Stellenbosch Municipality v. Lindenberg* (Searle 3, p. 345, at p. 350). In *Coper Phibbs* (2 Eng. and Ir. App. Cas., p. 149), the plaintiff knew that he was signing an agreement, but as he did so under a misapprehension of facts the Court granted him relief. In *Saayman v. Le Grange* (1879, p. 10), a long time had elapsed and many parties had come in. *Paget v. Marshall* (28 Ch. D., p. 255); *Moyle's Contract on Civil Law* (p. 190) shows that the cases of *Newbigging v. Adam* and *Redgrave v. Hurd* are based on Roman law as well as English. As to the new partners there was no cession of the lease to them; it is not referred to in the new deed of partnership. If necessary I apply for an amendment of the declaration by inserting a new clause 3 to the effect that before entering into the contract of 14th October, 1891, it was verbally agreed that a new lease should be executed in the same terms as the old lease, and that thereafter the plaintiff signed the lease of the 11th October, which did not in fact set forth the terms intended, and by inserting a new prayer asking for an order rectifying the lease of the 14th October by substituting clause 5 of the old lease for clause 5 of the later lease.

Mr. Innes did not object to the amendments, and they were accordingly allowed.

De Villiers, C.J., referred to *Murray v. Parker* (19 Beavan, p. 305),

*C.A.V.*

*Postea* (June 7th).

The Court recalled three witnesses.

Captain Van der Byl, the plaintiff (recalled), said that when his uncle expressed the wish to have a new lease, he did not write to him, but spoke to him about the matter, either at his house at Roodebloem or at Simon's Town. When he asked witness to execute the new lease, he said the new lease would be in exactly the same terms as the old lease which witness's father had executed. It was in consequence of this statement that witness signed the new lease.

Fred. Kilgour Wiener (recalled) said that before he entered into the business of Van der Byl & Co. as a partner he had not seen the new lease. Under the partnership it was generally understood that the firm had the option of purchase of the premises. Witness believed that the firm had this option when he entered into the partnership, but it was not in consequence of seeing the new lease that witness held this belief.

Pieter van Breda (recalled) said he had not seen the new lease before he entered into the partnership. He was told however that the firm had this right of option.

The Court ordered that the new lease be rescinded, with the option to the defendants to retain the lease with the rectification as proposed in the declaration, the defendants to pay the costs.

De Villiers, C.J.: The evidence on both sides has been given with perfect candour and fairness, and the only question to be determined is whether upon facts which are practically admitted the plaintiff is entitled to relief. In 1877 the plaintiff's father leased certain premises in St. George's-street to the firm of Van der Byl & Co. for a term of three years, but renewable for further periods of three years until a full period of twenty-one years should be completed. The fifth clause provided that "in case the lessor shall desire to sell the property he will be bound to offer the same to the lessees at the time constituting the firm of Van der Byl & Co. for the sum of £7,000." Ever since that time the members of the firm seem to have been under the impression that they had the absolute right of purchasing the property instead of a conditional right in the event of the lessor wishing to sell it. He died in 1890, and in the following year the plaintiff, who had been appointed his heir, happened to be in the Colony as lieutenant on board

H.M.S. Raleigh, and was asked by his uncle, Mr. Adrian van der Byl, one of the then members of the firm, to execute a new lease to take the place of the old one, and to be in the same terms as the old one. The reason given for the request was that the firm would rather have a lease from the plaintiff as the heir of his deceased father than from a lessor who was dead. Upon the plaintiff's acceding to this request, the agreement clearly was that he should let the property to the firm upon the said terms as those upon which his father had let it. A document was placed before him by Mr. Adrian van der Byl, with the assurance, which the latter honestly believed, that he (the plaintiff) was simply stepping into his father's shoes. In point of fact, however, the new lease contained a clause that during the existence of the lease the lessees should have the right to purchase the property at the end of any one year for £7,000 upon giving six months' notice. The plaintiff states, and there is no reason to disbelieve his statement, that if he had known of this departure from the terms of the old lease he would not have signed the new lease. He did not discover the discrepancy until the year 1898, when it was brought to his notice by Mr. Adrian van der Byl. In the meantime two of the old members of the firm had left it, and three new members had joined. Two of the latter state that they brought in a certain capital upon becoming partners, and that they knew that the firm had an option to buy the property, but neither of them stated that he saw the new lease before he became a partner. The fact is that it was a kind of tradition in the firm that the option existed, so that, even if the new lease had simply provided that it should be exactly in the same terms as the old, with the single change in the name of the lessor, the new partners would probably still have believed that the option existed in favour of the firm. In 1897 the firm gave notice to the plaintiff of their intention to exercise their right of purchase, and the plaintiff in his answer did not repudiate their right. In 1898, however, when the discrepancy was brought to his notice by his uncle, he wrote to the firm as follows: "It has now come to my knowledge that the lease I signed, which was to have embodied the terms of the then existing lease, is not in accordance with those terms, which gave no option to the firm to purchase my property

unless I desired to sell it." He accordingly refused to recognise the firm's right to purchase the property for £7,000, and the present action was the consequence. It appears to me not to admit of any doubt that if the plaintiff had discovered the discrepancy before there was any change in the membership of the firm, he would have been entitled to some relief. Neither party to the agreement intended that any important alteration should be made in the terms of the old lease, and yet the new lease contained a most material variation. The firm believed that the old lease gave them the right of purchase, and upon their assuring him that the lease was in the same terms as the old, he signed the said lease. If he had sued the old firm for a rectification of the lease they might have been entitled to say that, as they had misunderstood the terms of the old lease, they refused to have any lease at all but they could not claim the benefit of the new lease without such a rectification as would make its terms correspond with the terms of the old lease. The insertion of a new term in the lease was an entire mistake, which neither party could have contemplated. On the discovery of that mistake the plaintiff was entitled to call upon the old firm to do one of two things—namely, either to cancel the new lease, or, if they refused to consent to such cancellation, to consent to a rectification. The procedure of the Dutch law to obtain similar relief would have been somewhat cumbersome. An action would have been brought for *restitutio in integrum*, the result of which would have been to set aside the instrument which failed to carry out the true intention of the parties. Having obtained this relief the plaintiff would be in the same position as if the instrument had not been executed, and he would then be entitled to bring such action upon the original agreement as was competent to him. But in this colony it has been the invariable practice for the plaintiff, where the defendant claims title under an instrument, to obtain direct relief by asking for a rectification of the instrument. This relief is founded upon the same broad principles of equity as, according to *Fort* (4, 1, 1) constitute the foundation of *restitutio in integrum*. If, through a misfor which the plaintiff is not blamable, the instrument does not carry out the true agreement the defendant cannot claim the benefit of the instrument and at the same

time object to its being rectified in such a manner as to carry out the agreement. In the present case the defendants cannot lay the blame of the discrepancy on the plaintiff, because the new lease was drawn up by the firm, and before the plaintiff signed it he was informed by and on behalf of the firm that it was in the same terms as the old lease. If, then, the plaintiff could have sued those partners who were such at the time when he signed the lease, the question arises whether he is entitled to relief against those defendants who became members afterwards. The right to the new lease was one of the assets of the partnership, to a share of which they acquired a right on being admitted into the partnership, but they acquired no greater rights than those members possessed with whom the original agreement was made. They have, it is true, ceased to be partners, but such rights as they did acquire in respect of the lease were acquired by virtue of their partnership. If the old partners (and not the plaintiff) were blamable for the discrepancy between the two leases, the new partners cannot evade responsibility by showing that no blame attaches to them. Much less can they insist upon taking advantage of the mistake by reason of any negligence there may have been on the plaintiff's part in not comparing the two leases before signing the new one. Moreover, as I have already pointed out, the evidence shows that they never saw the new lease, and that it was not by reason of the form of the new lease that they were induced to enter into the partnership. The plaintiff's right to put the defendants to the election of having the new lease cancelled or rectified arises out of his agreement with the firm, that he would execute a new lease corresponding with the old. That agreement is as binding upon the new members of the firm as upon those who were members at the date of the agreement. The defendants now object to either a cancellation or a rectification of the new lease, but insist upon retaining the full benefit of its provisions. The Court must, therefore, order that the new lease be rescinded, with the option to the defendants to retain the lease with the rectification as proposed in the declaration. The defendants will bear the costs of the action.

Buchanan, J., in concurring, said: The only question which has troubled me is whether the rights of the incoming partners should

be protected, but under all the circumstances I have come to the conclusion that the Court can not interfere in their behalf. This new document was not an inducement to the partnership, and there was no formal cession of the document to the new partnership at all.

Maasdorp, J., also concurred.

Mr. Close asked that the order as to costs should not apply to the two submitting defendants, who had tendered costs to the date of plea.

De Villiers, C.J., said: The plaintiff is entitled to recover his costs against the whole partnership. The three defendants, against whom practically judgment is given, were led to believe, before joining the firm, by the other members of the firm that they would have certain rights which it is now proved were not possessed by them, and I think it is only right that between the defendants themselves there should be a contribution—that the costs should be paid by all the defendants.

Mr. Searle asked that the witness expenses of the plaintiff, who had come out from England to give evidence, should be allowed.

The Court refused the application, the Chief Justice remarking that the plaintiff was not free from blame. If he had insisted upon seeing the old document before signing the new one, the case would never have arisen.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Attorneys for the Defendants, J. A. van Breda, P. G. van Breda and Wiener; Messrs. Van Zyl & Buissinne; Attorneys for the Defendants, A. van der Byl and V. van der Byl: V. A. van der Byl.]

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## SUPREME COURT

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[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

LUCKE V. HECKROODT. 1899.  
June 7th  
" 8th  
Aug. 10th.

This was an action in which the plaintiff claimed the sum of £135 1s. 6d., as the balance of an account in connection with

the preparation of plans for and the building of a certain house at Green Point for the defendant.

The declaration was as follows:

1. The plaintiff is an architect, residing in Cape Town; the defendant resides at Glengarriff-road, Green Point.

2. In or about the month of May, 1897, the plaintiff, at the request of the defendant, prepared for him certain plans and specifications for the erection of a certain house at Green Point: the said plans were duly submitted to and approved of by the Green and Sea Point Municipality.

3. Thereafter in the month of August, 1897, it was agreed between the plaintiff and defendant that the former should, as architect, superintend the building of the said house according to the said plans and specifications, and that he should engage labour, purchase materials, and pay out moneys from time to time on behalf of the defendant, and generally act for him in and about the construction of the said house.

4. The building of the said house was thereafter commenced. One Brand, a builder, was engaged by the plaintiff on behalf of the defendant to superintend the actual building work; and the plaintiff thereafter from time to time purchased materials, engaged and paid for the labour, and made disbursements for and on behalf of the defendant, in accordance with the said contract.

5. During the progress of the said works certain extras were from time to time ordered and directed by the defendant, and were duly executed, and the defendant also specially directed in certain respects that better materials should be obtained than were provided for in the said specifications.

6. The said house with the said extra work was duly completed in or about the month of July, 1898, and the defendant has taken possession and is in occupation of the said house, and plaintiff has in all respects carried out his part of the said contract.

7. The plaintiff from time to time received from the defendant certain sums of money on account of the said work being performed by him. There is due to the plaintiff, after deducting the said sums, an amount of £135 1s. 6d., including a sum of £98 3s. 3d., for architect's commission. The plaintiff annexes hereto a memorandum of account showing the particulars of his said claim.

8. All things have happened, all conditions been fulfilled, and all times elapsed to entitle

the plaintiff to be paid the said sum of £135 1s. 6d., yet the defendant refuses to pay any part thereof.

9. Or otherwise, the plaintiff says that the defendant is indebted to him in the sum of £135 1s. 6d., being the balance of an account for professional work done and for money advanced and paid for and on behalf of the defendant, and at his special instance and request, during the time between the months of September, 1897, and August, 1898, in and about the erection of a certain building at Green Point, which sum the defendant wrongfully refuses to pay.

The plaintiff claims: (a) Payment of the sum of £135 1s. 6d. as aforesaid; (b) alternative relief; (c) costs of suit.

The plea was as follows:

1. The defendant admits paragraphs 1 and 2, and says that the plaintiff's estimate of the cost of the building to be erected, and for which the plans and specifications were prepared, was £1,175.

2. The defendant denies each and every allegation in paragraphs 3 and 4, and says that on completion of the plans the plaintiff at defendant's request advertised for tenders. Certain tenders were received, one of which for £1,200 was accepted, but owing to certain difficulties arising, was abandoned. Thereupon the plaintiff offered to build the house himself for a sum, which included the additional cost of water connection, drainage, wall, architect's commission, and extras, to wit, the sum of £1,415, and thereupon an agreement was entered into between the plaintiff and defendant that the plaintiff should build the house in accordance with the said plans and specifications, and with the additions aforesaid, for the sum of £1,415.

3. Thereupon the plaintiff began the erection of the said house, and the defendant admits that during its construction certain extras were agreed by him to be done, and he says that he has always been willing to pay for the same, but he says it was and is the duty of the plaintiff to render to him a full and true account, duly supported by vouchers, of such extras, but the plaintiff, though requested so to do, refuses and neglects to render such account. The plaintiff is not entitled to claim for such extras until he has rendered such account.

4. The defendant admits that he occupied the said house, although it was uncompleted. The plaintiff undertook that the said house should be completed in March, and thereupon the defendant gave notice to his land-

lord to vacate his premises in March. The said house was not completed in March, and is not now completed, but the defendant having vacated the premises occupied by him, was obliged to enter into occupation of the house in question.

5. The defendant admits that he paid the plaintiff the sum of £1,505 8s. The last item of £128 15s. was not paid by defendant to plaintiff. A sum was borrowed by the defendant from the father of the plaintiff, one Lucke, senior, on loan for six months at interest, and was repaid by the defendant to the lender himself on the 31st August, 1898, and the promissory note made by defendant in favour of the lender was returned to him. The balance of £290 8s. the defendant was, and is, willing should go off on account of such extras as might or may be due. The defendant further says that the architect's commission agreed upon between the parties was included in the sum of £1,415. Save as above, he denies the allegations in paragraphs 5, 6, 7, and 8.

6. The defendant denies that the plaintiff has carried out his part of the contract. He says that in many important respects the building has not been erected or built in accordance with the plans and specifications, that the defendant from time to time complained to the plaintiff with regard to these items, but the plaintiff, though requested so to do, has neglected and refused, and still neglects and refuses to carry out his contract in this respect. The defendant annexes a detailed list of the said items. The costs of putting the said items in a proper condition is the sum of £60.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

For a plea to the alternative claim the defendant refers this Honourable Court to the first plea, and says further that it was and is the duty of the plaintiff to render to the defendant a full, true, and detailed account, duly supported by vouchers, of every and each item; but the defendant, though requested so to do, refuses and neglects to render such account. Save as above, he denies paragraph 9, or the alternative plea.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

And in case the allegations in the above pleas be held by this Honourable Court against the defendant as insufficient and no answer to the plaintiff's claim, the defendant says:

1. He denies the paragraphs 5, 6, 7, 8, and 9 of the declaration, and begs to refer this Honourable Court to paragraphs 3, 4, 5, and 6 of the first plea.

2. He says it was and is the duty of the plaintiff to render a full, true, and detailed account, duly supported by vouchers, of each item of the memorandum of account annexed to the declaration, but the plaintiff, though requested so to do, refuses and neglects to render the said account. The defendant, upon receipt of the said account, is ready and willing to debate the same, as he is entitled to do.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

And for a claim in reconvention, the defendant says:

1. He begs to refer this Honourable Court to the matters and things set out in his pleas in convention.

2. The plaintiff failed and neglected to carry out his part of the said contract in respect of the said items annexed to the said plea.

3. By reason of the said breach of contract by the plaintiff, the defendant has sustained loss and damage to the extent of £60.

4. The defendant has performed his part of the said contract, but the plaintiff refuses and neglects either to carry out his part of the contract in respect of the said items or to pay the sum of £60.

Wherefore the defendant prays for judgment: (a) For the sum of £60 as and for damages as aforesaid; (b) alternative relief; (c) costs of suit.

The replication admitted that there was an error in the account, and said that defendant had been credited with £128 15s. more than he was entitled to. Save as above, it was in general terms.

Mr. Innes, Q.C. (with whom was Mr. Miller), appeared for the plaintiff, and Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

Edward Bernard Lucke, the plaintiff, said he now resided at D'Urban-road. He was an architect. He had known the plaintiff for many years. In 1897 it was agreed that he should draw plans and specifications for a house for defendant at Glengariff-road, near Three Anchor Bay. About half a dozen tenders were received, the lowest price being £1,225 and the highest being £1,850. One tender was accepted, but was subsequently withdrawn, the tenderer explaining that he had forgotten to provide

for the roof in his calculations. Subsequently defendant decided to build the house himself, and authorised plaintiff to engage one Brand as clerk of works and to purchase the material and pay the wages. Witness did not contract to build the house. Brand engaged the ordinary labourers, and plaintiff engaged other persons to do certain work, upon defendant's instructions. Witness also advanced money to defendant. The progress of the building was considerably delayed by unpropitious weather and dearth of cartage. Money was lavishly expended upon the work, and the best material was used. Witness put in accounts and other documents relating to the matter.

Sir Henry Juta: How long have you been an architect?

Witness: For ten or twelve years.

You were formerly a photographer?—In my father's premises.

But you carried on business in Cape Town and in Worcester?—I lived at Worcester for two months, and I could not very well carry on business there.

You got into trouble there?—Yes, perhaps so.

Did you or did you not? You were brought up on a charge of theft and committed?—Unhappily so.

You have been rather unfortunate. You have also been charged with perjury?—Yes, and most honourably acquitted.

The point not being material to the issue?—Oh, yes, it was material to the issue. The records will show that.

You have been somewhat unfortunate with your building cases. How many actions have you on hand?—Only three, because I am in the habit of giving too much credit, and of giving my customers too much latitude.

Cross-examination continued: Witness borrowed moneys from his father on defendant's account and on his instructions.

Brand, the clerk of works, stated that he was engaged to superintend the building at 12s. 6d. a day. The defendant brought him the money weekly to pay the wages. The work was properly carried out, and there were no complaints while witness was there.

Gabriel Neilsen, a carpenter, said that towards the end of 1897 plaintiff engaged him to construct the roof of defendant's house for £90. Witness proceeded with the work, and plaintiff paid for the material and made witness certain advances of cash. Subsequently witness found he could not complete the work for £90, and plaintiff, in



the presence of defendant, agreed to increase the price by £20, partly in cash and partly in wood supplied as material. After defendant had entered into occupation of the house, and while witness was engaged on inside work, defendant said the carpenter's work had been well done, but it had run away with a lot of money.

Cross-examined: Since that time witness had done work for plaintiff at Somerset West Strand. He did not know that a lawsuit was pending in regard to that matter.

Nicholas van Rede, a labourer employed on defendant's house, said plaintiff gave him his orders. The ladder, ropes, and scaffolding belonged to plaintiff. After the work was finished, plaintiff sent him to fetch the scaffolding and ropes, but they were locked up, and defendant's wife declined to give them up to him.

This closed the case for the plaintiff.

Jacob de Villiers Heckroodt, the defendant, said he bought some ground at Three Anchor Bay, and plaintiff prepared for him certain plans and specifications for a house. Plaintiff's estimate was £1,175. Tenders having been called for, plaintiff advised defendant to accept a tender from Tidswell & Co. for £1,260. Tidswell, however, asked for £80 more for items omitted from the original calculation, and subsequently plaintiff advised defendant to build the house himself. Defendant declined to do this, and plaintiff then offered to build the house for £1,175, plus £75 for extras and other charges for items such as water, drainage, &c., or £1,415 in all. Plaintiff commenced to build, money being obtained partly from defendant, and partly by a loan raised by plaintiff. Plaintiff never showed witness a slip or an account of any kind. Plaintiff suggested sub-contractors, subject to witness's approval. Witness did not engage any workmen. It was arranged that the extra amount paid to Neilsen, the carpenter, should be paid out of the £75 allowed for extras, and included in the £1,415. Witness paid plaintiff money from time to time as plaintiff asked for it. When plaintiff told him that the new house was ready, he (defendant) gave notice to the proprietor of the house which he was then occupying. As soon as defendant entered into occupation of the house, he had cause for complaint as to its condition. He frequently complained to plaintiff, but without avail.

Cross-examined: He paid plaintiff more than the £1,415 agreed upon. In one

account plaintiff charged him over £1,900 for the work, but in replying thereto witness made no remark upon the difference between £1,900 and the contract price, but simply asked for more details.

Walter Scott Law, an architect, said that he, in company with another architect, inspected defendant's house, and found several defects in and around the building, one of which was that the water ran the wrong way. The steps to the stoep inclined the same way as the yard—the wrong way. The building generally was what he would call rather a rough job. The sink, too, was rather a rough affair. The papering had left the wall in some instances, but that was not an unusual thing in this country. A side wall was two inches out of the perpendicular. He estimated the cost of putting the building into a proper condition at £88.

Cross-examined: In examining the house he took as his standard the average of Cape Town work. The curvature of the ironwork on the verandah was wrong, and would have to be replaced by other iron. At present the water flowed away from, instead of into, the gutter.

Vincent Arthur Hutt, another architect, gave similar evidence.

Christian Martin Hanson said that on one occasion when he visited defendant's house the verandah gave way, and the water poured down from two places. The cement in the backyard was broken.

Cross-examined: The rush of water was caused by rain. Nobody threw the water.

Alexander Gourlay, builder and contractor, said he considered the work done by the builder of defendant's house was badly done. He thought that £1,450 was a good price to pay for the building of such a house.

Herbert Tidswell, a contractor, said he would have constructed the defendant's building for £1,310, but the plaintiff put him off.

After argument,

Buchanan, J., having reviewed the evidence given in the case, said as to the contract, there is the evidence of the plaintiff on the one side and that of the defendant on the other, but there are no other witnesses as to the contract. This being the case, the Court has to look at the circumstances of the case, and what seems to weigh most strongly against the defendant are the letters written by him, in none of which is there any reference to a contract to build the house for a specific sum. All the letters are consistent

with the contention of the plaintiff that he was acting as defendant's agent. On this point the defendant has failed to prove his contention, and the Court must therefore on the first point raised decide that the building was erected by the plaintiff as the agent of the defendant. The plaintiff has sent in his account as agent, and this account, which is for £2,100, including commission, contains something like 200 or more items. It is utterly impossible for the Court to go over each of these items and decide which ought to be allowed, and judgment therefore can not be given until the account has been proved. The Court appoints Mr. Maynard Nash as referee, the onus lying upon the plaintiff to prove each of the items of the account to the referee. The referee will report to the Court, who will then know what judgment to give.

Maasdorp, J., concurred.

*Postea* (August 10th).

The referee's report was read. He reported that the plaintiff had proved that he had expended £1,198 19s. in materials, &c. As to the wages account £590 13s. 2d., and the account of £155 15s. 7d. for stone, sand, carting, &c., he was not satisfied that these amounts had been paid. A considerable amount however must have been paid in wages, and the Court having referred the whole case to him he thought it advisable to obtain some independent expert evidence as to the amount of labour spent upon, and the expense involved in building the house. He had therefore communicated with Mr. Herbert Baker, A.R.I.B.A., who had inspected the house with him and whose report was attached. Mr. Baker had estimated the actual cost of roofing, papering, painting, &c., &c., which was done by sub-contract at £376 18s. to which had been added 5 per cent. architect's commission £18 16s. 11d., making a total of £395 14s. 11d. With regard to the £155 15s. 7d. the referee regretted that he could not advise the Court in any way as to whether such charge was reasonable or not. Though money must have been paid also in this account, there was nothing to guide anyone in framing any estimate upon the justness of the amount claimed or otherwise. The contra account he admitted as declared £1,505 8s. This amount had been paid by defendant to plaintiff. Striking the balance the referee stated that in his opinion the plaintiff was entitled to £89 5s. 11d. plus

any amount the Court might think fit to award in lieu of the item £155 15s. 7d. for carting, stone, sand, &c.

Mr. Innes : Act 29 of 1898, section 22, sub-section 2, provides that the referee's report shall be equivalent to the verdict of a jury. The referee finds for the plaintiff for £89 and a *quantum meruit* which he does not fix.

Sir H. Juta : The action was instituted by the plaintiff as the defendant's agent. The Court found that he was such. Therefore his duty as agent is to prove his account. The only amount which he has proved is £1,198 19s. and this he has been paid. He has had every opportunity of proving the other claims and has failed. The defendant's advisers have had no opportunity of dealing with Baker's evidence. The plaintiff cannot claim architect's fees when acting as agent. The defendant is entitled to absolution from the instance.

Mr. Innes : The referee has reported that £395 is a fair amount for the work which must have been done although no vouchers have been produced. The fact that a person is an agent does not compel him to produce documentary proof. Baker's evidence was not on oath, but the Act allows the referee to take evidence on oath or otherwise.

Huchanan, J., in giving judgment, said : This is an action brought by the plaintiff who, as contractor, constructed a house on behalf of the defendant. In the building of that house plaintiff laid out money for material, work, and labour, and for other purposes. Annexed to the declaration is an account containing 200 items, showing an expenditure of £2,069. It is impossible for the Court to go into these several items. At the trial an issue was raised by the plea, that instead of the house being constructed by the plaintiff for the defendant at his cost or expense, there was a contract to erect the house for a specific sum. The Court found that the defendant had failed in his contention, that the house was not erected for a specific sum, but by the plaintiff at the expense of the defendant. Thereupon the account was submitted to an accountant as referee. The plaintiff having acted as agent, it was his duty to have kept vouchers and to be able to put before the Court and the referee satisfactory evidence to show the amount he actually expended. On going through his vouchers and books they were found to be very unsatisfactory, and the referee had only been able to find proof that £1,036 was spent by the plaintiff for the defendant, to which he added plaintiff's com-

mission, bringing up the amount to £1,198. The referee, however, said there must have been a considerable amount more spent for work, carting, &c. The referee obtained the opinion of a professional gentleman, which guided him to some extent as to what amount must have been expended on the house, but he was unable to say what exact sum had been spent for carting sand and other work. Allowing that the plaintiff had expended £1,198 as proved, the Court has next to determine what else should be added to the account for the other expenditure which was not properly vouched for, so as to settle the claims between the parties. In determining that amount, we are guided by the referee's recommendation, although not bound by it, and by the evidence which has been put before the Court in support of his recommendation. The original estimate for the construction of the house was £1,380. Certain extras were done afterwards, and witnesses varied in their estimates as to its value, some of them stating that from £1,500 to £1,700 would be a fair amount for such a house. Had the plaintiff done his duty, keeping proper accounts, there would have been no difficulty in determining the proper amount to award, and the Court would not have been driven to form an estimate for itself; but the plaintiff has failed in proving all his expenditure. Technically, perhaps, the proper judgment would be absolution from the instance. The case is, however, complicated by the fact that the issue raised by the defendant has been decided against him. There is therefore some part of the case in which the plaintiff has succeeded. In order to ascertain a *quantum meruit*, taking the value of the work as far as could be gathered from the evidence, at £1,600, after deducting therefrom the amount admittedly paid on account, a balance of £95 12s. remains. To settle the whole case between the parties the Court gives judgment for plaintiff for that amount. With regard to costs, the plaintiff has not come into court in a satisfactory manner, nor has he shown that he has done his duty. But as the issue to which I have referred has been decided in his favour, judgment will carry the costs of the action. As to the costs of the referee, the investigation has been elaborate, protracted, and expensive, and altogether due to the fact that the plaintiff did not keep proper accounts, and therefore he must pay the expenses of the referee and also Mr. Baker's charges.

[Plaintiff's Attorneys, Messrs. Demjers & van Ryneveld; Defendant's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

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## SUPREME COURT

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[Before the Hon. Mr. Justice BUCHANAN,  
and the Hon. Mr. Justice MAASDORP.]

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FICK V. GOOSEN.

{ 1899.  
June 8th.  
Aug. 10th.  
" 11th.  
" 24th.

This was an action in which the plaintiff, a builder and contractor, claimed £392, being the balance of his account for building a dwelling-house and outhouses for the defendant at Wellington.

The declaration alleged that the parties agreed that the plaintiff should erect a dwelling-house at Wellington for the defendant similar in plan, dimensions and other respects to a house belonging to one Malan. £880 was to be paid to plaintiff, who was to do all the work except the painting. Subsequently it was agreed that the plaintiff should build certain outhouses on the property similar to certain outhouses belonging to one Schwartz. £220 was to be paid for this work. The plaintiff had also done certain extra work to the dwelling-house.

The defendant pleaded that it was agreed that the dwelling-house should be 4 feet longer and 18 inches higher than Malan's, and that there were to be certain other slight differences. He denied that the buildings had been duly completed, and said that in certain items the buildings were neither in design nor in workmanship the same as Malan's and Schwartz's, in other items the work was bad and incomplete and the materials of inferior quality. He also disputed the correctness of the account for extras. He said further that the house had not been completed within the contract time. In reconvention he claimed an order upon the plaintiff to complete and finish the buildings and extras in accordance with his contract, or to pay £250 damages, and he prayed for the further sum of £75 as and for damages already suffered.

The replication admitted the difference of 4 feet and 18 inches in the buildings.

Mr. Innes, Q.C., and Mr. Upington appeared for the plaintiff.

Sir H. Juta, Q.C., and Mr. Molteno for the defendant.

Johannes H. Fick, the plaintiff in the action, said he was a carter and builder, residing at Wellington. He had had about thirty years' experience. In August, 1898, defendant asked him to build a house for him, and subsequently witness agreed to build a house for £880, exclusive of painting work and outhouses. Witness then carted stones and bricks to the site agreed upon, but shortly afterwards, upon defendant's request, he agreed to build upon another site, defendant agreeing to pay for the expense of removing the stones and bricks. No written contract was drawn up. After the main building had been commenced, witness agreed with defendant to build outhouses for £215, and this work was also carried out. While the main building was in progress, defendant said that certain details of the main building did not give him satisfaction, and witness altered them accordingly. Witness constructed the verandah according to defendant's request, and charged extra for it. After the work was done, defendant declined to pay.

Cross-examined: Defendant's house was higher than Malan's house. Witness never received a letter from defendant's attorneys calling his attention to defective work, and to a breach of contract.

David Arnot, a clerk of works in the employ of a Cape Town architect, said he inspected the defendant's house, the frontage of which was longer than Malan's. Defendant's house was higher than Malan's, but the height of the rooms of both houses was the same. There was very little difference between the roofs—both were bad. It would cost about £100 to make the outside of defendant's house present the same appearance as Malan's. Witness considered that plaintiff had not charged a sufficiently high sum for the extras. The house itself was far too cheap at £880. It could not be obtained for £1,200 in Cape Town.

Johannes Fick, a son of the plaintiff, corroborated his father's evidence.

Christian van Niekerk, a mason, residing at Wellington, said he was employed on defendant's house by plaintiff. Defendant never found fault with the work in the

house in witness's presence, but always seemed satisfied with it. The foundations were exceptionally well made.

Jacobus Munnik, a carpenter in the employ of plaintiff, said defendant never complained to him about the verandah while he was constructing it.

Daniel Gideon Hugo, another carpenter, corroborated.

Abraham Plessis, who assisted in paving the defendant's stable, and Piet Dreyer, a labourer, gave evidence as to the defendant being satisfied at the time with the work done.

Jacobus du Toit, a builder, who had inspected the building, gave evidence as to its efficiency.

Jacob Heinemann, a builder at the Paarl, deposed that Goosen's house was quite as good as Malan's, although the plaster work was inferior, but the appearance of Goosen's verandah was bad owing to its unsatisfactory construction, and this spoiled the general effect of the house. In many respects Goosen's house was quite different to Malan's, and the stable was not built on similar lines to Mr. Schwartz's.

For the defence, Pieter Andries Goosen, the defendant, deposed that he entered into an agreement with the plaintiff in presence of Schwartz and Burger, under which plaintiff was to build a house like Malan's, but 4 feet longer and 18 inches higher. The price agreed upon was £880, and a stable similar to that of Schwartz was to be erected at a cost of £215. The buildings were to be finished by 15th November, but this was not done, as he could only occupy the back part on 5th December. There was no verandah, although the stoep was finished, and the verandah itself had to be replaced by another and better one. Before moving into the house he noticed that some of the ceiling-boards were open, and other defects were observable. In February he refused to pay the plaintiff any more money, the amount he had paid up till then being about £50.

Cross-examined: He had never had any building work done for him before this. There had lately been very heavy weather at Wellington, but his house still stood practically intact. He never had any conversation with plaintiff's son or workmen about the house. When he informed plaintiff that he wanted a "braud zolder" the ceiling was already finished.

Mr. Schwartz corroborated the previous witness as to the agreement made between

plaintiff and defendant. In cross-examination he admitted that in his estimation £880 was not an excessive price for Goosen's house. There were no defects inside, and the material was good.

Noah, a mason, gave evidence as to the quality of the work done at the house.

W. A. Burger, confirmed previous statements as to the agreement, and said he supplied the bricks and stone used for £10½, and they were of good quality.

Henry Walter Scott, an architect and builder at the Pearl, stated that he had examined Goosen's and Malan's houses at Wellington, and they were totally dissimilar in construction and elevation. The workmanship and material in Goosen's house were inferior, and chips of wood and cement had been used to hide defects in the carpentry, &c. He estimated that in order to put Goosen's house in a condition equal to that of Malan's would cost £600.

He had not gone into details as to the actual figures, but he would not be inclined to undertake such a job for less than £100—that was, to make Goosen's house as good as Malan's. The contractor had evidently made a mistake in agreeing to build the house exactly like Malan's; such a structure could not be built for less than £1,100 or £1,200. Possibly the house as it stood could be put up for the contract price of £880, for the workmanship and material were inferior. Some builders had greater facilities than others in executing a contract. Witness was sent out by the Board of Trade as Clerk of Works at Victoria College in February, 1885.

Cross-examined: Witness said he did not mean the English Board of Trade; he came from New Orleans. Since then he had been an architect, contractor, and builder. He was the builder of the Lady Grey Station Hotel. It was not the case that the hotel had tumbled down or collapsed; it was simply this, that owing to the recent heavy weather the parapet had slid down. The roof had not fallen in. He drew the plans for the Lady Grey building.

William Black, architect, Cape Town, said he had examined the two houses—Goosen's and Malan's—and the former was slightly inferior, not nearly so ornate, a number of the ornamental features in the latter being omitted. A large amount of costly work would have to be undertaken if Goosen's dwelling were to be altered and

improved, to make it equal in appearance and workmanship to Malan's. It would cost about £450 to do so.

Cross-examined: He had prepared the schedules for this action, and in these had estimated the cost of the alterations at £260, but as a matter of fact, he did not then think the matter would come into court, therefore he just made a sort of sporting guess as to the amount. When, however, he went into details, he found that the fresh work would cost £450. He could not make out why the contractor had been so foolish as to undertake the work for the price, £880. He must have lost money by it.

Frederick Cherry was called. He deposed that he was an architect practising in Cape Town, and had personally inspected the two houses at Wellington, Malan's and the defendant's, and the latter was decidedly inferior in workmanship and structural arrangement.

Buchanan J., in delivering judgment, said: The plaintiff is a builder at Wellington and contracted to erect a dwelling at Wellington similar to another building already standing at Wellington. The declaration states that he has completed the work and that the defendant has entered upon possession. Plaintiff claims £392 as the balance due to him under the contract. Besides the contract for building the house there was another contract for building outbuildings and stables and certain extras, which work was also performed. In answer to this it is alleged that the plaintiff could not sue under a contract until he had completed his work. As a general principle of law that is undoubtedly a sound argument. But there is also another principle of law, as well as a principle of justice and equity: no person can take the benefit of another man's work and not pay him for doing it. In this case it is clear that if the defendant had refused to take the house and insisted on the contract and refused to pay anything further until the work was done, it would have been a different matter. But he has taken possession of the house and has had full benefit of the plaintiff's work and refuses to pay. It would be altogether wrong and inequitable to allow such conduct. Of the extras there are only two items which have been objected to. One is a fire-grate, which was put in at £6, and the other a wall to the pantry. I have no doubt that the fire-grate was not one of those things which it was a builder's duty to put in, and that

amount must be allowed. The wall erected for the pantry is reasonably charged at £2 10s. This has been erected, it is alleged by the defendant, in lieu of certain shelving which it was not the builder's duty to erect. The whole of the debit items must be allowed, reducing the amount to £359 13s. 9d. The defendant alleges that the contract for the house was not that it was to be exactly like Malan's house; there were to be certain differences. The parties did not go in for the careful preparation of plans and the engagement of architects, but had a sort of rough-and-ready agreement. The defendant could not expect a house identical in every minor particular with Malan's house. The "four feet longer" was agreed to, and the "18 inches higher" was admitted in the pleadings but denied in the evidence. As, however, it was admitted in the pleadings, it must be taken to be the case. Then there are the doors and windows, of which only the front door was to be of teak; the house was to be a cheaper one than that of Malan. The defendant has put in a claim in reconvention. First he claims damages for not having had the house finished by the 15th November. There are two answers to that. After the plaintiff had begun carting and building, the defendant himself altered the site, so that he could not have insisted on having the house finished in the contract time. He remained in the old house after the time, and the plaintiff paid his rent as compensation. His second claim is for £250 needed to put the buildings and extras in a condition according to contract. No doubt the houses do not present a similar outward appearance, but the evidence on both sides goes to show that inside they are substantially the same. There were one or two little scampings: there should have been the 4½ inch retaining wall for the bath, for instance; but inside the defendant has no substantial cause for complaint. Looking at the photograph, it appears that the houses would have been the same had the verandah in Goosen's been placed in the same position as in Malan's. The verandah seems to be the principal ground of complaint, though there are a few other little ones, the verandah has not been carried round so far, the pillars at the back are not so good, not correct Corinthians, and other little things which must be allowed. With regard to the "18 inches higher," if the defendant had not taken over the house, the plaintiff would have had great difficulty in recovering his

price. Mr. Black's estimate is that it would cost £50 to raise the roof those 18 inches; and the verandah, according to Mr. Arnott's estimate, would require £100. The Court will accordingly allow the plaintiff £359 13s. 9d. in convention, and the defendant £150 in reconvention. Judgment will therefore be for the plaintiff for £.09 13s. 9d. with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Walker & Jacobssohn.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

VISSER V. MURRAY. { 1899.  
June 9th.  
" 12th.

Evidence — Written agreement — Collateral oral agreement — Survey of property sold.

*A written agreement for the sale of land contained a clause providing that all expenses of the transfer including survey charges were to be borne by the purchaser, it contained no provision as to who was actually to have the survey made.*

*Held, that evidence of a collateral oral agreement between the parties stipulating that the purchaser should have the survey made was admissible, "inasmuch as such an agreement was not inconsistent with the written document.*

This was an action in which the plaintiff claimed an order compelling the defendant to complete the survey of certain land and pay £100 and interest from October, 1897, failing which, an order for the cancellation of the sale of the said land and £8 10s. damages.

The declaration alleged that a certain piece of land being portion of the remaining extent of the farm Wonderheuvcl had been sold to the defendant for £100; the contract was in writing, and provided that transfer should be passed within twelve months, and the purchaser undertaking to pay transfer charges, including expenses of survey. It alleged an oral agreement made at the same time, under which the defendant undertook to have the survey made. It said further that all necessary documents had been handed to the defendant.

The defendant in his plea denied the allegation as to the survey, and said it was plaintiff's duty to pass transfer and to have the necessary survey made, but this he had failed to do. He denied the delivery of the documents.

He said that by mutual consent W. Murray had been appointed surveyor. In reconvention he said he tendered the purchase price, and the costs and charges of carrying out all the terms of the contract, and claimed an order for transfer and £50 damages.

The material portion of the written contract was as follows: "The seller agrees to sell, and the purchaser agrees to buy a certain piece of ground situate in the division of Hanover, being a portion of the remaining extent of Wonderheuvcl in extent between six and eight morgen more or less, and detached from the bulk of the remainder of Wonderheuvcl owned by the seller and now called Gwenfontein, for the sum of one hundred pounds sterling to be paid by the purchaser to the seller immediately on transfer being passed within twelve months from this date seeing that the consent of the bondholders must be obtained, and for divers reasons the parties hereto concerning. All expenses of the transfer including survey charges are to be borne by the purchaser and transfer to be passed by Mr. B. de Villiers of Hanover."

Mr. Searle, Q.C. (with whom was Mr. Close), appeared for the plaintiff, and Sir Henry Juta, Q.C. (with whom was Mr. De Waal), appeared for the defendant.

Gert Petrus Visser, the plaintiff in the action, said he was the registered owner of the remaining extent of the farm Wonderheuvcl. The remaining extent consisting of two separate pieces was called Groenfontein. He obtained transfer in 1890. He knew the defendant had previously owned Wonderheuvcl. He concluded an agreement of sale of portion of the remaining extent with the defendant; the agreement was in writing.

An oral agreement was made with the defendant at the same time with regard to the survey.

Mr. Searle: What arrangement was made?

Sir H. Juta objected to the question: The agreement was in writing.

Mr. Searle: Nothing is said in the agreement as to the survey. The verbal agreement is not inconsistent with the written.

Sir H. Juta: A deduction would have to be made and it is the seller's duty to make the deduction.

Mr. Searle: I propose to ask the witness whether at the time an agreement was entered into that the defendant should survey. This is not inconsistent with the plea, which says that the plaintiff has not handed over the documents. For what other purpose could they be required?

[De Villiers, C.J.: For the present the Court will allow the evidence, at any rate until the whole drift of the evidence is seen.]

Witness: The oral agreement made at the time was that the purchaser, the defendant, should have the farm surveyed. Defendant suggested that his nephew should survey the ground. There was a bond on the whole property, and plaintiff had to arrange for the portion of the property in question to be released. In December, 1889, plaintiff visited defendant and offered to cancel the sale, but defendant replied that plaintiff must have patience and wait.

Cross-examined: Plaintiff could not point out the beacons as he did not know them. His diagram only showed the lower portion of the ground. Without an amended title no transfer could take place. He sold the land to defendant because the latter said that the land was there. Witness was willing to cancel the sale without payment of any damages to himself.

B. J. de Villiers, an attorney, said that he drew up the agreement, the defendant said he would have the survey made, and afterwards paid witness's charges for obtaining diagrams of the adjoining farms.

Cross-examined: The defendant knew what he was buying. It was a mistake not to insert in the agreement the stipulation that the defendant would do the survey.

Gerhardus Theodorus du Toit, who resided at the farm Bokfontein, said that in October last year defendant came to his farm, being accompanied by his son. Defendant asked witness to show the

beacons on an adjoining farm, adding that he had lost sight of certain ground which he desired to locate.

This closed the case for the plaintiff.

For the defence,

Wilfred Murray, a surveyor, said that defendant was his uncle. Defendant asked witness to look into the matter of the purchase from the plaintiff and he obtained certain documents. He was instructed to survey the ground, but he was unable to do so with the documents given to him. In May of last year he visited plaintiff's farm, and plaintiff told him where Groenfontein was in an indefinite way. Witness asked plaintiff to point out the beacons, but plaintiff said he did not know where the beacons were. Witness went over Groenfontein and another piece of ground, and he found one of the beacons as a result of a description given by the defendant, who referred to a long stone, but he could not find any other beacons. Witness had been employed on this work for some time. Before a survey could be made, the signatures of the various owners to an amended title would have to be obtained. Nothing could be done until an amended title was obtained.

By the Court: He could not identify the beacon which he found from the plan produced.

Cross-examined: Defendant described several other beacons to witness, but witness could not find them.

Re-examined: He was ready to go on with the work as soon as the papers were in order. The papers had never yet been in order.

By the Court: The work of obtaining amended diagrams was exclusively the work of a surveyor. In the present case, if the owners consented to certain beacons, it would cost the usual surveyor's fees to survey the land. If the owners did not consent the matter would be referred to the Divisional Council, and if there were then any dispute the matter would be referred to the Supreme Court.

James Murray, the defendant, said the farm Van der Heuvel originally belonged to him. He sold three portions of the farm about the year 1850, the third being the remaining extent. In 1861, he instructed Mr. Orpen to make a survey, because he thought 800 morgen still belonged to him. Witness had a consultation with plaintiff's father about the ground and said that he had got transfer of 800 morgen more than appeared on his diagram. He tried to get the land

from him. Subsequently he approached the plaintiff with the view of buying the land, and then the agreement produced was drawn up between him and plaintiff. Witness never agreed to have the land surveyed, but he promised to show the beacons, and to do all in his power to assist the plaintiff in the matter. Witness had carried out his promise, and he was prepared to do all that he could do under the contract. The ground was never pointed out to him by the plaintiff. When plaintiff approached him with regard to cancelling the sale, defendant objected. He had never declined to do anything with regard to passing transfer which he had been asked to do by the plaintiff.

Cross-examined: The agreement put in said nothing about the appointment of a surveyor. It was mutually agreed upon between the parties to appoint witness's nephew as surveyor.

By the Court: Witness did not show Orpen's diagram to plaintiff before the ground was bought. Orpen put up the beacons in 1861.

Cross-examination resumed: He did not agree to the cancellation of the sale because he desired to get the land.

Re-examined: He had never occupied the land. If he had occupied it, he could have made £3 a month out of it.

(C.A. V.)

*Postea* (June 12th.)

Judgment was delivered.

The Court gave absolution from the instance on the claim in convention and on the claim in reconvention, and made no order as to costs.

De Villiers, C.J., said: This case is unique of its kind. It appears that some years ago the defendant was the owner of a farm called Wonderheuvel, and he then sold it in three portions. Two portions of the farm were cut off from the original diagram, and the third portion was the remaining extent, which went from hand to hand until it came into the possession of the plaintiff. In the transfer to the persons who bought the property on the west side, the boundary of that west side was stated to be Government land. It is quite clear now that when the defendant sold that portion of the land he represented to the purchaser that the boundary of the west portion was Government land. It appears that under the transfer of the remaining extent, which was given into the hands of the plaintiff, 2,800 morgen was given as the extent of the property, whereas the extent



was only 2,000 morgen, and the purchaser, therefore, came to the conclusion that the remaining 800 morgen must be sought for on the west side. The defendant himself believed that that was the case. It is by no means clear that the defendant may not be ultimately liable to the plaintiff for the 800 morgen, but that question does not arise in the present case. The defendant believed that he had the right to the 800 morgen on the west side, which he thought he had not then transferred, although he had intended to transfer the whole. He therefore entered into an agreement with the plaintiff to buy from him the supposed 800 morgen, and the plaintiff agreed to sell it for £100. If this property had really existed, it would have been worth £900, and one can not help thinking that what the plaintiff really intended to sell was whatever right or title or interest he might have to any remaining portion. Unfortunately this intention was not expressed in the agreement which was entered into. Under that agreement the plaintiff sold certain land which it was assumed was on the west side, 800 morgen, for the sum of £100. The question has arisen as to whether there was not at the same time a collateral agreement. It was stated that the defendant was to do the requisite surveys for the purpose of obtaining transfer. Looking at the possibilities of the case, I am satisfied that there must have been an agreement between the parties that all the trouble and the expense of the survey was to be undertaken by the defendant. It is said that such a collateral agreement is inconsistent with the written agreement. I have looked carefully into the written agreement and failed to see any inconsistency. The agreement itself says that the purchaser should pay the costs of the survey, and this is by no means inconsistent with the further collateral agreement that all the expenses of the survey should be undertaken by the defendant. In the opinion of the Court a collateral agreement was entered into between the parties and the subsequent correspondence supports that view. Plaintiff's attorney wrote to the defendant about "your surveyor," and in the answers sent by defendant's attorney no repudiation of this term was made. It seems to have been assumed that all the trouble, risk, and expense of the survey was to be undertaken by the defendant. Some time elapsed, however, and nothing was done. Then the present action was brought, and the Court is now asked by the plaintiff to compel the defendant to execute the

survey, and failing that to have the sale declared null and void. In my opinion this is a form of action upon which the Court can not possibly decide. The mere fact that the defendant has not yet completed the survey does not give any ground for the cancellation of the agreement, whatever ground of action it may give. An action may possibly be brought upon the ground that as the defendant knew at the time that what he was buying was mere chance, and that inasmuch as no land now exists, the contract was entered into under a mutual mistake, and therefore there was no contract at all. I could have understood that ground of action. But Mr. Searle still strenuously says that there is this land, and in fact the declaration says that the land was pointed out by the plaintiff to the surveyor, but independently of this statement there is no proof that land existed, and nobody has pointed out any land to be surveyed. Therefore upon the declaration itself as it stands it is impossible for the Court to give any judgment. There can be no ground for an action for rescinding the sale or to compel the defendant to survey land which does not apparently exist. Clearly therefore there must be also absolution from the instance on the claim in convention. As to the claim in reconvention, the defendant is just as little entitled to succeed as the plaintiff. The defendant knew the whole of the circumstances of the case, and clearly he was responsible for the whole of the mistake that has arisen, and he has not done all that could have been expected from him under the collateral agreement to obtain proper title. There will also be absolution from the instance on the claim in reconvention. Under all the circumstances of the case, the Court is of opinion that there should be no order as to costs.

Buchanan, J., concurred, and expressed the view that the plaintiff in convention was premature in bringing his action, and that in respect of the claim in reconvention, the defendant was in a hopeless condition.

Maasdorp, J., also concurred.

Sir Henry Juta, Q.C., said his client, the defendant, was willing to cancel the sale, provided that each party paid his own costs.

Mr. Searle, Q.C., said the plaintiff had no objection.

The Court cancelled the sale by consent of the parties.

[Plaintiff's Attorney, C. W. Herold; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

## PROVISIONAL ROLL.

STEYTLER AND CO. V. MCKENDRICK.

Mr. Howel Jones applied for a decree of civil imprisonment upon an unsatisfied judgment of the Court for £34.

The defendant was in default.

Granted.

HARTZENBERG V. MARITZ.

Mr. Upington applied for a decree of civil imprisonment upon an unsatisfied judgment of the Court for £120.

Mr. Benjamin appeared for the defendant, and moved for a postponement.

The case was postponed until July 12.

ANDERSON AND CO. V. THERON.

Mr. Buchanan applied for provisional sentence upon two promissory notes for £110 10s. 5d. and £37.

The defendant appeared and asked for a postponement.

The Court granted provisional sentence.

CLEGHORN AND HARRIS V. JACOBS.

Mr. Upington applied for a decree of civil imprisonment upon an unsatisfied judgment for costs.

Granted.

S.A. LIFE ASSURANCE SOCIETY V. MCCODO.

Mr. Upington applied for provisional sentence for £7 10s., interest upon a mortgage bond.

Granted.

DE VILLIERS V. BOTHA.

Mr. Upington applied for provisional sentence for £675 7s.

Granted.

DEMPERS AND CO. V. HUMAN.

Mr. Miller applied for provisional sentence upon a mortgage bond for £1,500 7s. 5d., and that the property specially hypothecated be declared executable.

Granted.

VAN DER SPUY, IMMELMAN AND CO. V. SMUTS.

Mr. Upington applied for judgment under Rule 329 for £162 15s.

Granted.

FOX AND SON V. SPIES.

Mr. Close applied for judgment for £68 10s.

Granted.

JONES AND CO. V. BERRY.

Mr. P. Jones applied for judgment under Rule 329 for £75, for goods sold and delivered at public auction with interest, and £3 15s. for collection in accordance with the conditions of sale. Judgment was granted for £75, interest and costs, but refused for the £3 15s.

MARSH V. MCKENDRICK.

Mr. P. Jones applied for judgment for £36.

Granted.

MARSH V. COMBRINCK.

Mr. Currey applied for judgment for £81 13s. 3d., for goods sold and delivered.

Granted.

VEALE AND ANOTHER V. GROENEWALD.

Mr. Searle, Q.C., asked under Rule 329 for an order of ejectment against the defendant, a farmer residing in the Caledon division.

Granted.

RICHARDSON V. BURROWS.

Mr. Miller applied for judgment for £6 6s., for goods sold and delivered.

Granted.

BURMAN V. TRAGELLA.

Mr. P. Jones applied for judgment for £43 1s. 3d., for goods sold and delivered.

Granted.

BISSET AND ANOTHER V. BENNETT.

Mr. Close applied for judgment in term of consent paper for £374 10s. 9d.

Granted.

## REHABILITATIONS.

The following estates were rehabilitated :  
Erbert Marsh Munro, James Munro Gibson, Simon Christoffel Jacobus Bosch, and Richard Hollett Aamm.

## GENERAL MOTIONS.

COMBRINCK AND CO. V. STROMACH AND GRAHAM.

Mr. Searle, Q.C., applied on behalf of the defendants for a commission to examine a witness at Johannesburg.

Mr. Innes, Q.C., appeared for the plaintiffs and consented on condition that they also be allowed to examine a witness in London. He moved for such an order subject to the proper petition being filed. Both commissions were ordered.

IN THE MATTER OF THE CAPE TOWN AND GREEN POINT TRAMWAY COMPANY, IN LIQUIDATION.

Mr. Innes, Q.C., applied for the confirmation of the report of the liquidators. The report was confirmed and the company dissolved.

EDGAR V. SCOTT.

Mr. Molteno applied for a commission to examine a witness at Melbourne. Granted.

IN THE MATTER OF THE MINORS DE VILLIERS.

Mr. Searle, Q.C., applied for the appointment of a *curator ad litem* for the purposes of judicial proceedings.

Mr. G. W. Steytler was applied *curator ad litem* with power to consent to a family compromise if he should think it advisable to do so.

STANDARD BANK V. JACOBSON'S TRUSTEE. { 1899.  
June 12th.  
" 14th.

*Cost de bonis propius*—Writ of execution—Trustee.

*Although prima facie a trustee or other person suing in a representative capacity should be held personally liable for the costs of an unsuccessful action yet, if the judgment gives costs against him without ordering that they be paid de bonis propius, a writ of execution should be against him in his representative capacity.*

*The proper time to apply for such an order is before or at the time when judgment is given but the omission so to apply would not prevent the Court from supplementing its judgment afterwards.*

This was an application by the defendant in the action on notice to the respondent (the plaintiff) for an order that the writ lodged in this matter on behalf of the applicant, be issued or otherwise that a writ be issued in such a form as to grant the applicant due relief, and that the respondent be ordered to pay the costs of this application.

The affidavit of W. G. Fairbridge, applicant's attorney, set out that the applicant was the defendant in an action wherein the plaintiff, W. A. Currey, in his capacity as secretary for the time being of the General Estate and Orphan Chamber, and as such being the trustee of the wife and children of Jacob Jacobsohn, instituted proceedings for the cancellation of a certain cession of a life policy (see *supra*, p. 188).

That judgment had been given in favour of the defendant with costs, and the defendant's costs taxed at £60 8s. 3d.

That thereafter, upon demand being made upon plaintiff's attorneys, they stated that the plaintiff held no funds of the Jacobsohn Trust out of which to pay the costs. Thereafter deponent drew out and tendered to the Registrar of the Court a writ directed against the General Estate and Orphan Chamber for recovery of the costs, and the costs of the writ, making in all £61 9s. 8d.

That the Registrar had not issued the writ considering that he could not do so in the above form by reason of the fact that the plaintiff was the trustee of the wife and children of Jacob Jacobsohn.

That it was in his capacity as secretary of the General Estate and Orphan Chamber that the plaintiff sued, and not in his capacity as trustee.

That the defendant contended that there was no capacity or quality of trustee in the present case and that, in the action, the plaintiff Chamber was suing in reality on its own behalf inasmuch as, through the negligence of a previous official of the Chamber, it was in all probability liable to pay to any persons who might be entitled thereto, the amount of the policy on the life of the late Jacobsohn.

Deponent annexed an advertisement by the Chamber, requesting persons desirous of appointing the Chamber in any trust as executor or otherwise to make the appointment in favour of the secretary for the time being, and alleged that the appointment in the action had been in favour of one Pieteresen in his capacity as the secretary, or the secretary for the time being of the Chamber.

That in the action, the plaintiff was suing on behalf of persons who were represented as being without the Colony. Had the action been brought in any such form as to lead the defendant to suppose that the plaintiff would dispute the liability of his Chamber for costs, security for costs would have been demanded.

Mr. Innes, Q.C., for the applicant: The respondent is not in the same position as a trustee in insolvency or an executor.

[De Villiers, C.J.: He is an agent.]

He sued personally as agent for Jacobsohn's wife and children and lost. By our law an agent has no right to bring an action on behalf of his principal; the latter is the proper person to sue, if the agent sues he takes a personal liability for costs. *Wehnemeyer v. Trustee of Heyns* (1874, p. 46) is the case of a trustee in insolvency, and he has authority to sue under Ordinance 6 of 1843. As to the liability of a guardian for costs if he sues without leave of the Court *Van der Walt v. Hudson and Moore* (J. 4, pp. 327, 365).

Mr. Searle, Q.C., for the respondent: Although the doctrine of trust is not known to the Roman-Dutch law except in the case of *fidei-commissa*, yet our law has recognised trusts in various statutes one of which is the very act which incorporates the General Estate and Orphan Chamber of which the respondent is the secretary. See the preamble to Act 31 of 1861. In accordance with the principle of *Van der Walt v. Hudson and Moore*, the defendant might have asked for security for costs. The plaintiff is not in the position of an agent suing on behalf of an absent principal. It was not suggested in the action that he was suing on behalf of the General Estate and Orphan Chamber, but on behalf of the minor children and the wife of Jacobsohn. As the matter stands at present no writ can issue against him in the form asked for.

Mr. Innes: The prayer for "other relief" covers the application for leave to make the respondent personally liable. The proper test of his liability is whether or not he could take proceedings without instructions from some one else. If he is the legal owner of the trust property he is liable for costs, if he is not, he must get the instructions of his principal, and the action must be brought in the name of the principal. In *Buyshes v. S.A. Association* (Juta 3, p. 204), the Court held that in cases of insolvency it only knows the trustee.

[De Villiers, C.J.: If a fiduciary heir brings an action on behalf of the *fidei-commissaries* he is liable and must be indemnified by them. The English law of trusts is founded on the *fidei-commissum*.]

I am not prepared to admit that by English law a trustee is not liable for costs. If Currey had obtained judgment in the action, and had become insolvent, the property recovered would have gone into his estate. The agent of a foreign principal is in a different position to the agent of a principal resident within the jurisdiction *Paterson v. Gandesequi* (15 East, p. 62.)

[De Villiers, C.J.: There are some trustees who are recognised as such by our law, *e.g.*, trustees under an ante-nuptial contract.]

Such a trustee is liable to the wife only; if he is the *dominus* of the property in law he would have to bring an action in his own name, and then would be personally liable for costs; if the document does not put the ownership of the property in him then the real owner is liable.

C.A.V.

*Postea* (14th June).

[De Villiers, C.J.: Is there any reason why this application should not be treated as an application for costs *de bonis propriis*?]

Mr. Searle: It is not in that form, and it has not been treated as such. The Court has never gone so far in a case like this though it has in actions brought by trustees in insolvency.

De Villiers, C.J.: It has been the invariable practice of the Registrar in suits brought by or against persons in a representative capacity in which costs are awarded against such persons to issue the writs against them in their representative and not in their individual capacity. This course will be followed in future unless there is an order that the trustee or other representative person should pay the costs *de bonis propriis*. The proper time to apply for such an order is before or at the time when judgment is given in the suit, but where this has been omitted the Court may supplement its judgment afterwards, unless, of course, the order for the payment of costs *de bonis propriis* would be inconsistent with the previous judgment as to costs. In the present case judgment was given against the plaintiff with costs, and if it is deemed right that the defendant's costs should be paid by the plaintiff personally an order to that effect would not be opposed to the previous judgment. I am certainly of opinion that if an application at the

time of judgment had been made the Court would then have made such an order. The plaintiff, as trustee under Jacobsohn's settlement, brought a hopeless action against the defendant, and having failed in the action he excuses himself from the payment of costs by saying that he has no trust funds in his hands. He ought to have thought of this before he put the defendant to the trouble and expense of defending the action. The practice in the Registrar's office does not affect the power of the Court to order the person who sues or is sued in his representative capacity to pay the costs of an unsuccessful action or defence out of his own pocket. It rarely happens that such an order is made against a defendant, but where a trustee fails in an action brought by himself and is ordered to pay the costs, he ought *prima facie* to be held liable to pay the costs *de bonis propriis*. In the present case the Court will supplement its previous judgment by ordering that the costs be so paid by the Chamber.

Buchanan and Maasdorp, J.J., concurred.  
[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

*Ex parte* MBANDA. { 1899.  
June 12th.

This was an application by Michael Mbanda of Emgwali in the district of Statterheim, a native residing upon and occupying certain two lots in the Emgwali Mission, who stated that the said lots had been granted originally to one Suki Gaika, who died about 1877 or 1878; after her death they were occupied by her daughters; no trace of the daughters or any relative of Suki Gaika could now be found by the applicant. In 1894, wishing to purchase the property, the applicant applied to the Civil Commissioner of Statterheim and learnt then that the quitrents for the five previous years were unpaid; he paid these over-due quitrents, and had paid the successive quitrents as they fell due. The prayer was for an order authorising the applicant to take over the property, to have the title deed of Suki Gaika cancelled, and the land registered in his name.

Mr. Gardiner appeared for the applicant. The application was refused on the ground that the applicant had shown no proof of ownership.

[Applicant's Attorneys, Messrs. Innes & Hutton.]

FRYER V. FRYE".

Mr. Buchanan applied for a decree of divorce, the defendant having failed to comply with an order, calling upon him to return to plaintiff on or before this day.

Granted.

IN THE ESTATE OF THE LATE { 1899.  
MARY LOCK.—*Ex parte* { June 12th.  
STAPLES.

Mr. P. Jones applied for leave to sell certain property in the estate which had been bequeathed to the petitioner for life but without power to alienate, mortgage or encumber it, the property on her death to go to her children, and failing children to the testatrix grand-daughter. The rental was very small, and the property very dilapidated. The Master reported that the expense of repairs would require a large outlay, and recommended the sale and investment of the proceeds.

The Court referred the matter back to the Master for investigation as to whether the necessary repairs might not be paid for out of the rents.

*Postea* (13th July.)

The Master having reported that the state of the property did not justify repairs.

An order was granted in terms of the first report.

COL. GOVERNMENT V. MUNICIPALITY OF EAST LONDON. { 1899.  
June 12th.

This was an application by the Commissioner of Public Works for an interdict.

The petition set out that on the 10th June, 1898, the Colonial Government gave notice to the Municipality of East London of its intention to appropriate for railway purposes under Act 19 of 1874, a certain portion of the commonsage of the said municipality shown on a plan annexed.

That section 3 of the said Act provides that the Government may enter upon and use any land required for railway purposes leaving all questions of compensation to be settled thereafter.

That on the 22nd May, 1899, the Government proceeded to fence in the land appropriated, but that subsequently after certain telegraphic correspondence containing a notice to remove the fence, and on protest by the Government, the Municipality by its servants broke down and removed the fence.

Wherefore the petitioner prayed for a rule *nisi* operating as an interdict calling upon the Municipal Council to show cause why

they should not be restrained from proceeding with the removal of the fence or from trespassing upon the land expropriated, or in any way interfering with the erection of the fence.

Mr. Ward appeared for the petitioner.

The Court granted the rule to operate as a trespassing interdict, and to be returnable on the 12th of July, with leave, however, to the respondents in the meantime to apply for the discharge of the rule.

*Postea* (13th July).

Mr. Ward moved for the rule to be made absolute.

Mr. Innes, Q.C., for the respondents, consented. Rule made absolute.

#### ASSIGNEES OF COX AND BARNES V. CALCRAFT.

Mr. McGregor applied for an award in this matter to be made a rule of Court. Granted.

#### CILLIERS V. BERGSTEEDE. } 1899. June 12th.

This was an application for an order upon the respondent to deliver up a certain original document of agreement.

It appeared from the affidavits that the respondent had entered into an agreement in writing with the applicant to supply the latter with a certain number of bricks. The agreement when signed by the parties and witnesses, was placed by applicant in the hands of one Hendriks, who agreed to see that the respondent carried out his obligations thereunder. Some months later the respondent asked applicant for a copy of the agreement and was told by him that Hendriks would give him a copy. Hendriks said he was willing to do so. The respondent called at Hendriks house while the latter was absent and took away the original agreement. A letter of demand for a balance of account on the contract had since been received by the applicant from the respondent's agent.

The respondent filed an affidavit alleging that he had a claim against the applicant on the contract. He denied that he had obtained the agreement wrongfully and said that he considered that he was entitled to it as much as the applicant. He only wanted a copy and sent his son to get one but the son brought the original agreement. He attached a letter from his attorneys stating that he was prepared to hand up the original

agreement or a copy but could not admit applicant's right to claim the original or any costs.

Mr. Moltano for the applicant.

Mr. Benjamin for the respondent.

The Court directed that the document be handed over to the applicant, the respondent to pay the costs.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

#### IN THE ESTATE OF THE LATE PHILIP BALL OLIVER.

Mr. McGregor applied for leave to mortgage certain property.

The Court granted the order.

#### BAILEY V. JUBBECCA BROS.

Mr. Upington applied for leave to attach certain live-stock and moveables to satisfy arrears of rent. The applicant, the lessor of the property, alleged that he was instituting proceedings for the recovery of the rent and for ejectment, but was afraid that before obtaining judgment the respondents would remove their stock and other effects in order to defeat or delay payment.

The Court granted the order, pending an action to be forthwith instituted, with liberty to the respondents to apply for the discharge of the order.

#### IN THE MATTER OF THE APPLICATION OF MORRIS LEWIN AND WIFE.

Mr. Searle, Q.C., who appeared for the applicants, said the parties were married in Germany, and after marriage they entered into a contract before the British Consul at Berlin. The applicants now applied that the terms of this contract should be executed before a notary and registered here.

The Court granted the application.

#### *Ex parte* ERNESTINE WILHELM } 1899. MINE HOLM. } June 12th.

#### Ante-nuptial Contract—Cancellation.

*An ante-nuptial contract ordered to be cancelled on the application of one of the parties thereto, where almost twelve months had elapsed since its execution, the other party had left the applicant, and the latter was about to enter into another marriage.*

This was an application for the cancellation of an ante-nuptial contract.

The petition stated :

That petitioner was a widow residing in Cape Town.

That on or about the 20th July, 1898, she entered into an ante-nuptial contract with one Julius Wainbrecht before a notary public, which contract she annexed.

That immediately after the signing of the contract, and prior to the intended marriage, the said Wainbrecht left her, taking with him a considerable sum of money, her property, which had been placed in his hands for furnishing, and had not since returned.

That the petitioner was about to enter into marriage with one August Bernhard Roemer, but, before so doing, is desirous of having the entry of registration of the contract with the said Wainbrecht in the Debt Registry cancelled.

Mr. P. Jones appeared for the petitioner.

The application was granted.

[Petitioner's Attorney, A. Steer.]

IN THE ESTATE OF THE LATE GEORGE CHARLES BRISLEY.

Mr. Miller applied that the rule nisi granted in this case under the Derelict Lands Act be made absolute.

The Court granted the application.

IN THE MATTER OF THE PETITION OF THE LIQUIDATORS OF THE CAPE OF GOOD HOPE PERMANENT BUILDING SOCIETY.

Mr. McGregor applied for an order fixing a date within which claims must be filed.

The Court fixed the date as August 31, and directed that the notice should be published six times in the Cape Town English newspapers, including publication in the weekly editions and one Dutch newspaper.

IN THE MATTER OF THE MINORS DU PREEZ.

Mr. Upington applied for leave to sell certain property, which had been bequeathed by the mutual will of the petitioner and his wife to their seven sons, subject to a life-usufruct in favour of the surviving testator or testatrix. Five of the sons were now majors and consented to the sale. The testatrix had died in 1893, and since her death a share of the property had been mortgaged for £200.

The Court granted the order without prejudice to any possible rights of the minors in respect to the £200 raised by the bond referred to.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

NEEZER V. LONG } 1899.  
} June 14th.

Servitude—Right of way—Consideration.

This was an action to compel the defendant to execute a deed of servitude in respect of a road on certain land at Newlands, bought by the plaintiff from defendant for £1,150.

The declaration alleged that the defendant had sold certain land to the plaintiff through one Moller, a broker, but afterwards was anxious to have the sale cancelled. Plaintiff agreed to the cancellation and to pay Moller's brokerage and defendant agreed in consideration of the cancellation to grant the plaintiff as owner of Lot 8, Palmboom Road, and his successors in title a perpetual right of way over Lot 6 (defendant's property) from Palmboom Road to Lot 8, such servitude to be registered against the defendant's transfer-deed.

The plea alleged that the defendant received no consideration for the leave and license which he had given plaintiff to cross Lot 6, and that such leave was expressly given as a personal privilege, to hold good only whilst the plaintiff was the owner of Lot 6.

Mr. Upington appeared for the plaintiff, and Mr. Cloos for the defendant.

William Godfrey Louis Neezer, the plaintiff, said he was the owner of Lot 7, described in the plan put in. He had known defendant for about two years. Defendant owned the property adjoining witness's land. After defendant sold the land to witness, he asked witness to cancel the sale on the ground that he had not asked enough money for it. Defendant agreed to give him the road if he would consent to the cancellation and pay the brokerage. Plaintiff agreed to this and paid the brokerage.

Joseph Fock, an appraiser, said that early in September he called on defendant with reference to the property. Defendant told witness that if he could get £1,050 for the property he would give witness £40. Subsequently defendant authorised witness to sell for £1,150, promising witness a fee of £50. Witness then negotiated the sale with

plaintiff. Some three weeks later defendant told witness that he wanted £1,250 for the property, and that when he transacted the sale he was in liquor. Defendant was not drunk at the time.

Gert Hendrik Moller, a broker, said he passed the broker's note on the sale, and had received £10 as brokerage. Subsequently defendant told witness that the sale had been cancelled, and that he (defendant) had given plaintiff a right of way.

Charles Fock said he took the broker's note to defendant, who did not want to accept the note, saying he was dissatisfied.

Jacob Long, the defendant, said that when Joseph Fock saw him about the property, witness said he would take £1,100 for the property. A few minutes later, however, he told Fock that he had made a mistake. He desired £1,200, and told Fock that whatever he could make over that sum he could keep. No mention was made of brokerage, and witness declined to sign the broker's note. He knew nothing as to plaintiff paying the broker.

Cross-examined: He was not in liquor when he discussed the proposed sale with the plaintiff.

Alfred Long said his father mentioned £1,200 as the price of the property.

Henry Long said that when Fock, junior, called at defendant's house defendant told Fock that the price mentioned on the broker's note was too small.

Nicholas Parish said he heard plaintiff tell defendant that he had cancelled the sale of the property, whereupon defendant said he would let plaintiff have the use of the road in and out. Nothing was said about a deed of servitude.

Cross-examined: Witness had had a chequered career. He had been convicted of theft. He had never told Mr. W. E. Moore that defendant said he had made a mistake, because he was "tight" at the time.

This closed the evidence.

After argument,

The Court found for the plaintiff, with costs.

De Villiers, C.J., said: The plaintiff was anxious to acquire a right of road over the defendant's property, and in order to acquire that right he seems to have thought it best to acquire the defendant's land. Instead of going himself to the defendant he employed a broker to go, and Fock went. There is some conflict as to what took place at the interview. According to Fock there was a binding agree-

ment that the defendant would sell the land for £1,100, and would pay the sum of £50 as brokerage. According to the defendant the agreement was that Fock should sell for £1,200, or such other sum as he could obtain, and keep for himself any sum above £1,200. If the matter had rested there no Court would have held that there had been a sale, but the Court has to look at what followed to see if there was a sale or not. The day after the interview Fock sent a broker's note to the defendant by his (Fock's) son. Fock, jun., admitted that the defendant demurred to the note, and said that he would see Fock, sen, on the following day. But he did not go to see Fock, nor did he go to see plaintiff until a couple of weeks afterward. The mere evidence of the broker's note cannot be looked upon as being in itself a contract, but it is evidence of the contract, and in the present case it seems to me that it is almost conclusive proof of the contract. That raises the fair inference that the sale was intended to be completed. Subsequently the defendant seems to have regretted what had been done, and entered into further negotiations with the plaintiff to ascertain whether he would buy for £1,200, but the plaintiff refused, and then the defendant brought Parish with him in order to see what terms he could make. There was no mention of a sale being in existence, but the defendant said that as a matter of favour he would allow the plaintiff to have a right of road over this property. Supposing there had been no sale, at all events there was some ground for holding that there was a compromise arrived at. If we look upon what took place as a compromise there was, in my opinion, ample consideration for the contract entered into by the defendant, and the broker would have had his claim for £50 against the defendant. The defendant had demurred to paying as much as £50, and he induced the broker to accept £40. The plaintiff paid £10. This sum the defendant would have had to contest with the broker, but he had entered upon no such contest, and therefore there was a clear compromise on a disputed right between the parties. In my opinion that compromise, coupled with the payment of £40 by the plaintiff to the defendant, would be ample consideration for the promise which was given by the defendant to the plaintiff. I am of opinion



that the evidence of the plaintiff is the more probable, as it is supported by the documents. I am wholly unable to believe that the plaintiff would have been willing to take upon himself the payment of this £50 to the broker, and to relieve the defendant from the sale, which was so valuable to him, seeing that it involved his possession of the very right of road which was now in dispute. The judgment of the Court is for the plaintiff, with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorneys, Messrs. W. E. Moore & Son; Defendant's Attorney, C. W. Herold.]

PIKE V. BUCKLEY'S EXECU- { 1899.  
TORS. { June 14th.

Will—Construction of—Substitution  
—Institution.

*Husband and wife by their mutual will, after providing for the enjoyment of the joint estate during the life-time of the survivor, directed that on the death of the survivor, the said estate should devolve upon their children in equal shares, "the children of any deceased child succeeding to the share to which such deceased child would have been entitled." Before the date of the will one of the testators' sons had died leaving the plaintiff, his only child, surviving.*

*Held, that on the death of the survivor, the plaintiff became entitled to share in the inheritance with the testators' surviving children.*

This was a special case, stated for the judgment of the Court in the following terms:

1. The plaintiff is married in community of property to Annie Eliza Buckley, who is a daughter and only child of Albert William Edward Buckley, who died on the 21st day of May, 1875.

2. The defendant is the executor dative of the estate of Edward Buckley and Margaret Buckley, the father and mother of the said Albert William Edward Buckley.

3. On or about June 20, 1885, the said Edward Buckley and Margaret Buckley, who were married in community of pro-

perty, executed a joint will and testament in terms of which they provided *inter alia* as follows:

"And proceeding to the election of heirs, we hereby nominate and appoint the children begotten by us in marriage with each other to be the sole and universal heirs in equal shares of all the estate and effects, goods, chattels, and things whatsoever and wheresoever the same may be, movable and immovable, whether in possession, remainder, expectancy, or contingency, which shall be left at the death of the first dying of us, but we expressly will and direct that the survivor of us shall remain in the sole full and undisturbed possession and enjoyment of the whole of our joint estate for the full term and end of his or her natural life, . . . and at the death of the survivor of us the said estate shall devolve upon the children begotten by us in marriage with each other as aforesaid in equal shares, share and share alike, the children of any deceased child succeeding to the share to which such deceased child would have been entitled:—we will and direct that after the death of the survivor of us the executor or executors of this our will shall realise our estate and divide the proceeds thereof equally between our said children."

The plaintiff annexes a copy of the said will to this case, and prays that it may be considered as inserted herein.

4. The said Edward Buckley died on or about the 13th day of March, 1887, and the said Margaret Buckley died on or about the 19th September, 1897, without having made any alteration in the said will and testament.

5. The children begotten in marriage between the said testator and testatrix were six in number, namely: (1) Albert William Edward Buckley, (2) Erida Buckley (wife of Richard Cawood), (3) Jane Anna Buckley, (4) Charles Edward Buckley, (5) John Feagan Buckley, (6) Ida Rosetta Buckley, all majors.

The plaintiff contends that the said Annie Eliza Buckley is entitled under the said joint will of the said Edward and Margaret Buckley to succeed to the share of the inheritance which would have devolved upon her late father, the said Albert William Edward Buckley, namely, one-sixth share of the whole of the said estate of the late Edward Buckley and Margaret Buckley.

The defendant contends that the plaintiff is not entitled to any share in the said estate under the said will.

Wherefore the parties to the above suit pray for the judgment of this Honourable Court in terms of their respective contentions, or for such other order as to this Honourable Court may seem meet, and that the costs of this suit may be ordered to be paid out of the estate.

Mr. Graham, Q.C., appeared for the plaintiff, and Mr. Searle, Q.C., for the defendant.

Mr. Graham: The language of the will is clear and unambiguous. *Michau v. Michau's Executors* (11 S.C.R., p. 352) is decisive.

Mr. Searle: The terms of this will are not exactly the same as those of the will in Michau's case. This case is not so strong as Michau's case in the institution of heirs, there was a direct institution of grandchildren in place of deceased children. The grandchildren succeeded these by institution and not by substitution. "Children of any deceased child" refers to the children of a child who was living at the death of the first-dying of the testator's, but has died since, and before the death of the survivor. In *Meyer v. Meyer's Executors* (12 S.C.R., p. 134), the Court refused to read "children" as including grandchildren.

De Villiers, C.J.: I fail to see what doubt there can be as to the true meaning of the will. It is not necessary to resort to the inquiry whether the term "children" was intended to include "grandchildren" because, without such a construction, the plaintiff, who is married to a grandchild of the testator, is entitled to succeed. After giving directions as to the enjoyment of their estate during the lifetime of the survivor, the testators direct that "at the death of the survivor of us the said estate shall devolve upon our children in equal shares, the children of any deceased child succeeding to the share to which such deceased child would have been entitled. One of the sons of the testators died before the testators, in fact before the will was made, and he left an only child who is married to the plaintiff. She being a child of a deceased child is therefore entitled in terms of the will, to the share to which her deceased father would have been entitled. It is not a case of substitution, because her father died before the execution of the will, but a case of direct institution of himself as being a child of a child who had died before

the making of the will. Judgment must be given in terms of the plaintiff's contention, and costs must come out of the estate.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorney, G. Trollip; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

LENNOX V. LENNOX.

1899.  
May 31st.  
June 14th.

This was an application for a rule nisi to be made absolute.

The petitioner, Margaret Lennox, alleged on affidavit that she was married to Thomas Lennox in Ireland in 1857, the latter being at the time possessed of no means whatever. Three years later they came to the Colony and Thomas Lennox had obtained employment first as a gardener and later as a plate-layer; his wages were hardly sufficient to support his family and he was always extremely thriftless and intemperate. For the last two years he had been habitually drunk and had often threatened petitioner with violence and had actually on occasions committed acts of extreme violence. Petitioner had earned money by keeping a dairy and piggery and acting as a railway gatekeeper, and subsequently keeping a shop, and with her savings had purchased certain property in Woodstock in 1879 for £90. The transfer was passed in favour of her husband and her son Thomas James Lennox; this was done to prevent her husband dealing with it. Thomas James Lennox had not contributed a single penny to the purchase price and he had died on the 24th May, 1897, leaving a widow and children. Mr. Gus Trollip now represented his estate. The property had lately been sold by petitioner's husband for £2000, and she was informed that Mr. Trollip intended to appropriate £1,000 to the estate of T. J. Lennox and pay the remainder to her husband. She said that she felt positive that her husband would dissipate the money in a short while; that she was about to take proceedings against him for judicial separation, and that she was not possessed of means to enable her to proceed with the action.

The Court granted a rule calling on Thomas Lennox to show cause on the 12th June, why Attorney G. Trollip should not pay into Court, for further disposal, such sum of money as he should receive in payment of the price of the property in question pending the further order of the Court, and why out of such sum £50 should not be paid to the petitioner to be able to bring her action for judicial separation. The rule to

be served on Mr. Trollip and to operate as an interdict restraining him from parting with the money or any part thereof: to be also served on the executrix of Thomas James Lennox.

*Postea* (12th June.)

Answering affidavits were filed on behalf of the respondent denying the allegations made by the petitioner.

Mr. McGregor appeared for the petitioner. and did not press to have rule made absolute as against the son's estate.

Mr. Innes appeared for the respondent.

The Court ordered that the rule be discharged as to the son's half-share and made absolute as to the other half-share, and that £50 be paid out of the fund to petitioner. Costs to be costs in the cause.

De Villiers, C.J., said: As to the son's £1,000 there is not such a clear case before the Court as to justify the payment of the money. The first part of the rule must therefore be discharged. Then, as to respondent's half of the property, the applicant must be secured that in case she does obtain a judicial separation she should have some security for her maintenance. The Court will therefore make the rule absolute as to the husband's half. The action must be brought next term.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAANDORP.]

PALMER V. MOLTENO. { 1899.  
June 15th.

Mr. Graham, Q.C., applied for leave to withdraw the petition and counter-charges in the case of Palmer v. Molteno, and for an order made on such terms as should be deemed proper. The affidavit of Mr. Kayser, the attorney for the petitioner, was put in. This stated that on behalf of the petitioner it had been agreed that the petition be withdrawn and the counter-charges dropped, each party to bear his own costs.

There was no opposition, a consent paper having been signed.

The Court granted an order for the cancellation of the notice of the day of trial, and also granted a rule, returnable July 12, calling upon all concerned to show cause why the petition and counter-charges should not be withdrawn, the rule to be published once in the "Somerset Budget" and once in "Het Oosten."

JOHNSTON V. LENNON, LIMITED, { 1899.  
AND BISHOP. { June 15th.

Interdict—Contract in restraint of trade — Draper — Gentlemen's outfitter.

*J. who carried on a business as "draper and gentlemen's outfitter" hired certain premises from L. for the purposes of such business, he showed L. at the time a card containing a list of the articles in which he dealt, and L. undertook not to let an adjoining shop which belonged to him to any person carrying on a similar business. Subsequently L. let the adjoining shop to B. who intended to carry on business there as a "gentlemen's hosiery and outfitter." Several of the articles in J.'s card were similar to those which B. proposed to sell.*

*Held that L. must be restrained from letting the shop to anyone selling any of the goods mentioned in the card.*

This was an application upon notice to the respondents to show cause why the respondents Lennon & Co. should not be restrained from letting a shop to one Bishop for the purpose of carrying on a certain business there, and why Bishop should not be restrained from carrying on such business. The affidavits showed that John Johnston (the applicant) was carrying on business at Claremont in February last as a draper and gentlemen's outfitter, and then entered into an agreement with Lennon (Limited) for the lease of premises at Stellenbosch for the purpose of carrying on a similar business there. In a letter from Lennon (Limited) to the applicant, the former agreed not to let an adjoining shop, also their property, to any person carrying on

the same business as the applicant, but it was alleged that this agreement had been violated by the shop being let to one Bishop, who, as the manager for Thomas, Whitley & Co., was to open it for the sale of gentlemen's hosiery and outfitting. It was also stated in the affidavits that at the time the agreement was made a card was handed to the late Mr. Tebb, then a member of the firm of Lennon & co., who on behalf of the respondents entered into the agreement, showing that the sale of hosiery, boots and shoes, and gentlemen's outfitting was a principal portion of applicant's business. Applicant alleged that he would be grievously injured if Bishop was allowed to carry on the business in question.

In their answering affidavits the respondents denied that the two businesses would clash. It was contended that Bishop's was intended chiefly to be a better class trade, while the applicant's trade was such as would be principally confined to natives.

They said that Bishop's business was a first-class gentlemen's hosiery and outfitting business, including boots and shoes whereas Johnstone carried on a general drapery store and dealt principally with women's wearing apparel, and would have nothing in the nature of the goods which Bishop would keep.

The applicant in an answering affidavit denied the allegations as to his business being a native one. He said his gentlemen's outfitting department was his chief one, and it was a high class business.

Mr. Searle, Q.C., for the applicant: The facts show that this new business will compete with the applicant's business. Both are clothiers and are catering for the same people.

Mr. Innes, Q.C., for the respondents: The real question is, are these two businesses similar. The one is a draper's business, the other is a gentlemen's outfitter.

[De Villiers, C.J.: The original meaning of "draper" was a person who sold cloths; at the present day does it not include one who sells hosiery?]

I submit not; no doubt it overlaps other businesses in some respects, a chemist's for instance in respect to the sale of sponges; it might possibly overlap a jeweller's, but the main line of business is what must be looked to: otherwise the respondents Lennon might be restrained from letting the shop to a tailor, or a jeweller or a chemist. *Stewart v. Diplock* (43 Ch.D., p. 343.) There is not sufficient information before the Court as to

the scope of the business to justify the granting of an interdict. *Drew v. Guy* (1894, Ch.D. 3, p. 25).

De Villiers, C.J., in giving judgment for the applicant, said: The grounds on which the respondents now rely are not exactly those suggested in the affidavits, namely that the respondent did not intend to deal in the same class of goods as the applicant, but in a much superior class. I do not think it is for the Court to go into the question of the class of goods, because what the Court has to consider is whether substantially the respondent Bishop intended to carry on a business in regard to goods which were included in the goods the applicant was selling. As to that we have the card, which it is not denied the applicant gave to the respondents when the lease was entered into. The list of goods which Johnston & Co. stated on that card that they imported, include the goods which the respondent Bishop proposed to sell. Several of these things may fairly be included in drapery and several perhaps might not be so included. The respondents had notice that the applicant was dealing in them, and they must be considered as having contracted not to let their adjoining shop to anyone who proposed to deal in these goods. I think that Bishop's business would compete with that of the applicant, and that there is a sufficient *prima facie* case to, at all events, restrain Lennon (Limited) from letting the shop to anyone selling any of the goods mentioned in the card. The order will therefore be granted with costs, but leave will be given to the applicant to bring an action for the discharge of the interdict and the repayment of costs. In such case the Court can inquire into the usual business carried on by the applicant at Claremont, while there might be some injustice to the applicant in not granting the interdict at once.

Buchanan and Maasdorp, J.J., concurred.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

VAN DER SPUY v. VAN DER SPUY. { 1899.  
SPUY. { June 15th.

This was an action for judicial separation brought by the wife against her husband on the grounds of cruelty and ill-treatment. Plaintiff also prayed for an order for the maintenance of herself and surviving child of the marriage and the full benefit of the ante-nuptial contract under which the parties were married,

The defendant in his plea denied the allegations of cruelty and ill-treatment, and in re-convention sued for a decree of divorce on the ground of his wife's adultery with one Charles P. Hopkins, in the district of Wellington, in December, 1898. In her replication the plaintiff denied the allegation of misconduct.

Mr. McGregor appeared for the plaintiff.

Mr. Graham, Q.C. (with whom was Mr. Close), appeared for the defendant.

Mr. McGregor stated that Hopkins could not attend and give evidence that day owing to his having been summoned as a witness in a registration case at O'okiep, Namaqualand. The Court was asked to allow the matter to stand over should Hopkins be unable to be present before the other evidence had all been led, in case his evidence should be required.

The Court signified its assent.

Maud Maria Johanna van der Spuy, the plaintiff, stated that she was just seventeen years of age when she was married by ante-nuptial contract to the defendant in April, 1893. There were three children of the marriage, but the eldest and the youngest were now dead. The child still alive was a boy, now aged three years. The parties lived on a farm in the Koeberg district. Five months after their marriage witness went to see a neighbour, and as she came home rather late, defendant ill-treated her and struck her with a horsewhip. A month afterwards she was to sing at a concert, and asked defendant if she could practise some songs with her brother, but he refused, and went into another room and lay down. Witness went in there, and he woke up, flew into a temper, and half-pushed, half-kicked her out of the room. A few months afterwards he tried to smother her with a pillow, because he thought she was buying things for her mother with his money. He was always saying unkind things about her family. Witness married against her father's wishes, although he had been coaxed by her mother to give his formal consent. Her father never visited her after her marriage. A fortnight before her first child's birth, defendant knocked her senseless against the bed. Witness detailed further instances of ill-treatment on the part of defendant. On one occasion a servant was impertinent to her, and defendant then said even the servants had no respect for her and he throttled her. Another time he flogged her out of the house with a piece

of whip. Afterwards they lived together at Wellington, and six months after that her first child died. For a time—about two years—after that defendant treated her better, but then he began to get worse. In a number of other cases he treated her cruelly. At last, on March 6 last, after he had kicked and struck her during a quarrel over one of the boys killing a sheep, she left him. Defendant often used filthy language towards her and swore at her. When she was about to leave, she sent some parcels of clothing to the station. Her husband found that out, and brought the parcel back from the station. He had a knife in his hand for the purpose of cutting the string of the parcel, and threatened to kill her with the knife.

Cross-examined: The morning she left, she gave her husband no sign of her intention to do so. They had parted affectionately that morning, the defendant kissing her and giving her a couple of pounds. On March 7 he wrote and asked her to return to him, but she refused. She had never left her youngest child for eighteen days when it was sick. When defendant was in a temper he used to be cruel to the eldest little boy. She never told her husband she was sorry she married him; that she had married too young, and that she did not like farm life. The flogging had left marks, but she never told anybody because she was ashamed. Her husband was always kind to her in other people's presence, but when visitors had left he would drag her into a room and lock the door. So far as she could remember she never used strong language towards her husband. One night her husband beat her because the baby cried, and she asked him to light the candle.

Johannes Albertus Vink, a brother of the plaintiff, said that in 1893 he was at the farm where plaintiff and defendant resided. On one occasion witness and the plaintiff were going to sing at a concert and he went to the farm to practise, but defendant refused to allow her to do so. Afterwards she again went to the room where defendant was, and the latter pushed her out of the room and gave her a kick which made her fall against the wall. In 1895 witness slept one night in the house and about midnight he heard plaintiff crying. Another sister was also there. Defendant was a hot-tempered man. Witness was on the farm for seven months, and one day owing to a row over a reaping machine breaking defendant threatened to

strike plaintiff. She went into the pantry crying, and witness left the house. On his return he saw defendant come out of the pantry and put down a piece of a whip. Witness went into the pantry and found his sister crying. Witness brought her away from the farm.

Cross-examined: His sister had complained to him about the manner in which her husband treated her. Witness left the farm because at that time his life was in danger, the defendant having threatened to put his (witness's) head under the machine.

Christina Johanna Vink, a sister of the plaintiff, stated that after the marriage of her sister and defendant she was at the farm where they lived shortly before they removed to the Wellington district. At the same time her brother was there. One night she heard her sister crying, and on going to her bedroom door found her brother there. They waited for a while and then the crying ceased, and they left. Last year witness heard defendant saying to plaintiff in an outside room, "Get out of here, or I shall put you under the whip." The plaintiff, who was crying at the time, said something about "bad Van der Spuy." On another occasion she heard a noise, and on asking defendant what was the matter, he swore at her. Witness then went in to her sister and found her crying. That was eight days before the birth of the youngest child. Defendant was a passionate man. After plaintiff had left defendant the latter came and wanted her to return. He asked why she had left, and she said that it was because he had treated her so badly. Defendant acknowledged he had ill-treated her, and asked her forgiveness, but she would not give it. Plaintiff said to him, "What can you bring against me?" and defendant replied that he would say things, even if they were false, which would make her so ashamed that she would drop down in the witness-box.

Cross-examined: Witness was sitting behind a door, intending to hear all that was said. Afterwards she went away, as she thought they might make up their quarrel. Defendant had told witness on the farm that if he was brought into court he would make it as hard as he could for plaintiff. Witness had lived on the farm for nine months last year, but had not seen defendant striking her. So far as witness knew they were living on good terms then.

Rachael Maria van Sohor said she had visited the plaintiff and defendant about a

year after their marriage. One afternoon plaintiff wished to go out on a visit to a neighbouring farm, and asked defendant to drive her there, but the latter said she could not go out as his horses were tired, but later on he drove out others. The next morning Mrs. Van der Spuy complained about that and left the room. Van der Spuy got wild and gave plaintiff four slaps on the face in witness's presence. Defendant was an awfully bad-tempered man, but when not in a bad temper he was very kind.

Cross-examined: On the whole defendant treated his wife very well in witness's presence. Plaintiff annoyed defendant very much. Mrs. Van der Spuy was also to blame, as she was very cheeky. Witness had told plaintiff she ought to try to win defendant by love, but she said she could not do so as he had driven away all her love by his ill-treatment. Defendant was a sober, hard-working man, and fond of his children. Plaintiff had told witness that she did not like farm life. She never said she wished she had not married a farmer, but she wished he could retire so that they could live at the village.

Isaac Aarons deposed that he had seen defendant beating plaintiff with a horse-whip. Defendant was a bad-tempered man. After witness had received a summons to attend the Court the defendant offered him money not to give evidence.

Cross-examined: That was at Klipheuveel Station last Tuesday. Defendant said he would give witness something; even £5.

Margaretha Fortein stated that she was formerly in the service of defendant and plaintiff, and on one occasion had seen the former beating the latter.

Sarah Fortein also deposed that she had seen defendant beating plaintiff on one occasion.

Mietje, a little coloured girl, said she did not know how long she had been in plaintiff's service, or what her age was. The defendant was always cross about money. She had seen her mistress crying, but had not seen the master strike her with a whip. On one occasion driving home the master struck mistress on the side of the head with his fist, and she cried. On another occasion just before her mistress left she saw the master beating her.

Cross-examined: Witness was still in the employ of Mrs. Van der Spuy. The latter had spoken to witness about the case, and told her she must tell the truth.

Johan F. Mostert said defendant had admitted to him that he once gave his wife a couple of slaps. Witness at defendant's request went to Cape Town to try to induce plaintiff to return to him, but she refused.

Cross-examined: Defendant told witness he must try and keep plaintiff out of court.

This closed the case for the plaintiff.

For the defence,

Marthinus Johannes van der Spuy, the defendant, said he never heard of plaintiff's father having any objection to their marriage. After their marriage they got on well together. It was untrue that he had kicked plaintiff and struck her with his fists and a whip on numerous occasions. He had once or twice given her a few slaps. One of these occasions was during a quarrel about his not driving her over to a neighbouring farm because his horses were too tired, and then his driving some other people out. He only slapped her with his open hand. It was untrue that witness had offered Isaac Aarons £10 to withhold his evidence. They had a quarrel once in a cart, and plaintiff made witness very angry. He then gave her a slap. Those were the only two occasions on which he had lifted his hand to his wife. She had often told him that he must sell his farm and live in the village. Witness had a fairly large farm, and employed about eighty men. On the morning plaintiff left him witness had gone to a Bond meeting at Wellington, and they parted affectionately in the morning, witness giving her some money.

De Villiers, C.J., said that but for the charge of adultery, he would have suggested that the parties should come together. If the charge of adultery was not proven one could hardly expect the plaintiff to return to defendant after it had been made.

The Court would adjourn until the following morning, and he advised counsel to endeavour, if possible, to bring the parties together. He saw no reason why the breach should be made still wider by leading evidence as to adultery. The Court had had similar cases before, in which the parties had come together and lived happily afterwards.

*Postea* (June 16).

Counsel stated that an agreement to the following effect had been arrived at: The defendant to consent to a decree of judicial separation on the following terms: (1) Defendant to have the custody of the minor child of the marriage, but plaintiff to have its custody for two periods of seven days each year; (2) defendant to pay plaintiff

£400 in consideration of her forfeiting all her rights under the ante-nuptial contract and abandoning all claims for maintenance, but the settlements on the child to remain; (3) the claim in reconvention for divorce to be abandoned; (4) the £50 paid by the defendant to the plaintiff for the costs of the action to be given back to him; (5) the defendant to pay the costs of the action.

De Villiers, C.J., in giving judgment in terms of the consent paper, said that a judicial separation did not necessarily mean that the parties could not be reconciled at some future time. They might be reconciled again.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorneys, Messrs. J. C. Berrangé & Son.]

## SUPREME COURT

[Before Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP].

DE WIT V. DE WIT. { 1899.  
June 16th.

Act 30 of 1883—Fencing—Agreement to fence.

*Where a summons in a Magistrate Court called upon defendant to pay a share of fencing under Act 30 of 1883, and the Magistrate gave judgment for plaintiff upon the ground of an agreement to fence.*

*Held, on appeal, that the provisions of Act 30 of 1883 not having been complied with, and there being no proof of defendant's agreeing to pay a share, the appeal should be allowed.*

This was an appeal from the decision of the Resident Magistrate of Riversdale in an action which had been brought by Pieter Stephanus de Wit against Gerhardus Stephanus de Wit for the recovery of £5 0s. 6d. which the summons stated that the defendant owed the plaintiff "as and being the share of the cost of the erection of

certain fence on a dividing line on the farm Derde Rivier and portion of Waterval, situated in the division of Riversdale, which said fence was erected by the said plaintiff after notice given to the proprietors of the said farms abutting on the said fence, and completed by him in or about the month of August, 1898, as per account annexed."

At the trial the plaintiff's attorney put in the *Government Gazette* of 22nd February, 1898, containing a proclamation of Field-cornetcy No. 6, Ward Langberg, under the Fencing Act, No. 30 of 1883. In the Court below the defendant denied liability, and exception was taken to the summons on the ground that it was vague, but this exception was overruled. It appeared that the total cost of the fence was £45 5s., of which sum the plaintiff, whose land adjoined the fence on one side, paid half. Defendant owned a certain undivided share in the land on the other side of the fence, and his proportion of the cost of the fence came to £5 0s. 6d. The evidence for the plaintiff was to the effect that the defendant had, along with the other proprietors, agreed to the erection of the fence, and to pay if it was necessary. Defendant denied that he agreed to the fencing or to pay anything. He said he had not received any written notice that he would be liable for the costs.

The Magistrate gave judgment for the plaintiff for £5 and the following reasons: "The defendant, in conjunction with the other joint proprietors, having consented to the defendant's erecting the fence, waived the conditions provided in section 7 of Act 30 of 1883. I believe the defendant agreed to pay his share of the cost of the fence." Against the decision of the Magistrate the defendant appealed.

Mr. McGregor appeared for the appellant.

Mr. Searle, Q.C., appeared for the respondent.

De Villiers, C.J., in giving judgment for the appellant, said: The summons in this case is based not upon any agreement but upon the provisions of the Fencing Act, and in my opinion the Act has no application to the case at all. None of the steps required by the provisions of the Fencing Act have been taken in the present case. The Act requires certain forms of notice to be served upon all parties, and provides that, failing agreement between the parties, there should be arbitration. The Magistrate held that there was an agreement, although the summons was not based upon any agreement at all. The ques-

tion now is, whether there was an agreement. The evidence appears to show nothing more than an agreement on the part of the defendant to pay if, on the subsequent sub-division of the farm, his portion of the land came up to the fence, but not otherwise. On the subsequent sub-division defendant's share was found not to come up to the fence, and there was therefore no agreement to pay. The Magistrate was therefore wrong in holding that there was a binding agreement on the defendant, and the appeal must therefore be allowed with costs, including costs in the Court below.

Buchanan and Maasdorp, J.J., concurred. [Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

QUEEN V. MATROOS JAN. } 1899.  
} June 16th.

Theft — Indictment — Fraudulent sale by person instructed with safe-keeping.

*The indictment charged a prisoner with "theft" in that he did "steal" certain head of cattle. The jury found a special verdict that the prisoner was guilty of the theft of the cattle "by the fraudulent sale thereof which cattle had been intrusted to him for safe-keeping."*

*Held, on a question reserved, that the special verdict was covered by the indictment, and that in the absence of any prejudice to the prisoner arising from the form of the indictment, the sentence should not be disturbed.*

This was argument upon a point of law reserved by the Circuit Court of Graaff-Reinet.

The prisoner was tried upon an indictment charging him with "theft in that upon or about the 30th April, 1899, he did wrongfully and unlawfully steal ten head of cattle, the property or in the lawful possession of January Vena." He pleaded not guilty, and the jury found the following verdict: "Guilty of theft of two cattle by fraudulent sale thereof, which cattle had been entrusted to him for safe keeping."



At the request of Mr. Maasdrop, prisoner's counsel, the following question was reserved for the consideration of the Supreme Court, as the Court of Appeal in criminal cases: Whether upon the indictment as it stands the verdict found can be sustained as a verdict of guilty under this indictment.

Mr. Howell Jones for the prisoner: I cannot argue that the facts as found by the jury are not sufficient to constitute the crime of *furtum*; but I submit that as the prisoner was simply indicted for theft by stealing certain ten head of cattle and came to meet that charge he could not be found guilty of theft by fraudulently selling two of those head of cattle. The verdict practically meant that the prisoner was not guilty of the charge laid in the indictment but that he was guilty of fraudulently selling, and that if the fraudulent sale was theft in law that he was guilty of theft. The first part of the verdict is surplusage. *Archbold* (21st ed., pp. 188, 188.) "Theft" in the indictment means *furtum* and includes many kinds of theft, such as embezzlement, false pretences, &c., but "steal" has the narrow meaning of "larceny" in English law, a "felonious taking and carrying away." "Steal" here is not as wide as "theft"; if it were so the indictment would be tautologous. The prisoner could only have been properly found guilty of the particular species of theft which the jury found that he had committed if the circumstances and the nature of the theft were set out in the indictment and set out with certainty and precision in order that he might be properly prepared with his defence. *Archbold* (pp. 59, 61, Rule of Court 57); *Regina v. Berg* (1 S., p. 93); *Regina v. M'Glaskam* (9 E.D.C., p. 9). By English law under a simple indictment for stealing there can be no conviction for embezzlement; in an indictment for obtaining money by false pretences the false pretences must be specified. *Regina v. Mason* (2 T.R., p. 381); *Regina v. King* (5 E.D.C., p. 121); *Van der Linden* (2, b, 2) calls a theft of this description an aggravated offence, and Rule of Court 56 specially provides that the aggravation shall be strictly set forth in the indictment.

The prisoner is in the same position in which he would have been if tried on an indictment for forgery, which is fraud, and a fraud of a different description proved against him. He has been undoubtedly prejudiced. The record shows that the evidence was all directed to the question of the removal of the ten head of cattle, and that

no evidence at all was led as to the identity of the two head of cattle which he is found to have sold.

Mr. Ward, for the Crown, was not called upon.

De Villiers, C.J.: The prisoner was indicted for "theft" in that he did "steal" certain head of cattle, and the jury found that the prisoner was guilty of theft of the cattle "by the fraudulent sale thereof which cattle had been entrusted to him for safe keeping." The question reserved is, in effect, whether the special finding of the jury supports the charge that the prisoner did "steal" the cattle. The term "theft" is a very wide one in our law, and cases may well be imagined where the mere addition, after the charge of theft, that the prisoner did steal certain articles might seriously prejudice the prisoner in his defence. In the present case, however, no such prejudice could ensue. The fraudulent sale by a person of an article entrusted to him for safe keeping amounts to an appropriation to his own use and would be covered by the term "stealing" in its ordinary acceptation. There is considerable force in some of the arguments of Mr. Jones, who has shown great skill and industry in the conduct of the case, but the practice of the Courts supports the indictment as it stands. It is an everyday practice to charge shepherds with theft in that they did steal certain sheep entrusted to their charge, and the usual evidence is that they either ate the meat themselves or gave it to an accomplice. The question reserved must be decided in favour of the Crown, and the sentence will therefore not be disturbed.

Buchanan and Maasdrop, J.J., concurred.

[Prisoner's Attorneys, Messrs. J. & H. Reid & Nephew.]

HART V. COHEN. { 1899.  
June 16th.

Real injury — Judicial process — Malice — Reasonable and probable cause — Writ of execution Magistrate's jurisdiction — Setting aside writ.

*Acts done under the sanction of and within the limits of the authority conferred by judicial process are not actionable as "injuries" unless done maliciously and without reasonable cause.*

*In an action brought in a Magistrate's Court by B. judgment was given against A. for the delivery of a bicycle or the payment of £14, its value. Four months after judgment A. tendered the bicycle to B. who refused to accept it and sued out a writ of execution which was in due form and was enforced against the goods of A. An action was thereupon brought by A. in the same Court for illegal execution and the Magistrate, holding that the writ had been illegally sued out, gave judgment against B. for £5 as damages.*

*Held, on appeal, that as the execution took place under the formal sanction of judicial process and as there was no proof of malice on B's part, A. was not entitled to succeed in the action for damages whatever right he might have to set aside the writ.*

*Held, further, that if the writ was improperly issued, A. could not succeed in an action for malicious execution without first having the writ set aside.*

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the present respondent, Cohen, claimed £20 damages from Hart, the present appellant, and James Brittain, a law agent, for having on the 15th September, 1898, wrongfully and unlawfully and without reasonable or proper cause issued a warrant of attachment against the goods and chattels of Cohen for the sum of £21 13s. 9d. The summons alleged that the messenger of the Magistrate's Court under the said warrant levied upon and laid under attachment certain watches of the value of £40. It prayed further that the warrant should be set aside.

The following exceptions were taken to the summons:

1. That it was bad on the ground that it failed to allege malice or to disclose who is the owner of the goods alleged to have been attached in the warrant of execution, neither does it disclose in whose custody the goods were at the time of the attachment.

2. That the prayer to set aside the warrant of execution was *res judicata* inasmuch as the Magistrate's Court on the motion of the plaintiff or his agent on the 1st and 8th of October, 1898, to suspend the writ of execution, had decided that it could not be set aside.

3. That the Court had no jurisdiction to set aside a writ of execution regularly issued.

The Magistrate allowed the first exception and ordered the summons to be amended by inserting the word "maliciously" after "unlawful." The other exceptions were ordered to stand over. The defendant pleaded the general issue and put in a special plea justifying the issue of the warrant and the execution, and alleging that the defendants acted legally and without malice.

After hearing evidence the Magistrate gave judgment for the plaintiff against the defendant Hart for £5, and absolution from the instance as regards Brittain. The following reasons for his judgment show the facts of the case as found by him: This case arises out of another case in which the present defendant Hart sued the present plaintiff Cohen for the restoration of a certain bicycle or £20 its value. The defendant Brittain was Hart's agent. The case was heard on the 31st March, 1898, by the Assistant Magistrate, and the following judgment was recorded: "Defendant ordered to restore bicycle in question to plaintiff or to pay him £14 value thereof. Defendant to pay costs." The defendant noted an appeal which, however, was withdrawn on 23rd or 24th August, 1898, and on those dates Cohen's agent Shaw by letter to plaintiff tendered the bicycle in question, but it was refused by letter of the 24th August, 1898, on the ground that it had not been restored to plaintiff forthwith as directed by the judgment, and the sum of £14, the value thereof, was demanded with the costs. This demand was not complied with and a writ was on the 15th September issued and certain goods, the property of Cohen, were attached by the messenger. Thereupon the defendant Cohen commenced the present action against Hart and his agent Brittain for damages, and on the 21st December, 1898, I gave judgment for £5 against Hart and absolution as regards Brittain. The bicycle having been tendered to defendant Hart on the 24th August, 1898, in the same order it was when it came into plaintiff's possession originally the defendant was bound to accept it. The original

judgment ordered Cohen to restore the bicycle—no date for doing so was fixed—but an appeal was noted, and no steps were taken by Hart to enforce the judgment till 23rd August, 1898. The condition of the bicycle when tendered was not in question, and therefore it was assumed for the purposes of this case that it was in as good a condition as when Cohen got possession of it. In this view of the matter the writ was illegally issued, and the plaintiff was therefore entitled to recover the sum of £5 awarded, as it appeared to be a reasonable amount under the circumstances.

The defendant Hart appeared.

Mr. Benjamin for the appellant: To found an action for wrongful attachment, the plaintiff must show that the attachment was malicious as well as wrongful. *Anderson's Law of Execution* (p. 65); *De Medina v. Grove* (10 Q.B., pp. 152 and 172). As to the construction of judgments, *Jamieson v. Rhind* (E.D. 4, p. 316).

Mr. Buchanan for the respondent.

De Villiers, C.J. [After stating the facts]: The Court below allowed the exception to the summons and permitted an amendment alleging malice on the part of the defendant. This shows that, in the opinion of the Court, an allegation of malice was necessary to entitle the plaintiff to succeed in an action for attaching goods under a writ of execution which, on the face of it, was duly issued. In his reasons, however, the Magistrate does not state that the writ had been maliciously obtained, and he gave judgment for the plaintiff on the ground that the writ had been illegally issued. But the writ has never been set aside. An application was made to the Court below to set aside the writ on the ground that after the plaintiff tendered the bicycle the writ for £14, its value, ought not to have been issued, but the application failed. No proceeding has been taken in this Court to set aside the writ which was still standing at the time when the present action was brought. It is not suggested that, assuming the writ to be legal, anything illegal was done by the present defendant or his agent, under the writ. The Magistrate has now found that the writ was illegal, by which I assume him to mean that it ought not to have been issued at all after the tender of the bicycle, and the question to be determined is whether upon this finding alone the plaintiff was entitled to judgment for damages. The principle of the decision in *Benken v. Steyn* (Buch., 1874, p. 18) is clearly applicable

in the present case. It was there held that damages cannot be legally claimed for instituting an action without reasonable and probable cause unless it were also maliciously done. The fact that there was no reasonable and probable cause would be proof of malice, but not conclusive proof, so as to dispense with the necessity of alleging malice. If, after judgment, a decree of civil imprisonment has been obtained against the debtor the creditor is protected by the decree in arresting the debtor and unless the decree were obtained maliciously and without reasonable and probable cause he cannot be held liable, even if it be shown that the writ ought not to have been granted. To the same extent the creditor is protected by a writ of execution provided only he does not exceed the authority granted by the writ. The mere fact that the writ was improperly issued would not subject him to liability unless he obtained it maliciously and without reasonable and probable cause. If he did so obtain it he would be liable for the injury, for although there has been no direct offence against the person of the debtor, yet the indignity to which he has been subjected would make the offence an "injury." Thus *Foot* (47, 10, 7) enumerates among "real injuries" execution against the goods of a person other than the debtor against whom judgment had been given. In his enumeration he does not, however, draw a sufficiently clear distinction between acts done in excess of or without judicial process and acts done under the sanction of judicial process improperly obtained. Where execution has been issued against the goods of a person other than the debtor against whom the writ has been obtainable, there is, on the face of it, an illegality for which the owner has his remedy without proof of malice. But where the creditor acts under the sanction of judicial process something more is required than proof that the writ ought not in law to have been granted, for there must be proof of malice and want of reasonable and probable cause on the part of the creditor in obtaining the writ. This view, although not stated in identical terms by *Foot*, is not opposed to any doctrine laid down by him. In his heterogeneous lists of acts constituting "real injuries" he includes that of bringing a person into Court *exactionis causa*, and arresting a person under a writ obtained *dolo malo injuriarum causa*. For such vague generalities the decisions of this Court have substituted the more precise and intelligible rule that acts under the sanction

of and within the limits of the authority conferred by judicial process are not actionable as "injuries," unless done maliciously and without reasonable and probable cause. This rule although directly traceable to the influence of the English law has its origin in principles which are common to the Roman law and the law of England. In the present case there is some proof of want of reasonable and probable cause, but there is no proof of malice inasmuch as the defendant honestly believed that the plaintiff, after his long delay, was no longer entitled to elect whether to deliver the bicycle or pay the sum awarded as an alternative. But there is another objection to the judgment appealed against. The writ of execution, issued in due form and signed by the Magistrate still stands, and until it is set aside by a competent Court, no action arises for maliciously suing it out. The question does not now arise whether the Magistrate's Court was such a Competent Court. An application was made to the Court below to set aside the writ and refused, but the ground for the refusal does not appear. It may well be that the Court below had jurisdiction, and that the claim to have the writ set aside could even have been included in the present action, but no such claim was in fact made, nor was any amendment of the summons in this respect applied for. The appeal must be allowed with costs in this Court and in the Court below.

Buohanan, J., in concurring, said that malice must be proved, and in the present case there was a total absence of any proof of malice.

Maasdorp, J., concurred.

[Appellant's Attorney, A. P. Kenealy; Respondent's Attorneys, Messrs. Innes & Hutton.]

JIZANA V. LEONARD. { 1899.  
June 16th.

Negligence—Verbal Contract—Evidence—Credibility.

*L. entered into a verbal contract with J. in terms of which J. for valuable consideration undertook to look after and herd certain rams belonging to L.*

*Under the contract J. was not to be liable in the event of any of the rams dying, but he was to be liable for all other losses.*

*Between certain dates J. through negligence, as L. alleged, lost 33 of the rams.*

*The Court on appeal declined to reverse the decision of the Magistrate, who believed L.'s witnesses, and gave judgment against J. for the value of the rams he had lost.*

This was an appeal from a decision of the Resident Magistrate of Kokstad, in an action in which the respondent claimed £30 damages for the loss of thirty-three rams.

The summons alleged that the plaintiff hired the defendant in September, 1898, specially to look after herd and tend certain well-bred rams belonging to him, in return for which services the plaintiff agreed to supply the defendant with all cereals and plough about 50 acres of land, of which half the crops were to go to the defendant, and the latter was also to receive ten shillings a week as wages. That the defendant was not liable for any losses by death of the rams, but was responsible for all other losses. That he had at various times between October, 1898 to April, 1899, lost 33 of the rams, and had been unable to give any account whatsoever of them. That though the gross carelessness, neglect and want of care and attention of the defendant, the plaintiff had suffered damages in the loss of the said sheep in the sum of £30.

The defendant pleaded the general issue.

After hearing the evidence the Magistrate found: (1) That the agreement between the parties was as stated in the summons, (2) that thirty-three rams were lost, (3) that defendant was duly apprised that rams were missing when such was found to be the case, (4) that defendant has failed to explain what has become of these rams, (5) that defendant has been guilty of gross negligence. He therefore gave judgment for plaintiff for £30 and costs.

The defendant appealed.

Mr. Graham, Q.C., appeared for the appellant, and Mr. Searle, Q.C., for the respondent.

After hearing Mr. Graham, and without calling on counsel for the respondent, the Court dismissed the appeal.

De Villiers, C.J., said: This is essentially a question of credibility of witnesses, and although many of the circumstances mentioned by Mr. Graham might have led the

Magistrate originally to hesitate before giving judgment for the plaintiff, I am not prepared to say that those circumstances are sufficient to justify the Supreme Court now in reversing the Magistrate's decision. The Magistrate seems to have gone very carefully into the whole case, and seems to have been very much impressed by the credibility of the witnesses for the plaintiff. Under all the circumstances the Court cannot now, as a Court of Appeal, interfere with the decision of the Magistrate. The appeal will therefore be dismissed with costs.

**Buchanan and Maasdorp, J.J., concurred.**

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

MYERS BROS. V. BERLINER { 1899.  
June 19th.

**Goods sold and delivered—Principal debtor or surety—Documentary evidence.**

This was an appeal from a decision of the Assistant Resident Magistrate of Aliwal North.

The action in the Court below was instituted by the late Barnett Myers, who traded at East London as Myers Bros., against the defendant, Lewis H. Berliner, now the respondent, for the sum of £100, for goods sold and delivered. There was no question whatever as to the delivery of the goods, the real point at issue being whether defendant was liable, or whether defendant's brother, Levy Berliner, was liable.

Plaintiff contended that Levy Berliner was only a surety for his brother : the defendant contended that he was the principal debtor.

The plaintiff in his evidence stated that the defendant when ordering the goods on the 9th August, 1897, presented to him a letter of the same date from Levy Berliner addressed to the plaintiff. He had been unable to find the original letter but a copy

was produced from the press-copy book of Levy Berliner which was in the following terms.

"Dear Sirs, Yours of the 28th instant to hand as regards you ask me to what amount I shall stand good for one hundred pounds and I am sure as you will find him a straight-forward and I hope as you will sell him the goods what he wants as cheap as possible as I will look over when he brings with him the goods and also goods on approval as agreed with you when you were at my place."

A copy of a letter from Levy Berliner to the plaintiff dated 18th August was also produced and an original letter from the same person dated 21st August.

This letter was in the following terms: "Yours of the 16th with the guarantee to hand. I was surprised to see as you are wanting witnesses to my signature. I am dealing with firms for thousands of pounds and not one of them had not asked me witnesses and guarantee. If you like to give me 7½ per cent. discount on the goods which my brother bought of you, then I shall send you a cheque of mine or you will wait till the time will expire and I will see that you will have your money."

Judgment was given for the defendant with costs.

The following reasons for judgment were given by the Magistrate. The evidence taken was voluminous. After carefully considering the evidence of defendant and his witnesses, and the very unsatisfactory manner in which evidence was given by Mr Julius Myers, on whose evidence I did not place very great reliance, contradicting as it did in several points the evidence of his witnesses, I was of opinion that the order on plaintiff's firm presented by defendant and drawn by Mr. Levy Berliner was not merely an act of suretyship, but an acknowledgment that he would be responsible and pay for the goods purchased by Lewis Berliner, that the goods should be entered in name of Levy Berliner and the account rendered to him, in consideration of his not fulfilling his contract with his brother Lewis Berliner with regard to partnership. The contention is further borne out by documentary evidence of Mr. Attorney Cotterell attached to the records. That the alterations to the entries in the firm's books at East London are unsatisfactory. That Levy Berliner and not Lewis H. Berliner should have been sued. The weight of credibility was placed on defendant and witnesses.

The plaintiff's executors appealed.

Sir H. Juta, Q.C., appeared for the appellant.

Mr. Innes, Q.C., for the respondent.

After argument,

The Court allowed the appeal, and entered judgment for the plaintiff (the appellant), with costs, in this Court and the Court below.

De Villiers, C.J., said: Everything depends in this case upon the genuineness of the documents. In a letter dated the 9th August, 1897, Levy Berliner, brother of the defendant, wrote to the plaintiffs stating that he stood good for his brother for £100, and he was sure that plaintiffs would find defendant straightforward, and he hoped that plaintiffs would sell defendant the goods as cheaply as possible. This letter standing by itself would clearly show, if genuine, that the goods were sold to the defendant, and that the brother, Levy Berliner, was to be a mere guarantor for the due payment. Then there was a subsequent letter, dated the 18th, only nine days later, in which this view was fully supported. An attempt has been made to cast a doubt upon the genuineness of these letters, and if these letters had stood by themselves without any subsequent genuine letter corroborating them the Court would probably not have accepted them, because the originals being in the possession of the plaintiff he ought to have produced them. A letter dated the 21st Aug. was written, however, by Levy Berliner in which the view that defendant had bought the goods was maintained, and this letter is admittedly genuine. It clearly would have been to the interest of Myers Bros. to repudiate the letter of the 21st, as Levy Berliner was the rich man whom they knew could pay, and defendant was the poor man, but they accepted the statement contained in the correspondence that defendant was to be liable for the goods, and that Levy Berliner was only to be a mere surety. Defendant admits that he received the goods, but he relied upon a private arrangement which he said was entered into between himself and his brother, under which the brother promised to make defendant a present of £100, and that the receiving of the goods referred to in this case was part of that arrangement. But they cannot fight out their quarrel at the expense of Myers Bros., who supplied the goods to the defendant. The Magistrate, in giving judgment for the defendant, treated the case

as a question of credibility, but to my mind it is not entirely a question of the credibility of the witnesses, but a question of the construction of certain documents, and when once the letter of the 21st is admitted to be genuine, as it is, all question of the credibility of witnesses falls to the ground. The Magistrate appears to me to have missed the point. The Court is of opinion that the appeal must be allowed, with costs in this Court and in the Court below, and judgment entered for the plaintiff with costs.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Walker & Jacobssohn.]

AITKEN V. KYD. { 1899.  
June 19th.  
" 20th.

Partnership — Accounts — Umpire's decision.

This was an appeal from a decision of the Resident Magistrate of Kokstad.

It appeared that in April, 1895, the parties, who were both farmers, entered into partnership as speculators in cattle and as butchers. The plaintiff transacted all the buying, and the defendant all the selling and managed the butcher's shop. In December, 1896, the partnership was dissolved. Plaintiff alleged that defendant had rendered no account of the moneys which he received on behalf of the partnership. The plaintiff estimated that the profits accruing to the business amounted to £700, and called upon defendant to render an account or pay plaintiff £350 damage. He claimed further £26 2s. 6d. moneys received by defendant on his account and £13 4s. 6d., upon an account for moneys drawn by defendant out of the business, &c. Defendant pleaded that he had already rendered a proper account. The plaintiff replied that no proper account had been rendered. In the Court below the Magistrate held that a proper account had been rendered, and found for the defendant with costs, except as to the item for £26 2s. 6d., as to which absolution from the instance was granted. Against this decision plaintiff appealed.

The facts appear sufficiently from the judgment of the Chief Justice.

Sir H. Juta, Q.C., for the appellant.

Mr. Upington for the respondent.

After argument,

C.A.T.

*Postea* (June 20th).

The Court dismissed the appeal, with costs.

De Villiers, C.J., said: After having carefully read over the documents and the evidence in this case the Court has come to the conclusion that the decision of the Magistrate should not be disturbed. It is an action for an account brought by the plaintiff against the defendant. The two had been for some time partners in certain speculations in stock. It appears that they had carried on business for a considerable time before that in several capacities, and that whenever they wished to come to a settlement of accounts they used to employ a Mr. Richardson to go over the accounts between them and make a settlement of these accounts. The defence to the present action is this—that there has been a settlement of the accounts which are now in question. The evidence shows that the parties had in this instance also appealed to Mr. Richardson for his assistance. They both went to Mr. Richardson fully prepared with all the documents and accounts relating to these speculations, and Mr. Richardson, after going carefully through the accounts, and after going carefully into the matter, came to the conclusion that there was a certain amount owing to the present defendant, and in that way the whole matter was settled. Subsequently there was an arbitration between these two persons in regard to other matters, and even then the claim which the plaintiff now sets up was not brought forward. It seems that only eighteen months after the settlement the plaintiff stated to Mr. Richardson that he had some further claim of £250. When the defendant became aware of this claim he brought an action against the plaintiff to compel him to proceed with this action or to be condemned to perpetual silence, and it was only after a decree of perpetual silence had been made that the present action was brought, and even then the action was not brought within the two months allowed by the decree of perpetual silence. The case was heard by the Assistant Resident Magistrate at Kokstad, who took the evidence very carefully, and who came to the conclusion that there had been a proper settlement of accounts, and that nothing had been proved to be owing by the defendant. I am satisfied upon the evidence that the Magistrate came to the correct conclusion, and the appeal must therefore be dismissed with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

QUEEN V. JULY. { 1899.  
{ June 20th.

Mr. Justice Maasdorp, as judge of the week, said that a case had come before him in which one July was charged at the Durbanville Magistrate's Court with the offence of being drunk in a public place. July pleaded guilty, and was found guilty and fined £2, or one month's imprisonment in default. This was prisoner's first offence, and as the 9th section of the Act under which he was convicted provided that for a first offence the maximum sentence was a fine of £2, or fourteen days' imprisonment in default, the term of imprisonment inflicted by the Magistrate must be reduced from one month to fourteen days.

DE KLERK V. PIENAAR. { 1899.  
{ June 20th.

Prescription — Interruption — Land Beacons Act.

*The prescriptive period of occupation may be interrupted by the dispossession of the occupier. Such dispossession held to have taken place where the owner of a farm removed a beacon encroaching on his land, erected a new beacon in the line claimed by him and compelled one of the owners of the adjoining farm, who had pulled down the new beacon, to re-erect it on pain of being criminally prosecuted.*

Van Schalkwyk v. Hugo (Foord's Rep., 89) commented upon.

This was an application under the Lands Beacon Act to have the decision of the majority of certain commissioners appointed under that Act with reference to certain boundaries set aside, and that the Court declare the true boundary line of the land in dispute.

The petition of Jacobus Abraham de Klerk, proprietor of the farm Slagberg No. 2 in the division of Victoria West, set out that a dispute had existed between him and Petrus Francois Pienaar, proprietor of Klein Bosjesmanspoort, as to the accuracy of the boundary line between Kleinbosjesmanspoort on one side and Slagberg No. 2 and Slagberg No. 1, the latter owned by one Pfeiffer, on the other side, and that the Divisional Council of Victoria West were requested to investigate the matter in terms of section 93 of Act 7 of 1865.

That about December 10th, 1898, one Auret surveyed the boundary and reported to the Divisional Council submitting a diagram showing the disputed boundaries and marking the boundary found by him to be a true one.

That a commission was subsequently appointed under the Act and upon the 11th February, 1899, a majority and minority report of the commissioners was read and delivered.

That the real and substantial dispute between the parties was the position of a beacon known as red beacon and marked on the plan put in evidence in the commission as beacon X, the respondent claiming this beacon, while the petitioner claimed the beacon marked Y on the said plan, but was prepared to accept a certain line running between the two said beacons indicated by Auret as the true boundary line.

That all the commissioners held that the beacon X was in existence from the year 1863 and that a dispute as to this being the proper beacon arose in 1888; that the majority of the commissioners held that the facts disclosed by the evidence with regard to the said dispute in 1888 and thereafter was not of such a nature as to interrupt prescription or to disentitle the respondent to claim the said beacon as his beacon under the said Act 7 of 1865, while the minority report held that the said facts did so interrupt prescription, and that the beacon X could not be received as an undisputed recognised beacon within the meaning of the said Act.

That the farm Slagberg Nos. 1 and 2 and Klein Bosjesmanspoort were granted under quitrent lease on the 24th April, 1880 and 15th December, 1844 respectively.

That the said beacon X was not an original beacon of the farm, and was not placed there by the surveyor.

That if the respondent was entitled to the beacon at X it was only by virtue of the terms of Act 7 of 1865.

That by making X the beacon common to the two farms the petitioner would lose a considerable portion of land.

That the report and finding of the majority of the commissioners were contrary to the evidence, bad in law and contrary to the terms of the said Act.

Upon this petition a rule *nisi* had been granted (May 4th) calling upon the respondent on June 12th to show cause:

(1) Why the proceedings, the report and finding of the majority of the commissioners should not be set aside.

(2) Why the Court should not declare the boundary line indicated by Surveyor Auret, in the plan referred to, to be the correct boundary line between the farms in question.

The affidavit of the respondent Pienaar now filed submitted that the evidence put before the Commission and the plans of Auret proved that beacon X was an original beacon of Kleinbosjesmanspoort and that he was entitled to it under Act 7 of 1865.

That if it were not adjudged as the common beacon of the surrounding farms he would lose a considerable amount of ground which had been used by himself and his predecessors beyond the period of prescription.

He referred to the evidence taken by the Commission. Affidavits by the Commissioners and Surveyor Auret and the evidence taken by the Commission were also put in. The facts appear sufficiently from the judgment.

Sir H. Juta, Q.C., moved that the rule be made absolute.

Mr. Searle, Q.C., appeared for the respondent.

De Villiers, C.J.: Whatever doubts may exist as to other parts of the case it is reasonably clear that the Governor in granting the farm Kleinbosjesmanspoort in 1844 intended the northern boundary to be the one indicated by Surveyor Auret on the plan A. The land to the north still belonged to the Crown, and upon this land the owners of Kleinbosjesmanspoort encroached in



1868 by erecting the beacon at X. In 1880 the Crown land was surveyed and a grant thereof made to the appellant's predecessor in title. The land thus granted was called Slagberg, and its southern boundary coincided with the northern boundary of Kleinbosjesmanspoort. The surveyor then made a great mistake in not removing the beacon to its proper position. He allowed the beacon to remain at X, but when afterwards asked by the owners of Bosjesmanspoort to resurvey the property he pointed out to them that the northern boundary ought to be a straight line instead of a line with an angle at X. Disputes as to the boundary arose between the owners of the two farms before 1888, and in that year Erasmus, the then owner of Slagberg, pulled down the beacon at X, and erected a beacon at Y, which is to the south of the true boundary. Baird, who was then one of the two co-proprietors of the southern farm, destroyed the beacon at Y, but, upon being threatened by Erasmus with a criminal prosecution for destroying the beacon, he re-erected it. Erasmus grazed his cattle on to Y, and he seems on one occasion to have prohibited the lessees of the southern farm from grazing their cattle between X. and Y. but he never empounded any cattle. The owners of the southern farm afterwards re-erected the beacon at X. and if there has been no legal interruption of the period of prescription there is no doubt that the Commissioners were right in awarding the land on to X. to the respondents as owners of Kleinbosjesmanspoort. The question is whether there was such an interruption. In support of the negative view the Commissioners relied upon the case of *Van Schalkwyk v. Hugo* (Foord's Rep., p. 89). They were probably misled by the head note which seems to imply that prescriptive occupation can only be interrupted by judicial proceedings. In the judgment, however, dispossession is mentioned as one of the modes of interruption. By dispossession is meant not a personal ejectment of the occupier, but an act amounting to an actual occupation by another, and inconsistent with the continued possession of the person claiming the right by prescription. Where land is not fenced the placing of beacons to denote boundaries is symbolical of occupation, and in that sense it may be admitted that the owners of the southern farm occupied land of the northern farm on to the beacon at X. They also frequently grazed their cattle on to the beacon, and to that

extent also occupied the land. But before their occupation had reached the prescriptive period, the owner of the northern farm removed the beacon at X, erected one at Y, and compelled one of the owners of the southern farm, who had removed the beacon at Y, to re-erect it at X. So long as the beacon at X was down, and the beacon X was standing in full view of all concerned, and the cattle of Erasmus were grazing between the two points, the possession of the land in dispute was that of Erasmus, just as the previous possession had been that of the owners of the southern farm. Supposing there had been a fence between the two farms passing through X., and the owners of Slagberg had removed the fence so as to make it pass through Y, there would have been little doubt as to actual dispossession. In my opinion, considering the nature of the possession relied upon by the respondents in support of their prescriptive title, the acts done by the predecessors in title of the appellants were sufficient to interrupt the prescriptive period in 1888. The Court must therefore declare that the true boundary between the two farms is a straight line drawn from Blaauwberg on to the point B. on the plan of Surveyor Auret attached to the record. It is right to observe that none of the rules laid down in the 47th section of Act 7 of 1865 is applicable in the present case, and that the commissioners acted correctly in being guided by what they conceived to be the common law applicable to the case. There was no evidence of any original beacons having been pointed out at the original measurement of either farm or of such other circumstances as would make rule (b) relating to prescription applicable. The respondents other than the commissioners must pay the costs of this appeal.

Buchanan and Maasdorp, J.J., concurred.  
[Applicant's Attorney, Gus. Trollip;  
Respondent's Attorneys, Messrs. Scanlen & Syfret.]

TRUTER v. JOUBERT'S TRUSTEE. { 1899.  
June 20th.

Sale—Delivery—Ownership—Insolvency of purchaser—Vendor's right of retention—Stoppage in transitu.

*The vendor of certain sheep marked them in order that, in case of the death of any of them, the risk might not fall on him, and*

*kept them in his possession. The purchaser having become insolvent, the trustee brought an action against the vendor to recover the sheep or their value but did not tender the price.*

*Held, that there had been no delivery of the sheep to the purchaser before his insolvency and that, whether the sale was on credit or for cash, the trustee was not entitled to recover the sheep or their value without paying the price.*

This was an appeal from a judgment of the Resident Magistrate of Britstown in an action in which the plaintiff claimed from the defendant the trustee in the insolvent estate of I. G. Joubert, the sum of £47 being the purchase price of certain 49 sheep sold to the insolvent. The defendant pleaded that if the amount was due by the estate the plaintiff should have proved his claim as a creditor in the estate. He admitted that the insolvent had bought 180 sheep long before his insolvency and about 130 had been duly delivered. He further claimed £20 as damages for non-delivery of the balance and pleaded the general issue.

The evidence given by the plaintiff was that he sold the 47 sheep between the 3rd October, and 4th November, 1898, the agreement was that defendant could get as many as he wanted at a time. Payment was to be made on the first of each month.

Cross-examined: He said that that he had sold 180 wethers to the insolvent in July and could not say how many had been delivered. The last 10 sheep he sold were part of 180.

The insolvent stated that on the 29th June he bought 180 sheep from the plaintiff and still owed for those he got during the last month. He became insolvent and therefore could not pay. The sheep were to remain at plaintiff's place and be delivered as he required them. He last paid in the 3rd October. He never paid for the November sheep.

Cross-examined: When he bought the sheep plaintiff asked him to mark them so in case of loss plaintiff should not be the loser. He had received 156 sheep out of 180, the first month 40, the second month 35, the third month 31, the fourth month 47,

he still owed for the latter. He bought the sheep on credit and had a month in which to pay.

The Magistrate gave judgment dismissing the claim in convention with costs and for the defendant for delivery of the balance of 24 sheep or £20 damages and costs.

He gave the following reasons: In this case I found that the estate of J. G. Joubert was placed under sequestration on the 29th October, 1898. There had been a sale in July, 1898, by plaintiff of 180 sheep to the insolvent. The plaintiff admits that the 47 sheep for which he now claimed were part of the 180 sheep and his claim should have been filed in the ordinary way against the estate. I therefore dismissed the claim. There was a balance of 24 sheep still due to the insolvent and which from the evidence would appear to form part of the insolvent estate. The insolvent did not bring up the balance of sheep in his statement of assets, and this together with the manner in which the plaintiff and insolvent gave their evidence left a suspicion on my mind that there had been an attempt at collusion between them. The letters produced by plaintiff speak for themselves and it would appear the sheep in question ran on plaintiff's farm at the insolvent's risk and were sent for as required. For these reasons I gave judgment for the balance of the 24 sheep in favour of the defendant trustee.

The plaintiff appealed against the judgment on the claim in reconvention only.

Sir H. Juta, Q.C., for the appellant: The trustee has no claim to the sheep inasmuch as there has been no delivery.

Mr. Searle, Q.C., for the respondent: There was delivery in law by marking the sheep. As to the non-proof of the defendant and the right of set-off *Gammer's Trustee v. Saban Joseph* (1876, p. 229). Ordinance 6 of 1843, section 105.

De Villiers, C.J.: The plaintiff has acquiesced in the judgment on his claim in convention, and the only question now is whether the Magistrate's judgment in reconvention can be supported. By that judgment the plaintiff was ordered to deliver to the defendant, as trustee of the insolvent estate, twenty-four sheep or to pay him the sum of £20 as damages. The defendant's counsel admits that the only ground on which this order could be made, was that the property in the sheep had passed to the insolvent before his insolvency. The ownership could only have so passed if there had been delivery. What proof is there then of

such delivery? The plaintiff having sold some sheep to the insolvent marked them in order that, in case of the death of any of them, the risk should not fall upon him. The Court has repeatedly held that the mere setting aside of goods by the vendor does not amount to a delivery to the purchaser, so as to pass the ownership, although the risk may pass to the purchaser. The sheep remained on the plaintiff's land, and the insolvent did no act whatever from which acceptance of possession can be inferred. In view of counsel's admission, it is unnecessary to inquire as length, whether, in case the sale was on credit, the plaintiff would have been entitled to retain the goods as against the trustee before the period of credit expired, but it is sufficient to point out that the English law relating to stoppage *in transitu* which has been introduced into this Colony, might have a bearing on the point. In the absence of delivery to the purchaser the goods could have been stopped *in transitu* notwithstanding that the sale was on credit and therefore, *a fortiori*, they could be retained by the vendor upon the purchaser's insolvency. The vendor may not be entitled to re-sell them until the period of credit has expired but the trustee of the purchaser's insolvent estate clearly has no right in the interval to demand delivery of the sheep without tendering the price. If the sale was for cash there is even less doubt upon the matter. In such a case actual delivery would not have passed the ownership if the vendor had reclaimed the property within ten days after delivery in terms of the 105th section of the insolvent ordinance. But, as already stated, there has been no delivery of the sheep which still belong to the plaintiff.

The appeal in regard to the judgment in reconvention must therefore be allowed with costs in this Court.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorneys, Messrs. J. and H. Reid & Nephew; Respondent's Attorney, Paul De Villiers.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

QUEEN V. BRUYN'S. { 1899.  
June 22nd.

Appeal in criminal cases—"Prosecuting" appeal—Time for.

*An appeal is not properly "prosecuted" in terms of the 4th section of Act 21 of 1876 unless the day on which it is set down for hearing falls within forty-one days after notice of appeal to the clerk of the Magistrate's Court.*

This was an application on notice given to the respondent to the effect that it was the intention of the Attorney-General to move that the appeal case of Bruyns v. Queen, set down for hearing on July 12, be removed from the list, and the sentence declared final on the ground that more than forty-one days have elapsed since the appeal was noted.

The affidavit of Mr. H. R. Dale, Chief Clerk in the Attorney-General's Department, was to the effect that Christian Jacob Bruyns (the respondent) was convicted before the Court of the Resident Magistrate of Cape Town of culpable insolvency, and sentenced to six weeks' imprisonment on May 10 last. That deponent was informed that on the said day an appeal to the Supreme Court was noted. That on June 16 notice was given to the Attorney-General to the effect that the appeal had been set down for hearing before the Supreme Court on July 12. That if the appeal were not heard before the 12th July, more than forty-one days after giving notice of appeal would have elapsed.

The affidavit of the Clerk of the Magistrate's Court of Cape Town set out that the respondent was convicted on the 10th May, and on the same date an appeal was noted in writing against the conviction.

Mr. Ward for the Crown: A criminal appeal must be prosecuted within forty-one days after notice to the Clerk of the Resident Magistrate's Court of intention to appeal. Act 21 of 1876, section 4.

Mr. Close for the respondent: The sole question is the meaning of "prosecuting" an appeal. The appellant has done sufficient if he has within the period mentioned taken all the reasonable steps which are within his power. The meaning of "prosecute" given by the *Imperial Dictionary* is "carry on," "continue." The Act does not use the words "prosecute to conclusion" and so differs from Ordinance 40 of 1828, section 26, which contains that expression. An appellant cannot ensure the appeal being heard within forty-one days. The respondent in this case set it down for the first Court day after the expiration of the forty-one days. In *Snyders v. Theron* (J. 10, p. 309) the point was not argued. See also *Brink v. The Attorney-General—In re Regina v. Ben Desu* (8 Shail, p. 33).

[De Villiers, C.J., intimated that in some cases the Court might have discretion to hear an appeal after forty-one days had expired.]

De Villiers, C.J.: The Act allows every person convicted ample time to prosecute his appeal. He must give notice of his intention to appeal within four days after conviction, and he must "prosecute" the appeal within forty-one days after the giving of such notice. Does he prosecute his appeal merely by giving notice to the Attorney-General that it is set down for a future day? Clearly not, for whatever meaning that term "prosecute" might have in other Acts, it could only have been intended in the Act 21 of 1876 to mean that the day for which it is set down for hearing in the Supreme Court shall be within the forty-one days. That is certainly the meaning of the term when applied to appeals to any Circuit Court. When made to a Circuit Court the appeal shall be prosecuted at the next ensuing Circuit Court and that could only be done by setting down for hearing at such Circuit Court. At the same time it must not be understood that the obligation on the appellant to prosecute the appeal within a certain time would prevent the Court from extending the time. Special circumstances may arise in which, in the interests of justice, the Court would allow an appeal to be heard after the expiration of the time mentioned in the Act, but in the absence of such special circumstances in the present case the application to remove the appeal from the list must be granted.

Buchanan and Maasdorp, J.J., concurred.

[Respondent's Attorneys, Messrs. Innes & Hutton.]

CLAREMONT MUNICIPALITY V. HUDSON. { 1898.  
June 22nd.

Municipal bye-law—Erection of building—Line of street—Interdict.

*A municipal bye-law prohibiting the erection of any building which shall interfere with or encroach upon the line and direction of any street, without the written approval of the Council, does not justify the Council in refusing to allow the erection of a building, the plans of which are otherwise approved of by the Council, within an arbitrary line fixed by the Council, without reference to the frontage of houses situated nearer to the street than such line.*

This was an application upon notice to the respondent to show cause why an interdict should not be granted restraining him from proceeding with the erection of a shop and other buildings in Claremont in such a way as to overstep the building line or line of frontage of buildings on the Main Road as fixed by the Municipal Council, and why he should not be ordered to set back the shops and buildings to the said building line, and to pay the costs of the application.

The affidavit of J. J. Bisset, the Mayor of Claremont, stated that he annexed the regulations of the Municipality—which had been duly approved and proclaimed. That the Council had by resolution fixed a building line on the east side of the Main Road at 13 feet from the outside edge of the kerbing. That the line of building adopted as above set forth was the line of frontage of certain buildings erected recently by Messrs. E. K. Green & Co. No line had been formerly adopted, and the result was that the present building line was at present very irregular, and the Council was desirous to adopt a uniform line and secure regularity, particularly as many of the buildings were very old and would soon be removed. The respondent, Benjamin Hugh Hudson, submitted plans for the erection of certain shops and premises on the main road. These plans were approved by the Municipal Council, subject to the buildings being on the building line fixed, that was, in a line with E. K. Green's building, 13 feet from the

kerbing. Subsequently the Council ascertained that the said Hudson had not adhered to the said building line, but was laying foundations 1 foot 9 inches in advance thereof. After some correspondence, a letter was received from respondent's attorneys, pointing out that his building was in line with the adjoining buildings. It was denied that the Council had the right to define an arbitrary street line, and further, it was contended that the Council had no power to impose conditions in passing the plans. He therefore did not consider himself bound by those conditions.

The respondent in his affidavit stated that he adhered to the contention set forth in the letter of his attorneys.

That the building he was erecting was in the "street or building line" in the locality, that is to say it was within a line drawn from the faces of the buildings on either side of it, that if it were erected 13 feet from the curb, it would stand back about 1 foot 9 inches behind those of his neighbours.

That Green's building was about 238 feet away from respondent's, and was not exactly 13 feet from the curb, and was not parallel thereto, so that even if the line of the face of the said building were projected, respondent's building though not 13 feet from the curb would still fall within the projected line.

That respondent's building was already 5 feet 8 inches from his boundary on the Main Road, and if he were compelled to set it back to a line 13 feet from the curb, he would have to sacrifice a slip of land 1 foot 5 inches by 45 feet.

That he had no knowledge of the resolution referred to in the affidavit of J. Bisset nor had such resolution ever been made public and he contended that it was *ultra vires*, unjust and unreasonable.

That on the west side of the Main Road no general building line was observed.

That the letter of the applicants dated 21st January, 1899, provided that the respondent's building should be "kept in the same line of street as Messrs. E. K. Green & Co.'s building" but it was not until the 3rd May that the applicants wrote stating that the said line had been ascertained to be 13 feet from the curb and by that timesome considerable progress had been made with the building.

The affidavit of C. H. Smith, an architect practising in Cape Town, stated that he corroborated the affidavit of the respondent. He annexed a plan of the locality showing that the respondent's building was in "the

street or building line" in the locality. He said specially that the projection of the line of the face of E. K. Green & Co.'s building would fall approximately upon the front of Hudson's building and that none of the adjoining buildings were set quite parallel to the road. He considered the resolution of the Council defining the building line on the east side of the Main Road to be 13 feet from the curb to be arbitrary and unreasonable.

The replying affidavit of J. J. Bisset set out that as to one of the buildings adjoining that of the respondent and referred to by him plans for the rebuilding of its front had been passed by the Council, subject to the line of building as fixed by resolution being adhered to, that the buildings referred to were not modern buildings and were void of architectural design and appearance and much inferior to all shops recently erected in that part.

He admitted that there was a variation of two inches in the line of frontage of the buildings of E. K. Green & Co., but said that the distance of 13 inches was adopted for the sake of uniformity as the mean distance. That the resolution of the Council was taken on the 12th January; the meetings were open to the public and the minutes could be inspected by the rate-payers.

E. A. Ingle, the Chairman of the Public Works Committee of the Claremont Council, corroborated the statements of the last named deponent. There was considerable conflict in the various affidavits as to whether much progress had been made with the excavations or foundations of the respondent's building at the time when he received notice that he was over-stepping the building line.

Mr. Searle, Q.C., for the applicants: The Municipality have power to make regulations under Act 45 of 1882 as amended by Act 32 of 1893 and Act 20 of 1896. See Act 32 of 1893, section 45, sub-sections, 2, 3, 4, and Act 20 of 1896, section 4, sub-section g. Regulations have been framed under those Acts. Chap. IX section 1 of those regulations requires plans and specifications of new buildings to be submitted to the Council and proceeds "it shall not be lawful for any person to erect, alter or add to any building as aforesaid without giving the notice and submitting the plans mentioned in this regulation, nor to interfere with or encroach upon the line and direction of any street or thoroughfare without the written approval and concurrence of the Council, and the Council may cause any building being

erected so as to encroach upon any street or thoroughfare to be pulled down or removed at the expense of the owners thereof." Section 2 provides that "all plans submitted to the Council for approval shall show the line and width of the road, if any, which it is proposed to face, and the line of any adjoining property and height of foundations above the level of the said road." Section 3. "The Council shall within fourteen days after receiving a notice and plans, &c., &c., signify to the person giving or sending the same whether it approves or disapproves thereof; if it disapproves it shall give the person intending to build, notice of the alterations in the plans, &c., which it requires to be adopted." When the respondent sent in his plans the Council made it a condition that he should build in accordance with the building line. He could not have got his plans through without that condition.

[De Villiers, C.J.: Can the Council go beyond the actual line.]

There is no actual line, they have fixed an average and reasonable line.

[De Villiers, J.C.: If they had no power to make this line, I don't think they could make the condition.]

Even if they had not the power, they are entitled to an interdict, because the respondent had no right to go on building. In *Short & Co. v. Town Council of Cape Town* (8 Sheil, p. 224), it was pointed out where the Council's consent was illegally withheld the proper course was to come before the Court, and have it declared that the withholding of the consent was illegal. In *Clark v. Cape Town Council* (6 Sheil, p. 365), the Court said it would not interfere unless it was shown that the Council had acted fraudulently, and with some improper motive. I submit that the Council had power to fix building lines. They can define lines for the frontage of streets. Act 32 of 1893, section 45, sub-section 3. Act 20 of 1896, section 4, sub-section 9. The regulations provide that no plans are to go through without the consent of the Council, and the building must not interfere with the line and direction of any street, &c., without the approval of the Council.

[De Villiers, C.J.: That is the actual line.]

That is the building line.

[De Villiers, C.J.: Where is the bye-law which fixes the building line?]

That is not in the bye-law, it has been fixed by resolution at 13 feet from the curb-stone. The power to fix the distance is given by bye-law, it is not necessary to fix

the distance by bye-law. The principle laid down in *Cape Town Council v. Short* was that a certain reasonable line should be laid down.

Mr. Innes, Q.C., for the respondent: The municipality had no right to fix 13 feet as the line beyond which no buildings shall go. There is an important distinction between a bye-law and a resolution, the former has to be published and the consent of the Governor obtained. There is nothing in the regulations empowering the Council to fix any building line. Section 1 is only a prohibition against encroaching upon the thoroughfare.

But even if there had been a bye-law in the form of the resolution passed it would not have been operative for the reasons given in *Short & Co. v. Cape Town Town Council* (p. 227). Respondent's building is substantially in a line with all the houses in the block, and with all the houses in the next block on the Wynberg side, but the Council wish to make one building the line of the street. The line referred to in the regulations is the line of the street, therefore the respondent could build right up to the curb, that is shown by the regulation which provides that a building can be pulled down if it encroaches upon the thoroughfare.

As to the argument that we have had our plans passed on condition that we should build on this line, that point was discussed in *Dutch Reformed Church v. Cape Town Town Council* (8 Sheil, p. 13). There the Court held that the plans alone must be looked to, and that the Council could not refuse to pass them for other reasons if they were good plans. If the condition imposed by the Council was bad, it must be taken *pro non scripto*.

[De Villiers, C.J.: Then the consent lapses too.]

The Court will not compel the respondent to suspend his building operations until he can bring an action to get the consent. By section 3, the Council had to approve or disapprove within fourteen days; that is the only power they have. If they disapproved they did not follow the requirement of the section by pointing out the alterations, &c., required. The respondent had no knowledge of the resolution as to the 13 feet line until after the foundations had been started.

Mr. Searle: The respondent is now in position of a person under section 5, viz.: "No person shall carry out plans for which sanction has been refused or do anything

contrary to these regulations or omit to do anything required to be done by them." Sanction of his plans has been refused. The Council are entitled to put pressure on persons by refusing their plans. The case of *Dutch Reformed Church v. Cape Town Town Council* was a case of compensation for expropriation, this is not such a case.

De Villiers, C.J.: Act 20 of 1896 considerably extended the range of subjects in regard to which municipalities may make bye-laws. Amongst others they may make bye-laws "for securing the regularity of lines and levels of buildings, the class of architecture of new buildings and the removal, alteration and prevention of projections or obstructions in front of buildings." The Claremont Municipal Council has passed a resolution fixing the line of the streets at 13 feet from the kerb line, but this resolution has never been sanctioned by the Governor as a bye-law. Among the bye-laws which have been duly passed there is one which, after providing that any person who wishes to erect a building is bound to submit plans to the Council, proceeds thus: "it shall not be lawful for any person to erect, alter, or add to any building as aforesaid . . . to interfere with or encroach upon the line and direction of any street or thoroughfare without the written approval of the Council, and the Council may cause any building erected so as to encroach upon any street or thoroughfare to be pulled down or removed at the expense of the owner thereof." There is no question in the present case as to the quality or architecture of the building which the respondent proposes to erect. The Council has approved of the plans, but asks for an interdict restraining him from building on his own land in such a way as to overstep the 13 feet line from the kerb which has been fixed by resolution. As an indication what that line is, the Council has adopted the line of E. K. Green's building. That building is certainly not in the actually existing line, because there are other buildings with a frontage nearer to the street. In determining the line and direction of an existing street under the regulation, the Council is not entitled arbitrarily to select some particular building, but should be guided by the buildings nearest the street. Under the regulation, therefore, the Council had no power to make its consent to the erection of a building of which the plans are fully approved of dependent upon the building being erected outside the actually existing line. But the Council next falls back upon the

resolution fixing the 13 feet limit. That resolution, however, if it confers on it larger powers than those given by the bye-laws, can have no force until it is duly approved of and published as a regulation. It is urged as a further ground for granting the interdict that, whether the Council were right or wrong in imposing the condition, the respondent could not legally build without obtaining either the Council's unconditional consent or an order from the Court authorising his building without such consent. At the same time it is admitted that such an order would be granted, if the Council, while fully approving of the plans, withholds its consent on grounds not warranted by the Act or by regulations under the Act. It would, however, be quite contrary to the practice regulating the granting of interdicts to restrain a person from doing an act which in fact does not infringe upon the legal rights of any other person. The simple course, therefore, in the present case is to refuse the application with costs.

Buchanan, J. said: It is clear that the respondent in this case received the consent of the Claremont Municipal Council with certain conditions, by which he did not abide, and I would have been prepared to grant the interdict if it had not been for the further question whether, if the respondent moved, he would not be entitled to have the interdict set aside. When we come to consider whether the consent could have been withheld or not, we see that the Municipality has not availed itself of the powers conferred on it by the Act of 1896, which gave it the power to frame the necessary building regulations, which had then to be approved of by the Governor and published in the "Government Gazette." By that they could have fixed a building-line, but as the regulation stands there is no such power. I therefore concur in refusing the application.

Maasdorp, J.: It seems to me also that there is no rule now in existence to prevent a person from building upon his own ground without reference to any line that might be approved of by the Council. Rule 1 seems simply to prevent a person from encroaching upon any street, not from building upon his own ground. Therefore I also concur in refusing the application for an interdict.

[Applicant's Attorneys, Messrs Tredgold, McIntyre & Bisset: Respondent's Attorneys, Messrs. Findlay & Tait.]

MADSEN V. SCOTT.

1899.  
 { June 22nd.  
 " 23rd.  
 " 24th.

Charterparty — Bill of lading —  
 Freight—Estoppel—Damage to  
 cargo—Stowage—Perils of the  
 sea—Charterer's factor.

*By a charterparty, executed in England, the defendants' agents chartered a ship to proceed to the port of P., and there to load a cargo of timber and lumber to be shipped by the charterer's factor to Cape Town. The cargo was to be delivered alongside the ship at merchants' risk and expense, and to be then at ship's risk; the stowing was to be done by the shippers, for which and other services they were to be paid by the ship-owner at a certain rate per load, and the stevedore was to be approved by them. The factors employed at P. were K. & Co. by whom the goods were shipped and consigned to the order of the shippers or their assigns. The timber was wet when shipped, and part of the lumber was in a damaged condition, and a protest against the condition of the cargo was lodged by the master with the shippers. The ship was seaworthy, but owing to the generation of steam in the tropics from the wet timber, some additional damage was done to the lumber, and the damage would probably have been less, if, in stowing the cargo, ventilating spaces had been left between the layers of cargo.*

*Held, that the defendants, as indorsces of the bills of lading, were liable for freight upon delivery to them of the cargo.*

*Held, further, in a cross action by the defendants for damages owing to damaged condition of the cargo that the plaintiff was not*

*estopped from denying that the cargo had been shipped in good order and condition.*

*Held, further, that as part of the cargo was shipped in a damaged condition, and damage was done to the rest of the cargo by reason of the wet condition of another part of the cargo, the ship owner was not liable in damages.*

*Held, further, that if additional damage was done to the cargo by reason of faulty storage, the master was not liable inasmuch as the stowing had to be done by the shippers.*

*Held, lastly, that on refusal of the defendants to pay freight after arrival in Cape Town and tender of cargo the master was entitled, in order to maintain his lien for freight, to stack the timber in the customary manner at the docks at the expense of the consignees.*

This was an action for the sum of £1,535, being the balance of freight upon a cargo of timber consigned to the defendants, £30 expenses incurred in connection with the said timber, and £500 damages caused by defendants' refusal to give a proper receipt for cargo and to pay the freight.

The plaintiff's declaration was in the following terms :

1. The plaintiff is Fredrik Madsen, master of the Norwegian barque Natant, now lying in Table Bay. The defendants are William Scott and George Adie Scott, trading in partnership in Cape Town under the style or firm of W. & G. Scott. They are the consignees of the cargo hereinafter referred to.

2. In or about the month of August, 1898, Messrs. William Dunn & Co., of London, acting as duly-authorised agents for and on behalf of Messrs. William S. Keyser & Co., of Pensacola, Florida, United States, entered into an agreement of charter party with the owners of the said barque Natant, whereunder the said owners undertook to load a cargo of timber and deals at Pensacola in the said barque, and to convey to, and deliver the same at Cape Town upon certain conditions



and stipulations in the said charter party contained, to which the plaintiff craves leave to refer.

3. The said barque arrived at Pensacola in November, 1898, and there shipped, in accordance with the said charter party, a cargo of timber and "lumber" (the said "lumber" consisting of deals and boards).

4. Under the terms of the said charter party, the said cargo was to be loaded and discharged according to the custom of the respective ports, being delivered alongside at merchant's risk and expense, and to be then at ship's risk, the ship providing sufficient "dogs" and chains to secure it when so delivered; the charterers to supply suitable timber, &c., for beam fillings, and deals or boards or both, at their option, for broken storage; the stevedore to be approved of by the loading merchants.

5. The custom of the port of Pensacola is to deliver the heavy timber by floating it alongside the vessel, and the said cargo was delivered and loaded in accordance with the said custom, and under superintendence of the stevedore chosen by the shippers.

6. During the course of the said loading, owing to very heavy weather being experienced at the said port, portion of the heavy timber lying alongside for the purpose of being loaded was carried away by the force of the winds and waves, but without fault of the plaintiff, who had taken all the proper and reasonable precautions which it was his duty to take in that behalf.

7. Some of the said timber was subsequently recovered, but the rest was lost; the plaintiff incurred an expenditure of £30 in connection with the above.

8. Thereafter, after the cargo had been loaded on board the said barque, on or about the 16th December, 1898, the plaintiff signed bills of lading undertaking to deliver the said cargo to the order of the shippers or to their assigns at Cape Town, as set forth in the said bills of lading, to which plaintiff craves leave to refer; the said bills were endorsed to the defendants as consignees of the said cargo.

9. On or about the 10th April, 1899, the said barque arrived in Table Bay, and thereafter commenced to unload and deliver the said cargo. The said cargo has been delivered to the defendants, who have paid the sum of £1,050 on account of the total amount of freight due, viz., £2,585 3s. 4d.; the balance of freight in respect of the cargo delivered as aforesaid is the sum of £1,535 3s. 4d.,

10. The defendants refuse to give a receipt that the said cargo has been received in good order and condition, or to pay the balance of freight due, but have paid certain moneys into the Standard Bank, Cape Town, on account of freight to abide the result of this action.

11. The plaintiff has in all respects performed his portion of the contract as aforesaid, and all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to recover the balance of freight due as aforesaid, and the expenses aforementioned.

12. By reason of the wrongful refusal of the defendants to give a proper receipt for the said cargo, and to pay the said freight, the plaintiff has been put to certain expenses, and has sustained damages in the sum of £500.

The plaintiff claimed (a) £1,535 3s. 4d., being the balance of freight due; (b) £30, expenses incurred by plaintiff on behalf of the defendants as aforesaid; (c) £500, damages.

The defendants pleaded as follows:

1. They admit the first paragraph.

2. They deny that Messrs. Dunn & Co. acted as the agents of Messrs. Keyser & Co., of Pensacola, in entering into the charter party which is referred to in the second paragraph; but they admit all the other allegations in the said paragraph contained.

3. They admit that a cargo of timber and lumber was shipped in the said barque at Pensacola in November, 1898, but they deny the other allegations in the third paragraph. The said cargo had been purchased by the defendants through Messrs. William Dunn & Co., and was by the instructions of the latter shipped by the firm of Wm. Keyser & Co., to be delivered at Cape Town under bills of lading made to the order of the shippers. The said bills were endorsed in blank by the said Keyser & Co., and were by them forwarded to the defendants.

4. They admit that some of the terms of the charter party are set out in the fourth paragraph, but they ask leave to refer to the document itself when produced for its full conditions and effect. More especially they direct the attention of this Honourable Court to the following among its provisions: (a) It provides that the said barque shall be tight, staunch, and strong, and in every way fitted for the voyage; (b) it provides that the value of cargo short delivered, if any, shall be deducted from the last payment of freight; (c) it provides that all claims of

average and other questions arising under the charter shall be settled in London in conformity with the law of England, and the custom of Lloyds.

5. They have no knowledge of the allegations in the fifth, sixth, and seventh paragraphs. They do not admit the said allegations, but they refer this Honourable Court to such proof thereof as the plaintiff may adduce.

6. They admit the eighth paragraph, but they ask leave to refer therein to the allegations in the third paragraph of this plea.

7. As to the ninth paragraph, they deny that the whole of the cargo has been delivered, and they deny that the sum of £1,535 2s. 4d is due as the balance of freight for the said cargo: but they admit the other allegations in the ninth paragraph.

8. They admit the tenth paragraph, save that the moneys therein referred to have been paid into the Bank of Africa and not into the Standard Bank, and they say that their refusal to sign a receipt as therein stated, and to pay the balance of freight is justified by reason of the matters herein-after set forth.

9. They deny all the allegations in the eleventh and twelfth paragraphs.

10. The said barque was not tight, staunch, and strong, and fitted for the voyage when the said cargo was placed on board; by reason of the faulty condition of her decks and otherwise, a large portion of her said cargo has been saturated with water, and has become discoloured and rotten; and a large quantity of lumber, besides being wet and rotten, has been landed split and damaged. The defendants say that a large part of the said cargo when landed was and is in a damaged and unmerchantable condition, and was not landed in good order and condition as the plaintiff was bound to land it under the bills of lading.

11. The plaintiff wrongfully signed bills of lading for more pieces of lumber and logs than were shipped on board the said barque at Pensacola. The defendants have paid through Messrs. William Dunn & Co. for the full cargo as appearing in the bills of lading, and they claim to deduct from the last payment of freight the value of so much of the cargo as will be short delivered. Owing to the plaintiff not yet having delivered the whole of the lumber and logs on board his vessel it is impossible as yet to ascertain the exact number of pieces which are short.

12. The defendants contend that the said disputes and questions as to damage and

short delivery should be settled in London, in conformity with the laws of England and the custom of Lloyds.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

For a further plea to the declaration should the above plea be over-ruled, the defendants say:

1. They refer this Honourable Court to the matters set out in their first plea.

2. By reason of the premises they have been put to great expense in having the ship and cargo surveyed, in having to pay rent for the damaged cargo, in having a large part of the said cargo delivered to them in a damaged and unmerchantable condition, and in other respects. They estimate their damage at £1,375; but it is impossible to frame an exact account of the loss owing to the fact that the quantity of cargo short has not yet been ascertained. They are, and always have been, willing to pay to the plaintiff any balance of freight which may be due over and above their said claim for damage so soon as the said shortfall has been ascertained.

Wherefore they pray that the plaintiff's claim may be dismissed with costs. For a claim in reconvention in case the first plea in convention be overruled, the plaintiffs in reconvention say:

1. They refer this Honourable Court to the matters set forth in the two pleas in convention.

By reason of the said matters they claim payment of the sum of £1,375 as damages, &c.

Mr. Searle, Q.C., and Mr. Molteni appeared for the plaintiff.

Mr. Innes, Q.C., and Mr. Gardiner for the defendants.

Frederik Madsen, the plaintiff, said he was the master of the Norwegian barque *Natant*, which arrived here in April, but had now gone to Ship Island, witness remaining behind for the purpose of the present action. The ship was twenty-four years old and timber built. She was in good order, about two-thirds of the deck having been repaired during the past five years. In November, 1898, witness arrived at Pensacola to ship the cargo now in question for the defendants. They began to load on December 2 and were finished about December 14 or 15. The shippers appointed their own stevedore. The timber was taken aboard at Pensacola by water. That was the usual custom, as very few loads were brought down by trucks. The lumber

came aboard from lighters. He gave details as to the manner in which the cargo was stowed on the vessel. Some cargo was stored on deck, which was usual in the circumstances. Some of the poplar timber when shipped had old splits. Witness had, before it was shipped, seen it stacked in the open air, exposed to wind, sun, and rain. Witness had been in the timber trade since he was a boy, but had never carried poplar lumber before. While loading, some of the timber broke loose during a severe gale, and some of it was lost. Witness spent the £30 claimed in recovering a portion of it. The timber was properly secured, but the gale was a violent one, lasting for eighteen hours. Four days before reaching the Cape, the *Natant* was struck by a heavy gale and lost five sails, &c. During the gale the vessel did not take in more water than usual. On the voyage he noticed that there was some heating of the cargo in the hold, and he took means to ensure ventilation. When the vessel arrived here the poplar lumber was in a worse condition, being more discoloured, than when it was shipped. That was due to the wet timber steaming. The timber was in the same condition as shipped. When shipping witness pointed out to the stevedore and to Keyser & Co., that the poplar lumber was not in good condition. He refused to sign the usual bills of lading, which were to the effect that the cargo had been shipped in good order and condition. He signed the bills put in instead. He also signed a protest against the condition of the lumber shipped, a lot being split and taken on board in a wet condition. He also protested against any damage done to the dressed lumber on account of it being stowed with the other lumber. When he protested to Messrs. Keyser & Co. they said, "It has nothing to do with you; you do not know what we have sold." On arrival at Cape Town the logs were landed in the usual manner, being floated into the water and put on the quay by witness. No exception was taken to the cargo, and he received £1,050 for the freight, of which he sent about £900 to his owners. The first objection was taken to the poplar lumber about the end of April. The defendants had never refused to take delivery, but they had declined to pay any more of the freight.

Cross-examined: Witness admitted that at the end of the voyage some of the pitch-pine logs were covered with fungus, but he would

not admit that they were soft. The logs were properly stowed. He never told Mr. George Scott that the damage was due to bad stowage at Pensacola, and that he had complained about that at the time. He did not endorse on the bills of lading that the timber was in bad condition when shipped, because Keyser & Co. would not allow him to do so. He knew it was his duty to have done so. On the voyage to the Cape they had a lot of rain. Timber that was shipped wet would not dry on the voyage. After they had been about three weeks at sea and had got into the tropics the vessel steamed very much.

Re-examined: There were some leaks which might have happened in the severe weather witness had spoken about. He had had three or four captains to survey the ship. All the pitch-pine boards arrived in good condition, except those on the top. He had not carried timber cargo with boards between to ensure ventilation. He had carried many timber cargoes, eight in his last vessel, the *Natant*.

By the Court: He was of opinion that some of the damage to the timber was caused by the leakage due to the bad weather experienced when four days from the Cape.

Onaas Skaugen, a marine surveyor, and formerly a sea captain, said that he had been six and a half years in Cape Town. He knew that the custom of loading timber at Pensacola was to have the timber floated in rafts alongside the ship and then taken on board. The water was discoloured there. Witness had surveyed the ship here, and found it in ordinarily good condition for the class of vessel. He had superintended the discharge of timber ships, and in this case he found the timber to be ordinary Pensacola timber. He knew very little about poplar lumber, having only once before seen a consignment of it landed here. That consignment was also for Messrs. Scott. It was from New York. Witness, at Messrs. Scott's request, held a survey on it, and found it was in the same condition as that brought by the *Natant*. He pronounced it unmerchantable. In his survey of the *Natant* he found two leaks, but that was the only fault he found with the ship. He believed the poplar lumber had been injured by being shipped with the wet timber. With regard to the slits in the deck, all timber vessels were bound to have them. Witness had never seen a pitch-pine cargo from Pensacola perfectly

"bright"; it was always somewhat discoloured. He had carried seven cargoes from there, and that was his experience.

Cross-examined: There was always more or less fungus on these cargoes. He was at the Docks every day supervising the landing of the cargo, and knew all about Captain Madsen's difficulty. He was paid by Captain Madsen. He made his impartial report after that. It was the steaming which had done the injury, the timber having been shipped in not very good condition. Witness did not see the water dripping through the decks, although he had been at the vessel every day when she was being discharged. There was always more or less steaming coming through the tropics.

Pieter Larson Aaroe said he was master of a Norwegian barque, and had been a sea captain for twenty-nine years. He had been acquainted with the timber trade for many years. In the Pensacola trade the custom was to float the timber alongside the ship in rafts and then take in on board. The timber was wet when taken out of the water, and sometimes the timber had been lying in the river for a long time previously. The discoloration of the timber depended upon the length of time it had been in the water. Witness had surveyed the Natant to a certain extent, and it seemed to him to be a good ship of the ordinary class of vessel used in the timber trade. Witness looked at the decks above and below ship and they seemed to be in good condition. He could not see any defect in the ship which would render it unseaworthy. There were the usual slits for passing ropes through. These were in all timber ships, and were fitted in with blocks.

Cross-examined: He did not go to survey the cargo in the ship, but he noticed that the cargo was very wet, as it was bound to be. The ship had windmill pumps, but that was not significant, as such pumps were put in in new ships. It was not raining when he went on board the Natant. For a vessel of that age pumping her every watch did not show that she was a leaky ship.

Carl Eric Ahlbom said that he was in the employment of Karl Lithman, timber merchant, and previous to that had for eight years been with Robertson & Bain. He had had a good deal of experience in timber generally, and had examined the state of the cargo of the Natant. The timber was wet, with white fungus on some of the logs. It was dark, but in the ordinary condition of

timber from Pensacola. His firm had cargoes from Pensacola, and they had arrived in a similar condition, but they were better ventilated than the cargo in question. They had purchased about twenty of the logs from the Natant, and paid the full market price. He was of opinion that the timber was in good ordinary condition. The poplar lumber was cracked, split, and discoloured, and there was dry rot. The steam that would arise from the cargo would be sufficient to destroy the wood. The timber would not crack in the ship. With regard to dry-rot, his experience was that if planks were put in a store in wet weather three months would be sufficient to develop dry-rot.

Cross-examined: Pitch pine had not gone up recently. They were still paying the same price now as they did some time ago. The poplar lumber was in a very bad condition, and had deteriorated in value about 60 per cent. He had not sailed in a timbership himself, nor had his firm imported any cargoes of poplar timber. They had imported one-inch boards. He thought the importation of the poplar lumber in this case was a kind of experiment. He believed that though the ship was dry, if the poplar was shipped with wet logs the effect would be the same.

Nathan Hansen, manager of the City Steam Saw Mills in Cape Town belonging to Wm. Anderson & Co., said his firm had bought 300 logs of pitch-pine timber to arrive by the Natant. Of these they received 272, but did not receive the whole 300, owing, he believed, to some question of size. They rejected four or five logs, which were in bad condition, and returned them to defendants. The rest were just in fair condition. They paid a fairly long price for them. The logs were wet when they arrived. It could not be otherwise with Pensacola timber. Pitch pine was a risky cargo, and was apt to develop fungus. When they ordered a cargo they usually, to ensure ventilation, ordered sufficient planks or dunnage necessary for stowage, and left the matter to the discretion of the stevedore. They never ordered timber in vessels under A1 class. Poplar lumber was one of the softest of the hard woods.

Cross-examined: The logs they received were not worse than ordinary logs. His firm had made a claim against defendants on the ground of the logs being bad, but they did not expect to be paid. They generally imported their own cargoes from Pensacola,

and in such cases would not make a paltry claim. When they ordered dunnage with their cargoes they never found it injured.

Rudolph Marloth, professor of chemistry in Cape Town, and formerly of the Victoria College, said that he had examined some of the poplar-wood boards, part of the cargo in question, a month or two ago. He took a number of samples out of a heap of poplar boards, and two samples out of ten contained salt water.

Cross-examined: The fungus on the timber was due to moisture, which might arise from steaming.

The plaintiff, Captain Madsen, recalled, said his ship was surveyed at Calais in 1897, by the Norwegian Veritas.

The case for the plaintiff was closed.

Further evidence taken on commission having been put in,

For the defence,

George Scott, a member of the firm of W. & G. Scott, timber merchants and contractors, and one of the defendants, said that Messrs. W. Dunn & Co., of London, were the correspondents of his firm. He had had no communication with Keyser & Co., of Pensacola. The correspondence showed that the defendants sent their first order at the end of 1897 for pitch-pine timber and poplar, and afterwards they ordered the logs. They had a Government contract at the time, and the smallest size of log they could supply under the contract was 12 by 12. The vessel sailed in December, 1898, and arrived here in April last. They got the bill of lading on January 25 from Messrs. Dunn & Co. About April 22 witness first saw the protest Captain Madsen had made at Pensacola. The captain gave witness the impression that the cargo was slightly damaged, and witness said that if that was all it would not matter. Captain Madsen then raised the question of the money he had expended in recovering a portion of the cargo. It was after that that Captain Madsen made the protest. Generally timber on deck was worse than the timber below hatches, but in the present case that state of affairs was reversed for the first time in his experience. When he went down the hold he found the cargo seriously damaged. It appeared to him that the vessel had been filled with water and then pumped dry. Witness had had cargoes from Pensacola before, but never one in such a condition. Witness also noticed leaks in the decks, and when it was

raining he noticed the water coming through. Delivery was stopped for a day or two, until defendants could find out their position. The vessel was insured against total loss only. Afterwards delivery was resumed, receipts for the damaged cargo being given. The pitch-pine logs were thoroughly soaked with water and soft. 600 logs had been specially ordered for the Government, but defendant had only supplied 400 of these, selecting the best. They also supplied 270 to the City Saw Mills. These were also selected from the best. About nine logs were sent back. They could not supply more logs of the same quality, having exhausted all the good ones. They had a number of logs still in hand, and these had deteriorated to 20 per cent. less than cost price. With regard to the poplar lumber, it was the worst witness had ever seen. It was black, discoloured, and split. It was rotten and quite brittle. They had tried to use it, and found only about one good piece in every hundred. They had supplied Isaacs & Co. with some of the wood, but the latter objected to take it. The oak, ash, and walnut woods were also damaged. Witness believed the damage was caused by the leaky condition of the decks of the vessel, the water coming right through. Witness had never before had a pitch-pine cargo damaged like the present one, never before having to complain to a captain.

Cross-examined: The lot of poplar was described as an unfortunate lot in the correspondence, simply because they had wished to ship it from New York instead of Pensacola, but had not been able to do so. There was a difficulty in getting freight at the time. Poplar lumber was more readily damaged than pitch-pine logs.

Gustav Christian Hogeahl, at present delivery clerk to the defendants, said that at the time the vessel arrived he was in the service of Mr. Karl Lithman. In Sweden witness was in the timber trade. Shortly after the arrival of the *Natant* he went on board and noticed the condition of the deck. It was one of the most leaky decks witness had ever seen. It was not properly caulked, and the seams were open. He had never in his life seen a cargo landed in such a condition. The condition of the poplar lumber was such that they could not sell it. He had had to take a six-inch plank to get a three-eighths inch board, and he could not always get a piece even with that.

Cross-examined: All pitch-pine logs from timber ships were more or less wet. He had never before seen poplar in a ship like that.

Robert Arbuthnot Mitchell, a builder and contractor in Cape Town, said that in the course of his business he naturally had a good deal to do with timber. At Mr. Scott's request witness had twice inspected the cargo brought by the *Natant*. At that time about half the cargo was already discharged. He noticed several leaks in the deck, and that water was coming through. There were traces of considerable leakage. The ship seemed moist all over. The condition of the cargo struck witness as being about the worst he had ever seen. The pitch-pine logs were fairly saturated with water, discoloured, and a lot of white fungus had formed on it. He would not say the cargo was in a merchantable condition. The logs would require stacking with air-space between. Witness considered 1s. 6d. a log for stacking very reasonable.

Archibald Paterson, a shipwright, said he had spent almost the whole of his life as a shipwright. He examined the barque *Natant* shortly after she arrived in Cape Town, when she was about half discharged. He noticed that the decks were in a very bad condition, the seams being leaking all over. On going below, witness noticed that the deck was leaking all over. One day a good deal of water was coming through. He did not notice the cargo particularly. The decks would not stand caulking. He tried the deck in the usual way with a pricker, and it went clean through. An ordinary good ship would only require pumping once in twenty-four hours. If a ship had to be pumped every watch, it was an indication that she was very leaky. Witness had had experience of the North American timber trade, where the wood was floated down in rafts, and he had never known it to be damaged. North American pine was a softer wood.

Cross-examined: The portion of the old deck that was left in would not stand caulking. If the ship had had heavy weather outside Table Bay he should have expected the timber to be discoloured. The decks would strain if the vessel encountered very heavy weather. He had never heard of holes in the deck of timber ships to run ropes through.

Hector McLean McLeod, contractor and builder, said he had been six years in the Colony. Previously he had been in Australia, having been in the Government

dockyard there. He had examined the decks of the *Natant*, and found them very leaky all over. The rain-water was oozing through.

Ralph B. Purcell, a partner in the firm of Purcell, Everett & Yallop, timber merchants, said he had been connected with the timber trade since 1880. He went on board the *Natant* when she was nearly discharged. He went into the hold, and found the pitch-pine logs very wet. He had never before seen a cargo in such a state. The logs looked as if they had been lying in water all the voyage. He noticed when they lifted them up that the water just oozed out of them. His firm had had cargoes of Pensacola timber, but never got any in such a state. He did not consider it merchantable. The charge of 1s. 6d. per log for stacking was a fair charge. Witness had seen the logs on hand, and considered they had depreciated at least 20 per cent. Witness saw the poplar lumber on the quay, and found it in a very bad condition. One-third of it would not be worth cartage, and the other two-thirds was worth about half. Portion of it was quite rotten, and in such a state that it was unfit for use as timber.

Reginald A. Leigh, marine surveyor, deposed that on May 4 he examined the *Natant*, and found the decks leaky. The cargo in the hold was very wet, and the beams were also in many cases very wet.

Jonathan Wilson, a stevedore, said he had been eight or nine years at the work in Cape Town. He unloaded the *Natant*. When they opened the hatches they found the cargo wet. Afterwards, one day when it was raining, his attention was called to the decks, and he saw they were leaking. While discharging was going on the ship began to dry.

Walter Isaacs, manager of the factory of Messrs. D. Isaacs & Co., Cape Town, said that the firm purchased some poplar lumber from defendants. When it came they accepted it, but under protest, because it had been damaged by water. They had received about 50,000 feet and had rejected the rest. The 50,000 feet was not worth half the full value. They had stacked it with wood in between. The poplar had been partly paid for. He could not tell exactly how much had been paid. There was a dispute between them as to the price.

Gellatly Scott corroborated the evidence of his brother, the first witness for the defence. The firm supplied 400 logs to the

Railway Department. Eleven had been sent back, and the Railway Department reserved the right on cutting them up to send back any which were found bad. Witness considered 1s. 6d. a moderate charge for stacking the logs.

Mr. Searle : As to the right to full freight for delivery of damaged goods or for short delivery, *Scrutton on Charter parties and Bills of Lading* (3rd ed., pp. 254, 255). As to the effect of a clean bill of lading, i.e. "shipped in good order and condition and to be delivered in like good order and condition." *Manda and Pollock's Law of Merchant Shipping* (4th ed., p. 341). As to the conclusiveness of the bill of lading *Scrutton* (pp. 55, 56.)

Mr. Innes, Q.C. : The text books lay down the doctrine that a master is not estopped as against a consignee for value from going behind his bill of lading in regard to quantity or quality. *Kay, Law of Shipmasters and Seamen* (2nd ed., p. 234). The cases referred to there almost all deal with statements as to quantity; but they are based upon the leading case of *Grant v. Norway* (10 O.B., p. 665). See judgment of *Jervis, C.J.* at (p. 687). The principle laid down is that it is outside the scope of a master's authority to give a receipt for more than he received. He can give a binding receipt as to the quality. *Cox v. Bruce* (18, Q.B.D., p. 147) is the strongest case against my contention; but it follows *Grant v. Norway* and explains the reasons of the distinction between statements as to quality and statements as to quantity. *Howard v. Tucker* (1 B. and A., p. 712) is more on all fours with the present case. Also *The "Pieter der Grouse"* (1 P.D. p. 414). There is no case which goes so far as to show that a master is not estopped where he gives a clean receipt knowing that the goods are in bad condition. The argument that estoppel cannot apply because *Keyser & Co* were the defendant's agents, if a good argument, would place Cape Town merchants in a very bad position; if there is any doubt as to its validity, the defendants should have the benefit of the doubt. That case is not made in the declaration; that says that *Dunn & Co.* were *Keyser & Co.*'s agents. We say that we bought through *Dunn & Co.*

[*De Villiers, C.J.* : *Dunn & Co.* were your agents, and they employed *Keyser & Co.* as factors.]

There is nothing in the bare use of the word factor to show that they were agents, as far as the evidence goes they may have

been the sellers. It was necessary to appoint some one from whom the cargo was to be received. The word "factor" may possibly mean that the cargo was to be bought from them. If *Keyser & Co.* are the agents of *Dunn & Co.* for all purposes, then the defendants are responsible for all risks although our interests are adverse to those of *Keyser & Co.* *Holman's Handy-book for Shipowners and Masters* (3rd ed., p. 71) as to the master being primarily responsible for the safety of the ship and the stowage of the cargo, and has control over the stevedores, even though the shipper has to arrange the stowage. As to the bill of lading being conclusive evidence in the hands of a consignee as against the master or other person signing the same, notwithstanding that such goods or part thereof have not been shipped, see 18 and 19 Vict. C. III., section 3. *Brown v. Powell* (10 O.P., 562); *Lishman v. Christie* (19 Q.B.D., p. 333).

Mr. Searle : The invoice of the goods put in, states that they were shipped by *Dunn & Co.* *Dunn & Co.* therefore took the responsibility and they were defendants' general agents, that is clear from the charterparty and other documents. *Pynan v. Burt* (1 O. & E., p. 207); *Mews (on. Dig.* (pp. 1659, 1668) shows to what extent one can go behind the bill of lading, as between the parties. Every fact can be looked at. There is much greater reason for enquiring into the actual quality of the goods delivered, than into the quantity. We consent to the reduction of freight £1 19s. 4d. for the six pitch pine logs. We object to paying their value because they were not delivered. They are in the same position as if they had been washed off the deck of the ship. The pleadings do not allege any negligence in stowage.

*De Villiers, C.J.* : The bills of lading are in a somewhat unusual form. The goods are not therein stated to have been shipped in good order and condition but they are "to be delivered in like good order and condition." The Charter-party, the conditions of which are incorporated in the bills of lading, was executed in London between the owners of the ship "Natant" and *Wm. Dunn & Co.*, the defendants' agents. It provides for the shipping of a cargo of timber and lumber by the factors of the Charterers at Pensacola to be delivered at Cape Town according to bills of lading. The cargo had "to be loaded and discharged according to the custom of the respective ports, being delivered alongside

at the merchants' risk and expense, and to be then at ship's risk, the ship providing sufficient dogs and chains to secure it when so delivered. Stevedore to be approved of by loading merchants. . . Shippers to do the stowing of the cargo, the harbour towage of the ship and towage to sea" and other services "for two dollars per load of 50 cubic feet." The factors employed at Pensacola were Keyser & Co., by whom the goods were shipped and consigned "to the order of the shippers or to their assigns." The custom of the Port of Pensacola is to deliver timber by floating it alongside the vessel. The timber was so delivered and was secured to the ships with dogs ropes and chains, but owing to very heavy weather, portion of the timber was carried away. Through the plaintiff's exertions the greater part was recovered but six logs were wholly lost. The plaintiff claims the sum of £30 for his expenses in recovering the timber and the defendants claim the sum of £7 19s. 6d. being the value of the six logs short delivered and freight therefor. In regard to the cargo which was actually shipped all the timber was perfectly wet, having been in the water for a long time previously, and some of the lumber, especially the poplar lumber, was in a damaged condition. Before signing the bills of lading the plaintiff protested against the condition of the lumber shipped, a lot being split and taken on board in a wet condition, and also against any damage being done to the dressed lumber, it being stowed with the wet timber." A copy of the protest was given to Keyser & Co. The plaintiff refused to sign bills in the ordinary form stating that the goods had been shipped in good order and condition and Keyser & Co. refused to accept bills of lading with an indorsement as to the damaged condition of part of the cargo. The bills of lading now in Court were accordingly signed and accepted. It is probable, although this is not perfectly clear that during the voyage part of the cargo was further damaged. There is a difference of opinion as to the cause of this damage, if any. The defendants say that it was caused by the unseaworthiness of the ship and they called several witnesses as to her condition after her arrival here. It is noteworthy that they did not call Captain Burmester, who was one of the surveyors appointed by themselves. The plaintiff, on the other hand, stated that the ship was in a perfectly seaworthy condition when she left Pensacola and that if there was some leakage at the

main and after hatch after her arrival here it was caused by the heavy weather which she experienced a few days before her arrival. This statement is supported by several experts of great experience who made a thorough survey of the ship while in Table Bay. The Court is satisfied as to the correctness of the plaintiff's evidence on this as well as on the other matters deposed to by him. Some of the damage may have been done by leakage at the main and after hatches caused by stress of weather. Considering the quantity of wet timber taken on board it was a mistake to ship any lumber, especially dressed lumber, for the necessary effect of steaming at the tropics would be to diffuse the moisture throughout the hold and thus affect the whole of the cargo. The damage would probably have been less if ventilating spaces had been left between the different layers of the cargo, so that if additional damage was done during the voyage, it was probably aggravated by faulty stowage. After the arrival of the ship part of the cargo was delivered to the defendants, and freight for the same was paid by them. It is admitted by them that they are liable for one day's demurrage. As the unloading proceeded a dispute arose as to the condition of the cargo, and upon the defendants' refusal to pay further freight, the plaintiff hired some land in the docks on which he stacked the timber. For the expenses incurred in stacking the timber the plaintiff claims £71 15s., and for the dock rent paid by him he claims £7 16s. 8d. Under the general claim for damages the plaintiff has included several other items, but they were not pressed. His chief claim is for the balance of freight which is still unpaid, and which is admitted to amount to £1,373. The defendants plead that owing to the unseaworthiness of the ship a large part of the cargo was landed in a damaged and unmerchantable condition, and that there had been short delivery of the cargo, and by way of reconvention they claim the sum of £1,375 as compensation for the damage done to the cargo. It is clear that the plaintiff must have judgment for the freight less the amount short delivered. He excuses the short delivery on the ground that six logs had been lost without any fault on his part. Under the charter-party, however, the timber was to be at the ship's risk after it had been delivered alongside, and before it was shipped, and the master cannot, therefore, claim freight for the logs which were lost. For the same reason he is not entitled



to recover the sum of £30, which he spent in recovering the timber which had been carried away from the ship's side. But he is, in the opinion of the Court, entitled to recover the expenses incurred in stacking the timber in the Cape Town docks. He had his lien on the cargo for the freight and when the defendants refused to pay the freight, he was justified in going to the expense of stacking the timber in a place hired by him for the purpose of maintaining his lien. The main question to be decided is whether the defendants are entitled to claim damages, owing to the cargo not having been delivered in good order and condition. It is contended on their behalf that, as they are endorsees for value of the bills of lading, the plaintiff is estopped from denying that any portion of the cargo was not, when shipped, in good order and condition. They cannot, however, be regarded as endorsees for value, in the ordinary sense, seeing that the endorsees were the factors of their own agents. The plea admits that the cargo had been purchased by the defendants through Messrs. Wm. Dunn & Co., and by the instructions of the latter shipped by the firm of Keyser & Co. Any doubt upon the matter is removed by the heading of the invoices supplied to the defendants by Wm. Dunn & Co. Full notice of the damaged condition of the cargo was given to Keyser & Co., who might reasonably have been expected to impart the information to their principals. Then it is said that the defendants were induced by the form of the bills of lading to settle accounts with Wm. Dunn & Co. which they would not have done if they had not received clean bills of lading. But there is no satisfactory proof that before the plaintiff informed them of the protest which he had handed to Keyser & Co., they had so altered their position as not to be entitled to take advantage of any claim they might have had against William Dunn & Co. if the bills of lading had contained an indorsement as to the damaged condition of the cargo. The argument, moreover, proceeds upon the assumptions that they were clean bills of lading and that, if they were such, they were conclusive proof as against the plaintiff that the cargo was undamaged when shipped. No authority has been cited in support of either assumption. I am not aware of any case in which a bill of lading in a form similar to those in question has been adjudicated upon. If the defendants had carefully read the bills of lading they

must have been struck by the fact that the goods were not directly stated to have been shipped in good condition. By implication it might be said this is alleged and I will assume that the bills were clean bills of lading. In the case of *Lishman v. Christie* (L.R., 19 Q.B. Div. 333), which has been relied upon, the charter party expressly provided that "the bill of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein," and it was of course held that the bills of lading estopped the shipowners from denying that the full amount of cargo stated therein was shipped. A case more in point was that of *Cox v. Bruce* (18 Q.B., Div. 117). A bill of lading signed by the master in respect of a shipment of jute described the bales as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged it was found that there had in fact been shipped fewer bales marked with one of such quality marks, and more marked with another of such marks indicating an inferior quality than stated in the bill of lading. It was held by the Court of Appeal that an indorsee for value of the bill of lading, without notice of the incorrectness of the description, had no right of action against the shipowners, either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading. The case of *Peter der Grosse* (L.R., 1 Prob. Div. 414) which was also cited by the defendant's counsel does not carry their argument much further. It was there held that, in the absence of any satisfactory proof on the part of the shipowners that the goods were in bad condition when shipped, it was not incumbent on the consignees, in order to establish their claim for damages, to prove where or how the goods were damaged. In the present case there is satisfactory proof that part of the cargo was in a damaged condition and that any damage done to the remaining part of the cargo was occasioned by the wet condition in which the timber was shipped. It was the shippers' own fault that the condition of one part of the cargo contributed to the damage done to the other part. It is possible that faulty stowage and leakage during the voyage may have further contributed to the damage, but this is mere matter of theory. If faulty stowage did so contri-

bute the negligence was that of the shippers who under the charterparty were to do the stowing and for doing it along with other services were to be paid two dollars per load. If the leakage contributed to the damage such leakage as took place was caused by a peril of the sea and not by the unseaworthiness of the ship or negligence on the part of the plaintiff. For the reasons already mentioned, judgment must be given for the plaintiff for the following sums, viz.: £1,373 for freight, £16 for demurrage, £71 for stacking the timber, and £7 16s. 8d. for dock rent. On the other hand the defendants are entitled to recover the sum of £7 19s. 6d. under their claim in reconvention. The defendants must pay the costs of the action including the plaintiff's expense as a witness, such expenses being assessed at £20.

Buchanan, J., in concurring, said that the defendants had failed to establish a right to recover more than the £7 19s. 6d.

Maasdorp, J., concurred.

In reply to Mr. Searle, Q.C., the Chief Justice said the defendants would pay the costs, including plaintiff's expenses as a witness.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

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## SUPREME COURT

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[Before the Chief Justice (Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

*Ex parte* SOUTH AFRICAN  
WESLEYAN METHODIST { 1899.  
CONFERENCE. } June 23rd.

Act 3 of 1873—Appointment of new trustees—Notice.

This was an application under Act 3 of 1873, section 6, for authority to transfer cer-

tain property of the Wesleyan Church at Somerset West to the representatives of the South African Wesleyan Methodist Conference.

Mr. Close, for the applicants, stated that the property was held by trustees on behalf of the Wesleyan Methodist Conference of England, and the owners had given a power of attorney to the president of the South African Conference for the transference of all the properties to it.

De Villiers, C.J., said: The Act seems to contemplate that notice should be given to all concerned in applications of this kind, but it seems to me that there is sufficient evidence to show that this is a *bona-fide* application, and that the parties are acting on behalf of all concerned, so the Court will appoint the President for the time being of the Wesleyan Methodist Conference of South Africa as trustee in lieu of the deceased trustee.

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MCLEOD V. GREEN AND SEA { 1899.  
POINT MUNICIPALITY. } June 23rd.

Rule 35—Evidence—Commission.

Mr. Graham, Q.C., applied, on behalf of the plaintiff in the above action, for a commission *de bene esse* to examine Mr. W. T. Scott Bailey, now residing at Bloemfontein, but formerly, until compelled to give up his situation on account of ill-health, engineer to the defendant Municipality. The application was made under Rule of Court 35. The evidence of Dr. J. W. Dalglish was to the effect that Mr. Bailey was suffering from tuberculosis, and as the disease was in an advanced stage, unless the evidence was taken speedily, there was a danger of it being lost. Mr. Bailey was a material witness to the case.

Mr. Innes, Q.C., for the respondents, said that the declaration had only just been filed, and he asked for a little delay, so as to allow preparation to be made for the cross-examination of the witness.

The Court granted the order for a commission *de bene esse*, the examination to take place within seven days from date. Mr. Kizer was appointed commissioner, or failing him, Mr. Brown.

# “Cape Times” Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

LANGFORD V. MOORE & OTHERS. { 1899.  
May 16th.  
Dec. 9th.  
1900.  
Jan. 11th.  
„ 12th.

Principal and agent—Unauthorised contract made by agent—Measure of damages—Building Society—Deposit.

*Although the ground of an agent's liability for an unauthorised contract made by him on behalf of his principal with a third party differs from the ground upon which a similar liability rests under English law the measure of damages is the same.*

*One of the rules of a Building Society provided that the directors shall have power to borrow any sum for the purposes of the society to advance to their members, either from their bankers or any other source, not exceeding two thirds of the amount secured to the society by mortgages from its members.*

*Held, that the acceptance by the directors of deposits amounts to a borrowing and that the acceptance of any deposit at a time when the two-thirds limit had been exceeded was not authorised by the terms of their mandate.*

*The society having been placed in liquidation, a creditor whose deposit had been so accepted, proved for the amount of his deposit and the liquidators reported that there would be available assets to pay the depositors and other creditors a dividend of 10s. in the pound.*

*Held, that in the absence of fraud on the part of the directors, the depositor could not claim from them the difference.*

This was an action for £500 damages.

The plaintiff's declaration was in the following terms:

1. The plaintiff is a draper carrying on business in Cape Town. The defendants were, on all days material to this case, directors of the Cape of Good Hope Permanent Land, Building, and Investment Society, the registered office of the said society being at Cape Town aforesaid

2. By the rules of the said society, the defendants in their capacity as directors of the said society were authorised to borrow from their bankers or any other source an amount of money not exceeding two-thirds of the amount secured to the said society by the members thereof.

3. On or about the 5th day of April, 1898, the plaintiff deposited with the secretary of the society, William John Hancock, and the said Hancock, in his said capacity and authorised thereto by the said defendants, accepted from the plaintiff for and on behalf of the said society the sum of £300 as a loan deposit, to bear interest at the rate of 4 per cent. per annum.

4. On or about the 19th April, 1898, the plaintiff deposited and the said Hancock accepted, both in the manner and with the object in the last preceding paragraph set forth, the sum of £200.

5. On the date set forth in the two last preceding paragraphs, and for a long time previous thereto, the defendants in their capacity as directors of the said society had far exceeded the limits of the borrowing power prescribed by the rules of the said society.

6. On or about the 19th July, 1898, the said society was placed in liquidation by an order of this honourable Court.

7. By reason of the defendants' wrongful and unlawful acts set forth in paragraphs 3, 4, and 5 of this declaration, the plaintiff is entitled to claim from the defendants in their personal capacity a refund of the said sums of £200 and £300, with interest thereon from the said 5th and 19th days of April respectively. Wherefore the plaintiffs pray for an order compelling the defendants in their personal capacity to repay to the plaintiff the said amounts of £200 and £300, together with the interest thereon from the date of deposit.

And for an alternative claim, in case the above is overruled, but not otherwise, the plaintiff says:

1. He craves leave to refer to the matter set forth in the above declaration.

2. On the dates referred to in paragraphs 3 and 4 thereof, the defendants in their capacity of directors of the said society, wrongfully, unlawfully, falsely, and fraudulently represented to the plaintiff that they were authorised to borrow on behalf of the said society the sums of £200 and £300 aforesaid, whereas in truth and in fact the defendants in their said capacity were not authorised to borrow the said amounts.

3. The plaintiff was by the abovementioned false representations induced to deposit with the said society by way of loan the aforesaid amounts of £200 and £300.

4. By reason of the premises the plaintiff has lost the said sums of £200 and £300, and

has sustained damages in the sum of £500. Wherefore he prays for an order compelling the defendants in their personal capacity to pay him the said sum of £500, together with interest as and for damages.

The defendant filed the following plea in abatement and pleas:

Before pleading to the merits the defendants say that the plaintiff is not entitled to have and bring this action now, as the said society has not been liquidated, and that until the final liquidation thereof it cannot be ascertained what portion, if any, of the said sum of £500 will not be able to be paid to the plaintiff.

And for a plea over the defendants say:

1. They admit that they were at various times directors of the said Building Society.

2. The said Society was established in 1877, and on the 30th of July, 1877, certain rules were framed and adopted, which were and are the rules of the said society, save as they have been altered. The said alterations do not affect the matters in issue.

3. By Rule 22 it is provided that the Board of Directors shall have power to borrow any sum for the purpose of the society to advance to their members, either from their bankers or any other source, not exceeding two-thirds of the amount secured to the society by mortgages from its members.

4. By rule 71 (75) it is provided that the directors may receive from time to time deposits from shareholders and others of not less than 2s. 6d., upon which 5 per cent. or such other rate as might from time to time be determined upon would be allowed.

5. By rule 7 it is provided that an annual general meeting of members shall be held in the month of August, which was altered in 1884 to the month of October, for receiving a report exhibiting a general statement of the funds, effects, liabilities, and assets of the society, together with an account of all and every the sums of money received and expended on behalf of the society during the past year, such statement to be previously audited in manner provided by the rules, and that a copy of such statement shall be sent to each member at least seven days previously to such annual meeting.

6. By other rules it was provided that two auditors should be appointed, who should once every year at least audit and examine the vouchers, books, and accounts of the society, and inspect the mortgages and other securities belonging to the society, and should certify their correctness or otherwise.

7. In July, 1879, the then directors, in pursuance of their duty under rule 7, framed a report and a statement of liabilities and assets, which was certified by the auditors to be correct, and which was sent to each shareholder. The said statement showed amongst the liabilities a deposit account and a loan account, the latter being the moneys borrowed under rule 22, and the former being the moneys received on deposit under rule 71 (75), and the statement showed that the loan account together with the deposit account exceeded two-thirds of the amount secured to the society by mortgages from the members, and that the loan account was less than the said two-thirds. The said statement was approved of and confirmed by the shareholders at the general meeting assembled in 1879, several of whom were shareholders from the beginning of the society. The said statement was thereafter published in the local press for public information.

8. Thereafter in each and every year up to and including the year 1897, the directors framed a similar report and statement, which was in each case certified as correct by the Auditors and sent to each member, and was in each case approved of, ratified, and confirmed in general meeting assembled, and was subsequently published in the local press for public information. Each and every such statement from the years 1879 to 1897 inclusive showed that either the deposit account alone or the deposit account together with the loan account, exceeded two-thirds of the amount secured to the society by mortgages from the members, and the said statements of 1895, 1896, and 1897 inclusive contained no loan account at all, but only a deposit account, which exceeded the aforesaid two-thirds.

9. In 1895 the plaintiff became a shareholder and member of the said society, received a copy of the said rules, and had during the years 1895 to 1897 inclusive full knowledge of them, and had full knowledge that, according to the aforesaid statements framed and published as aforesaid and delivered to him, that the deposit account exceeded the aforesaid two-thirds. The plaintiff whilst such shareholder further received advances from the said society through the said directors with full knowledge that such advances could not have been made to him unless the amount received on deposit exceeded two-thirds of the amount secured to the society by mortgages from its members; and the plaintiff, notwithstanding

ing the above, raised no objection to the accounts, or the mode of dealing by the directors, but acquiesced therein and approved of, ratified, and confirmed the action of the directors in this behalf, and received the said advances. The plaintiff further whilst such shareholder and member received and acquiesced in the payment of dividends on his shares, which dividends to the knowledge of the plaintiff could not have been paid except by deposit account exceeding the aforesaid two-thirds.

10. The defendants say that the true intent and meaning of rule 22, and it was so understood by the shareholders, was and is that the directors should not borrow money for the purpose of making advances to member, beyond the prescribed limit, and that it did not and was not meant to apply to moneys received on deposit under rule 71 (75), which could be withdrawn by fortnightly or monthly notices; and they further say that if this Honourable Court should find that such was not the true intent and meaning of the rule, but that it did extend and apply to moneys received on deposit, that for 18 years the shareholders, who had the power of altering the said rules, and the said plaintiff whilst a shareholder, acquiesced in and approved of, ratified, and confirmed the said mode of dealing by and action of the said directors and the defendants, and that the plaintiff by virtue of the premises is now debarred and estopped from setting up his claim, if any.

11. The defendants further say that they are not aware of the allegations that on the 5th and 18th of April the plaintiff deposited the sums of £300 and £200 with their Secretary, W. J. Hancock, and they deny them. They deny that the said Hancock was authorized to receive the same, and they deny that they accepted the same from the plaintiff for and on behalf of the society.

12. They say that according to the rules and practice of the said society, of which the plaintiff had knowledge, money deposited on fixed deposit could only be received on behalf of the society, and a receipt given therefor by the trustees of the said society, and that money which any person wished to deposit with the said society could only be accepted on behalf of the said society and a receipt given therefor by a director. That if the plaintiff did pay over the two sums of £300 and £200 the said W. J. Hancock no receipt therefor was signed or given by either the trustees or any director.

13. They say that during the years 1895, 1896, 1897, and 1898 the secretary to the society, who is an officer thereof in terms of the rule hereinafter mentioned, was the said W. J. Hancock, and the said Hancock during the said period received moneys from intending depositors without the knowledge of the defendants, and criminally misappropriated the same to his own use, and otherwise criminally misappropriated moneys by falsifying the books of the society in various ways, in order to prevent the directors from discovering his said frauds and misappropriations, and the said Hancock has been criminally tried and convicted for his said criminal offence. If the plaintiff paid the aforesaid sums into the hands of the said Hancock, the defendants say they were misappropriated to his own use by the said Hancock.

14. By Rule 72 (77) of the society it is provided that the directors and all other officers of the society shall be and are hereby indemnified and held harmless out of the funds and property from and against all losses, costs, charges, damages, and expenses which they may incur or be put to in or about the execution of their respective offices, trusts, and services, and none of them shall be answerable for any act or default of any other of them, or for the insufficiency or deficiency in any title or otherwise of any security whatever, unless the loss arising from such means shall happen through their own neglect or default; nor shall they be liable for any banker or other such person with whom the trust money shall from time to time be deposited for safe custody, invested or otherwise, nor for any involuntary loss, misfortune, or damage whatsoever which may happen in the execution of their respective offices, services, or trusts, or in relation thereto.

15. The defendants admit that on the 19th July, 1898, the society was placed in liquidation by an order of this Honourable Court, and they say that it was by consent of the members, and further that at the date of the liquidation the assets of the society were more than sufficient to pay its liabilities; but they admit that the assets were not sufficient to pay the amount of the defalcations aforesaid of the said secretary, W. J. Hancock.

16. The defendants say that if the plaintiff is entitled to rank as a creditor for the aforesaid sums of £300 and £200 and is not paid in full, or if he has any claim to payment of the said £500, that the

deficiency or loss to which the plaintiff may be put is covered by the aforesaid rule, and that it did not happen through the neglect or default of the defendants themselves, and that in any case the plaintiff as a shareholder or member is not entitled to claim from the defendants payment of the said sums or any part thereof by virtue of the said rule.

17. Save as above the defendants deny the allegations in paragraphs 1 to 7 inclusive of the declaration.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

And for a plea to the alternative claim, the defendants say:

1. They beg to refer this Honourable Court to the matters and things set forth in their first plea.

2. They deny that they wrongfully, unlawfully, falsely, or fraudulently represented to the plaintiff that they were authorised to borrow on behalf of the said society the said sums, and they deny that they were not authorised to borrow the said amount.

3. They deny that the plaintiff deposited the said sums with the society by way of loan, and they deny that they received the same. They say that, if the plaintiff paid the said sums to the said Hancock, that he was not induced to do so by any false representations made by them or with their knowledge or consent.

4. The defendants say that they were authorised under their rules to receive the said deposit; that, if this Honourable Court should find that they were not, they say that the plaintiff had full knowledge of the rules of the society and of the powers of the defendants; that from 1879 to 1898 inclusive, and more especially in the years 1895, 1896, 1897 and 1898, the Defendants had received moneys on deposit in the same way, under the same circumstances, and under the same state of accounts as in April, 1898, and that the plaintiff with full knowledge thereof had acquiesced in, approved of, ratified and confirmed the action of the defendants in this behalf; and that, if at the said dates complained of the defendants had, owing to the state of the accounts, no authority to receive money on deposit, that this was known to and caused by the action of the Plaintiff, and ratified and approved of by him.

Save as above, the defendants deny the allegations in paragraphs 1, 2, 3, 4, of the alternative claim.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

The plaintiff answered that the plea in abatement was bad in law and prayed that it might be dismissed with costs.

For a replication he admitted the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 14 of the plea. He denied the allegations contained in paragraphs 9, 10, 11, 12, 16. He said he had no knowledge of the allegations contained in paragraphs 7 and 8. With regard to the allegations contained in paragraph 13 he admitted them save that he said he had no knowledge of the facts alleged in the concluding paragraph of the said 13th paragraph. Save as above he joined issue on both the plea, and the plea to the alternative claim.

Mr. Graham, Q.C., and Mr. Upington appeared for the plaintiff.

Sir H. Juta, Q.C., and Mr. Ward for the defendants.

John Howard Langford, draper, the plaintiff, said that on the 5th April, 1898, he made a deposit of £300 with Hancock the secretary of the Cape of Good Hope Building Society. Witness had known Hancock for years. On April 19 witness made a further deposit of £200 with Hancock and Moore, the bookkeeper, who were both present. Witness received a pass-book (produced), signed by the secretary (Hancock). Above the signature was printed, "Signature of director or secretary."

By the Court: Witness was not a shareholder. He became a member of the society. When he saw Hancock the latter told him that it was a mere form for him to become a member, and Hancock pointed out on the fly-leaf of the book of rules of the society, the words, "Members incur no liabilities whatever."

Examination continued: Witness first had dealings with the society in 1895. He and others took a joint bond. He had no idea that the directors had exceeded their borrowing powers, and only found it out after the liquidators' report was published. He had never attended meetings of the society. He had received a copy of the prospectus of the society since he became a member, and a copy of the rules in 1885. He paid the bond he took out in 1895. After the liquidation he asked the liquidators for a return of his deposits. The liquidators repudiated his claim.

Cross-examined by Sir H. Juta: Witness had to take shares before he could obtain a loan. All he stood to win was 5 per cent.

per share. He had to take eighteen shares, for which he paid £27. He paid the entrance fee and obtained a copy of the rules and a pass-book, for which he paid. Witness took up a loan of £500 after having a conversation with Hancock. The latter had a copy of the rules and prospectus of the society, but he did not explain them to witness. He laid more emphasis on the fly-leaf, which stated that members incurred no liability whatever. Hancock did not explain the financial position of the society. In 1896 witness received a copy of the balance-sheet for 1896 (put in). From that sheet witness could see that there was no loan account at all. There was a deposit account of £60,000, and on the credit side there was £52,000. He could see from that that more money had been received than had been advanced. He had received a balance-sheet again in 1897, from which it was evident that there was no loan account. On the credit account there was £55,000, and on the deposit account £53,000. On the 1895 balance-sheet there was again no loan account, and the deposit account was larger than the advance account. Witness supposed that the directors got the money for advancing on loans. He presumed that the company obtained money by the deposits. He knew that he was paying the company on the mortgage from 7 to 8 per cent. Witness admitted that from the balance-sheets the money advanced could only have come out of deposits and subscriptions.

By the Court: Witness was told by Hancock that he could not discharge his bond in less than three years. He did not discharge his bond at once instead of paying 4 per cent. on it because it was a syndicate bond, and witness did not want to make himself a bankrupt on account of the others. All his receipts were signed by the directors, and he made no inquiry as to why the two receipts in question were not signed by directors.

Re-examined: Witness asked Hancock if he could withdraw the bond some time before the payments. That was about the end of 1897. Hancock never explained the financial position of the society to him, but simply the *modus operandi* of getting a loan.

By the Court: Witness saw the balance sheet before making the deposit.

Harry Gibson, secretary to the S.A. Association and one of the liquidators of the

Cape of Good Hope Building Society, produced a copy of the liquidators report of August 2, 1893 (see 8, Sheil 319). Witness said he had examined the books of the society with Mr. Steytler, the other liquidator. He estimated the defalcations at about £37,000, but he said since found they were about £61,000. The assets were £57,000, and the debts £104,000. There would be a deficiency now of about £61,000 with additional debts. He remembered the plaintiff making an application for cancelling his bond. Witness had prepared a statement (put in). It was clear from the books that from the very commencement of the society the directors borrowed more than two-thirds of the amount authorised on the advance and loan accounts. Witness had seen the pass-books put in by plaintiff. The signatures were in Hancock's writing. Witness had found an entry of the £300, but not of the £200 deposited by plaintiff in the books of the society. Plaintiff's cheque for £200 was not paid into the bank for account of the society, but was paid to Hancock's private account at the Bank of Africa. Hancock left the Colony on April 20 last year. Messrs. Moore, Willmot, and Stephens had been directors of the society from the commencement. Mr. Paul de Villiers joined in January, 1881, and Mr. Robertson in December, 1894, and Mr. Marsh in September, 1890. The books kept by the society were a rough cash-book and a clean cash-book, apparently balanced monthly. All moneys were supposed to be entered in the rough cash-book. Hancock would simply make no entry, and pocket the money. Payments would be made by cheque, and would go into the clean cash-book. The entries in the rough and clean cash-books sometimes corresponded, sometimes not. Most of these that did not agree were erasures. There was such an erasure under date April 25, 1898. This was a deposit by H. J. de Wet, which stood at £82 in both books, but had evidently been something else in the rough cash-book. The bank pass-book was also altered, presumably to make the directors believe that the overdraft was less than it was. Everyone had complete confidence in Hancock and Moo. e.

Cross-examined: In the ordinary course of business the directors would not see the books until after the erasures had been made. Witness had been engaged on the books for ten months. It had been a most involved fraud right through. From the very beginning of the society the deposit

plus the loan account, always exceeded two-thirds. Witness could not say from memory that the loan account ever did exceed two-thirds by itself. The directors got loans from the Standard Bank, but not from other institutions as far as he knew. From the minute-book of the first meeting it was evident who were present. Apart from the defalcations, the position of the society would have been a sound one. There had been no loss upon the ordinary property of the society.

De Villiers, C.J.: What is the present state of the society? Will all the debts prior to a certain date be paid?—I can't say yet. We are now recovering mortgage debts which will realise their full value. There is no loss on the investments of the society. A large number of depositors have not yet filed their claims.

This closed the case for the plaintiff.

William John Hancock said he was the secretary of the Cape of Good Hope Building Society from 1895 to 1898. He had been convicted in regard to certain embezzlements. He had made certain alterations in the books. He used to make the alterations after each of the directors' fortnightly visits. When the auditors examined the books once a year they were made to square up, and afterwards alterations were made again. This went on for some time. One or other of the directors was constantly there. Langford, the plaintiff, was known to witness, who saw him at the plaintiff's house. Witness took a copy of the prospectus and the book of rules he believed. He was about two hours with the plaintiff and thoroughly explained the position to him. Plaintiff had to take shares as he could only get a loan as a shareholder. He remembered taking at least one of the loans which plaintiff had given.

Cross-examined: Witness received these deposits as secretary in the ordinary course of his business with the consent and knowledge of the directors. He had been doing so ever since he had been in the company's employ. Witness remembered telling plaintiff that he could not discharge his bond for three years from the commencement of the bond. The directors were elected by the shareholders each year. Bond debtors would be present and vote at the annual meetings. If suspicion had been aroused, and if a careful examination of the books had been made, the alterations he made would have been detected. If the auditors had done



their duty they would have discovered it. Witness paid into his private banking account in thirty months £16,300, and paid to Messrs. Erridge & Co. £41,000.

He denied that his defalcations amounted to £61,000. He had not embezzled more than £24,000. He had borrowed large sums from personal friends, amounting to some thousands of pounds, and he had a store at Observatory.

Re-examined: If the books had been carefully examined by the auditors they should have noticed many things that ought not to have been in the books. Witness received instructions at one time not to receive deposits if there were no advances to be made. Witness exceeded those instructions.

By Mr. Justice Maasdorp: Witness had power to receive money as secretary.

Charles Lewis, one of the original director of the society, said he took part in drawing up the rules of the society, which were confirmed at a meeting of the society. From the moment the rules were framed, witness made advances which were beyond the two-thirds limit. He always regarded the deposit as a distinct affair from loans raised upon mortgage. The directors could not borrow more than two-thirds of any mortgage-bond they had in hand. The deposits were at first in small sums, and the investments were at fifteen years. Witness was a director from the beginning to the end. The auditors audited the accounts every year. At every annual meeting the reports and accounts were brought up and were published in the newspapers. The directors took loans at various times from various public bodies, the Standard Bank, Colonial Mutual, Colonial Orphan Chamber, Commercial Bank, and other institutions. They would only take up two-thirds of the face value of the loans. The money was borrowed to advance to their members. The directors met every fortnight, when the books were produced. Witness had nothing to do with the society after 1890. No question was ever raised during his time as to the directors exceeding their borrowing powers.

Cross-examined: They took the money on deposit, for the purpose of making advances on mortgages, without discounting the mortgage bonds. The directors looked after the management of the society pretty carefully. If they had enough money to lend, they would not borrow any.

George William Steytler said he was one of the liquidators of the society, and had been a

director until 1887. During that time the directors never borrowed more than two-thirds of the face value of each bond. Bonds could be paid off at any time. Witness was also secretary of the Colonial Orphan Chamber, and in 1887 the society borrowed from the Chamber £2,000.

Cross-examined: It was quite clear that the money borrowed under rule 22 was used for advances to members, if it was not to repay depositors. The original capital of the company was £4,000.

William Edward Moore, one of the defendant directors, said he became a director after the society had been established, and had been a director ever since. During that time the two-thirds rule was never acted upon in regard to deposits. The question was never raised by any shareholder or depositor. Reporters were present at every meeting of the society. The deposit, plus the loan account, always exceeded the two-thirds limit. The directors met every fortnight for the purpose of receiving money from bond debtors, subscribers, and depositors. These entries were all made in the rough cash book. The directors took every possible precaution to see that nothing was wrong. No directors could have been more careful than they were. Deposits were of two kinds—fixed and floating. The instructions to the secretary were that he was not to receive large sums of money unless he had directions from the directors, or unless they were in want of money. Witness and Mr. Willmot, as trustees, always signed the receipts. Directors signed receipts for instalments paid in and also for floating deposits. The previous secretary had never signed a receipt, and witness believed that no receipt had been signed by Hancock.

De Villiers, C.J.: Why then is there printed in the book, "Signature of director or officer"?—That was the form.

Continuing, witness said there had never been any reason to suspect Hancock.

De Villiers C.J.: If you had not had such confidence in Hancock would not the books have been more carefully examined?—Not as directors. No body of directors, as far as I am aware, goes through the books. The auditors do that. The auditors were the late Mr. Dowthwaite and the late Mr. Willmot.

Cross-examined: The directors had confidence in Hancock. The business had increased very largely during his secretaryship, and they were pleased with his work.

He was aware that Hancock was carrying on business at Observatory-road, but had not the slightest knowledge that he was dealing in shares. If he had known that he would of course have reported it. He remembered Hancock winning a ticket in a lottery for £700. Witness then expressed his surprise that a man of his principles should have taken a lottery ticket. Hancock then said he would never do so again.

Francois John Hinsbeeck said he was clerk to the society from 1880 to 1895. He used to post the annual reports to the shareholders. During the time witness was secretary the reports were brought up and confirmed at the public meetings.

Cross-examined: Witness received nearly all the cash during term of his office, but never signed pass-books. The fixed deposit receipts were signed by the trustees, and other receipts by the directors.

David Stephens, a director of the society since 1877, corroborated the evidence of previous witnesses. Witness had never known any question raised as to their mode of dealing. Witness could think of nothing that the directors neglected.

Cross-examined: The auditors examined the books once a year. Witness did his duty to the society. He had seen the erasures. He could not say now within thousands of pounds what the assets and the liabilities of the society were. There were a fair number of poor people among the shareholders.

Re-examined: The erasures were pointed out to witness after the defalcations were discovered.

John Louis Mitchell Brown, M.L.A., merchant, said he was among the first of the directors of the society. He agreed with the previous witness as to the mode of dealing of the society. No question was ever raised.

Cross-examined: Witness regarded the deposits as loans to be utilised for the purposes of the institution. While he was a director he should think that they always had sufficient over and above to cover the deposits.

Re-examined: As far as witness knew, the two-thirds limit never applied to the deposits.

Philip G. H. Willmot, director of the society since 1877, corroborated the evidence of directors who had previously given evidence.

Bartholomew Henry Parker, a shareholder in the society, said he always received

reports before the meeting. Witness was one of those who wanted a change in the secretaryship, thinking Mr. Simkins was too old for the work. Witness mentioned Hancock's name as a likely secretary.

John M. Shaw, a shareholder in the society, gave corroborative evidence.

This closed the case for the defence.

For the liquidators first report upon the position of the society *vide* 8 Sheil, p. 319. The second report and a supplementary second report were presented to the Court on the 10th November, 1899 and 9th December, 1899, respectively after the evidence in the action had been heard but before judgment was delivered.

The second report was in the following terms:

1. Since our first report was presented the affairs of this liquidation have been before your Honourable Court on several occasions, and, as a result of an action against the Standard Bank of South Africa, Limited, to determine certain rights relating to a curities, another action (that of Langford v. the Directors of the Society) has been adjourned to enable the Court to learn the outcome of our investigations into the affairs of the society.

2. Every effort has been made to prosecute our work in this direction by a competent staff, under the immediate supervision of the liquidators. As the work progressed, however, it was found that the defalcations and operations of the society's officers had been of such a complicated nature, and had extended over such a period of time, that any attempt at mere rectification of the accounts would be worse than useless, and a reconstruction of the society's records was essential, and has been commenced from the 31st July, 1895. This entailed more labour than would at first sight seem necessary, owing to the unreliability of the office records. In many instances the customers' pass-books had been tampered with, as well whilst left with the society. Some of these had not been taken away by depositors for fully six months.

3. At the date of this report your liquidators have only been able to complete the work to 31st July, 1897, leaving a period from then to 30th April, 1898, when the society closed its doors to the public, still to be dealt with in a later report. Annexure A shows the society's balance-sheet reconstructed to 31st July, 1897, and Annexure B gives (in the form suggested by your Honourable Court on a previous

occasion) the correct amounts of advances made by the society as compared with the amounts of deposits and loans—*vide* rule 22, which we quote in full to facilitate reference :

22. That the Board of Directors shall have power to borrow any sum for the purpose of the society to advance to their members, either from their bankers or any other source, not exceeding two-thirds of the amount secured to the society by mortgages from its members.

It will be seen from the latter annexure that under this rule, as we understand your Honourable Court to have interpreted it in the action against the Standard Bank of South Africa (Limited), the directors exceeded their borrowing powers from the second year of the company's formation. It is also noticeable that such increased borrowings rapidly swelled in volume shortly after Mr. F. J. Hinabeek went on pension in 1895, and J. W. Moore was appointed bookkeeper.

4. At the 31st July, 1897, the position shown by the annexed reconstructed balance-sheet compared with the balance-sheet issued to members of the society by the directors was as follows [shillings and pence omitted] :

LIABILITIES.

	As issued.	As reconstructed by liquidators.
Subscription account — (i.e., share account) ... ..	£8,386	£8,963
Deposit account ... ..	53,276	83,364
Management and contingent account—really accumulated reserves ... ..	5,229	—
Overdraft at bank ... ..	—	447
	£66,891	£92,774

ASSETS.

Advance account—On mortgage of properties ... ..	£55,772	£55,294
Property account—Mainly bought in from insolvent estates to cover advances made, but including offices in Greenmarket-square, Cape Town ... ..	10,421	9,471
Office furniture ... ..	53	53
Premiums on fire policies—Recoverable from debtors ... ..	87	64

Cash balance ... ..	556	
Net deficit arrived at as follows:		
W. J. Hancock's defalcations, £31,929 13s. 4d.		
Less—		
Management fund, as per contra ... ..	£4,269	
Profit, 1895-6 ... ..	60	
	£4,329	
Loss, 1896-7 ... ..	290	
	£4,039	27,890
	£66,891	£92,774

Note.—The dividends actually paid in 1895-6 and 1896-7 have been debited in the profit and loss for the two years stated above.

It will be noted the defalcations to 31st July, 1897, amounted to £31,929 13s. 4d., and your Honourable Court was informed from the witness-box on one occasion that the defalcations were estimated to total £61,000.

The estimate will probably not be far from the mark, but the net loss to the society will not be quite so large as these figures indicate, owing to repayments by Hancock from time to time on the lines indicated towards the end of paragraph 18 of this report.

5. In the balance-sheet at 31st July, 1897, as issued by the directors, two points quite apart from the defalcations should be mentioned :

(a) The additions or cast of the totals of assets and liability are ten shillings less than the correct amounts.

(b) The bank balance is given at £556 16s. 9d., which is manifestly incorrect.

6. The bank balance shown in the cash-book at that date was detailed as follows :

As per pass-book ... ..	£627 5 0
Less outstanding cheques—	
543. De Wet ... ..	£3 11 6
556. Gordon ... ..	9 0 0
575. Hancock ... ..	30 0 0
576. Moore ... ..	17 10 0
577. Hancock ... ..	5 16 9
577. (a) Freilich ... ..	4 10 0
	70 8 8
	£556 16 9

These figures should have been :

Outstanding cheques—	
As above ...	£70 8 3
402. Ball ...	4 10 0
474. Balne ...	1,000 0 0
	<hr/>
	£1,074 18 3

Less—	
Balance as per pass-book...	627 5 0
	<hr/>
Overdraft as per recon- structed balance-sheet	£447 13 3

7. To say just when the defalcations ought to have been discovered is perhaps one of those cases when it is more easy to be wise after the event, but the following facts are instructive as bearing on the point: When Hancock was appointed secretary and took up his duties on January 1, 1895, the cash-book was written up by F. J. Hinsbeeck (since retired on pension), who also regularly made the usual adjustment between the balance and bank pass-book. Hinsbeeck continued writing the cash-book, but from January, 1895, down to the last, Hancock regularly inserted the adjustment himself, thus securing control of manipulations in the bank-book. Down to September, 1895, these adjustments were correctly made, but we then find the following results :

Month.	Bank Pass-book.	Cash-book.
October, 1895 ...	£2,214 13 3	£3,351 2 1
November ...	531 0 3	2,378 2 3
December ...	101 16 2	2,743 9 10
January, 1896...	1,026 1 5	4,161 15 1
Feb. (overdraft)	627 10 5	Cr. 2,533 11 4
March (overdraft)	137 3 5	Cr. 3,647 8 7

and so on, the months of July, 1896 and 1897, when the accounts were published, being the only months when the adjustments were made apparently to agree—the pass-book being manipulated to attain this end. The auditors should have been alive to the fact that outstanding cheques must be accounted for, and had this been done, results given above would have been so much the worse, as such outstanding cheques should be deducted from any credit balance shown in pass-book, or added to overdrafts, to make those figures agree with cash-book.

These cheques for the months given above totalled :

October, 1895 ...	£129 18 6
November...	251 15 6
December...	100 2 9
January, 1896 ...	59 2 5
February ...	335 6 8
March ...	202 0 6

In October, 1895, Hancock's books show d he received ...	£1,961 18 9
To which must be added a sum received in September, but not banked ...	116 1 3
	<hr/>

As shown by a memorandum on page 77 of the cash-book in Hancock's writing ...	£2,078 0 0
The amount paid in during that month as per bank-book was only ...	978 0 6
	<hr/>

A discrepancy against the society of ... £1,099 19 6

On looking to see whether this was perhaps hidden by manipulating the bank pass-book, we find the adjustment commences

Balance as per pass-book ... £3,351 2 1 but the pass-book shows only £2,214 13s. 8d., and the entry has no appearance whatever of having been tampered with—in fact, it is prior to the date from which we thought it necessary to have the pass-book re-written by the bank.

8. Even if the defalcations had not been discovered when auditing the 1895-96 balance-sheet there remains that for 1896-97. It is a little uncertain when the auditors, Messrs. C. W. Dowthwaite and H. G. S. Willmo (the latter since deceased), signed this last balance-sheet, but from the minute-book it would appear to be between the 7th October, 1897, and 14th idem., as on that date a draft of the annual report and financial statement were submitted to the Board and adopted, and the chairman, Mr. W. E. Moore, reported he and Mr. Willmot (presumably P. G. H. Willmot, his co-trustee and brother of the auditor) had inspected the securities and found them in order.

9. The cheque "402, Ball, £4 10s." was issued on 12th April, 1897, so that item should have been easily detected, but that of "574, Balne, £1,000," was one of Hancock's most glaring frauds, and the following facts should be recorded. This cheque was issued on 23th July, 1897, for £1,000, and a cheque, No. 557, in favour of P. de Villiers (conveyancer to the society), £1,500, was issued on 14th July, 1897. In the bank pass-book the entry was apparently "To cheque 57, £1,500," the hundreds in numbers of cheques being only at the top of the page, and, as is the local custom, not repeated in each entry.

When this pass-book was handed to us the entry read, "To cheque 574, £2,000," the figure "4" having been added, and "£1,500" erased, and "£2,000" substituted by (apparently) Hancock, the amount of the cheque having also been altered by the same person after payment by the bank on 7th August, *i.e.*, a week after the date to which the books were made up, from £1,000 to £2,000. This transaction was one of the counts in the indictment to which Hancock pleaded guilty at the Criminal Sessions in October, 1898. If the alteration in pass-book had been so performed as not to create suspicion, and it was held the auditors, although exercising reasonable care and caution, had been deceived into believing that the cheque to Balne had been paid by the bank, the fact would remain that the counterfoil of cheque 557 to De Villiers appeared in its proper place in the cheque-book, but was not debited by the bank as paid, and that should consequently have been brought up as outstanding, as although both cheques had been issued, only one had been cashed. As a fact, the alteration in pass-book by Hancock is clumsily done, and should have aroused suspicion even if not accompanied by the fact that cheque 557 to De Villiers, £1,500, had not been accounted for. We have dealt on this transaction at some length, as in our opinion it was at this stage, even if previous defalcations had escaped notice, that anyone exercising ordinary business prudence and care might have been expected to have been placed on his guard, and when by proper inquiries the fact that defalcations had taken place, at all events to the extent of several thousands of pounds, should certainly have come to light. Had the partial discovery then taken place, it is only a fair deduction to make that a more rigorous investigation would have at once followed.

10 There can be little doubt that the society had been plundered as far back as 1895, for in the balance-sheet for that year we find subscription account (a liability) stated as £7,370 5s. 10d., whereas the figures should have been £3,291 15s. 2d. The former amount is entered as transferred from old ledger in one item; but no details of the several accounts comprised in this total are, as far as we can trace, recorded, though had the subsidiary ledger been abstracted we do not see how the discrepancy could have remained undiscovered.

11. It is, however, beyond doubt that though more or less petty thefts had been

committed, and had totalled some £5,000 prior to 1895-96, the bulk of the defalcations took place in the years 1896-7 and 1897-8, and we ask your Honourable Court to refer to paragraph 8 on this subject.

12 In dealing with this question it must be remembered that the audit of the society was not a continuous one: it apparently only commenced after July 31 in each year, to which date the accounts were made up. Hancock and Moore had therefore a whole year to carry on their operations before any scrutiny by the auditors was to be met. This method of audit is a not unusual one in comparatively small concerns, but the present case should at least be a warning to others of the dangers attending the practice.

13. One or other of the directors appear to have attended at the offices of the society every evening for the receipt of subscriptions and deposits. This system was inaugurated some years back, when the transactions of the society were mainly confined to the receipt of small sums from minor tradesmen and the working-classes. In later years, and in a more marked degree since the appointment of Hancock as secretary, the proportion of large transactions has increased, fixed deposits ranging to upwards of £1,000 from one person were accepted, and the operations nearly resembled those of a small land bank. It was almost impossible to continue the old system in its entirety under the changed conditions. Cheques received during the day were endorsed by Hancock, and a duplicate deposit slip, initialled (presumably by the bank teller), shown to the director in the evening, who would thereupon sign the rough cash-book.

14. These altered conditions, coupled with the fact that the bookkeeper of the society was in some instances at least an accomplice, and there was no other office staff beyond an office boy, gave Hancock the opportunities he so freely availed himself of to commit a series of frauds. Some of the bank deposit slips shown to the directors were fraudulent from beginning to end, the supposed initials being, to use Hancock's own words in the witness-box, "just a wiggle like any teller's, and not meant for any particular man's initials"; though he admitted, in reply to the next question, that the object was to deceive his directors by a fictitious credit.

15. In other cases, the system described enabled Hancock to endorse cheques and cash them at the counter, and, in some cases,

pay them in to his own credit with his private bankers, who were not those of the society.

16. In connection with these endorsements, we would point out that the method of signing cheques is defined by the articles of association as follows :

"24. That all cheques for the payment of money shall be signed by the secretary and two directors."

We are not aware that any special authority was given to Hancock to blank endorse cheques for encashment over the counter, but he appears to have done so, as the chief official of the society.

17. It may be of interest to your Honourable Court, and possibly of assistance in deciding some of the questions which, we understand, are to be brought forward if, besides the samples given above, we outline other methods adopted by Hancock, who undoubtedly possessed the confidence of his employers, bankers, and the public generally.

(a) In some cases sums were received and properly entered in the depositor's pass, but no entry made in the cash-book. As the depositor held the pass-book the fraud was not traceable at once, and Moore seems on several occasions to have assisted by later on making entries for interest in pass-books without corresponding entries being passed to the ledger.

(b) Smaller sums were entered in cash-book than were actually received. Though not always the case, the general rule was to drop a figure either at the commencement or end, *e.g.*, £1,500 entered as £500, and on another occasion as £150. Here also the depositor held the pass-book.

(c) Entering the correct amount in rough cash-book prior to signature by director, and substituting a smaller credit afterwards. Several of these frauds would have been impossible without an accomplice, as was pointed out at the preliminary examination in the criminal proceedings.

(d) Continued falsification of bank pass-book, which has numerous erasures and alterations during a period of many months.

(e) Closing account by an entry purporting to be a transfer to another account. This latter seems to have been mostly Hancock's private banking account or his pocket.

Besides the above there were single instances on the following lines :

(f) A cheque was drawn to purchase a bank draft for remittance to a depositor who then lived in England. A letter was written stating the draft was enclosed, press copied, and entered in postage book, but it never went, and the cheque, which was to bearer, went to the credit of Hancock's own banking account. The depositor has proved for full amount of the alleged draft in this case.

(g) After the last audit to July 31, 1897, a fictitious credit of £200 was created in ledger without any entry in subsidiary books. Against this a cheque of £200 was drawn in favour of the broker who executed Hancock's orders here, and paid to him on account of Hancock's share purchasers.

There were many other methods of defrauding the society, but the examples given will give your Honourable Court a good idea of the difficulties encountered in the performance of our duties.

18. Before leaving the question of defalcations we would call attention to Annexure H, giving totals month by month, from which it will be seen that, in three individual months, more money was returned than was abstracted. Hancock on occasions appears to have drawn on his ill-gotten gains to repay the creditors of the society and keep the ball rolling with a view of subsequent operations. The returns for the later period will, when submitted, show similar entries. At the preliminary examination Hancock admitted having kept an accurate record of his operations, which he had destroyed to prevent publicity, and in a conversation with one of your liquidators said that his accomplice Moore had evidently secured more than he (Hancock) had previously thought was the case.

19. On 12th June, 1897, your Hon. Court made an order on petition of the liquidators, that all claims against the society should be filed before the first day of August, 1899.

This order was published as directed, and 374 claims in all had been filed to the date named viz. :

Bankers' overdraft	...	...	£7,406	13	8
Deposits—fixed	...	...	57,903	8	8
Deposits—floating	...	...	39,478	18	10
Subscriptions—investing members	...	...	3,466	18	1

Subscriptions — borrowing members ... ..	55 0 5
Office supplies, advertising fees due, &c... ..	70 11 6
	<u>£108,283 6 2</u>

Since which we have had submitted:

No. 375, Emma J. Powrie, investing member ... ..	£15 1 4
No. 376, "Cape Times," advertising, &c. ... ..	45 3 10

Making a total of... .. £108,243 11 4

As both those claimants appear to have been under erroneous impression that our notice referred to depositors only, the liquidators offer no objection to the admission of the two late claims.

20. For the purpose of calculating the position of the society the above total must be reduced by:

Claims reduced by Liquidators ... ..	£575 0 0
Proceeds of securities held by the Standard Bank of South Africa, in terms of judgment given on 2nd June, 1899 ... ..	3,830 9 6
	<u>£4,405 9 6</u>

Leaving to be dealt with later on ... .. £103,938 1 10

In the accounts prepared by us from the books of the society, and reported to the directors immediately prior to liquidation, the liabilities appear as:

Deposits ... ..	£53,033 1 2
Share account ... ..	8,906 11 0
	<u>£61,939 12 2</u>

Add—  
Offices expenses incurred but not brought to account 115 15 4  
£62,055 7 6

Which shows that the liabilities of the society, after allowing for £575 overclaimed, were understated to the extent of at least £45,713 8s. 10d., and probably some thousands more, as some of the creditors on subscription and deposit accounts have not proved.

In the report to directors already alluded to the assets of the society were stated as shown by the books:

1. Advance account ... ..	£49,905 17 8
2. Insurance recoverable ... ..	87 11 1
3. Property account ... ..	10,228 6 8
Total ... ..	<u>£60,221 15 5</u>
The assets should have been stated as ... ..	£55,403 16 7
Arrived at as follows:	
Advance account (mortgages) ... ..	£37,153 16 6
Landed properties sold... ..	13,762 7 7
Cash in Bank of Africa at date of liquidation ... ..	676 10 1
	<u>£51,582 14 2</u>

Deduct—	
Surplus on properties realised ... ..	14,632 3 10
Deficit on other properties realised ... ..	776 14 3
	<u>£15,408 17 13</u>
	<u>£47,727 4 7</u>

Still to be realised—	
Advance account, book value ... ..	7,676 12 0
Total ... ..	<u>£55,403 16 7</u>

So that the assets were overstated in the books to the extent of ... .. £1,817 18 10  
Add to this the discrepancy on liabilities given above ... .. 45,713 3 10

And we get ... .. £50,531 2 8  
as the minimum extent to which the books were falsified by the officers of the society.

21. The result of the liquidation to 31st July, 1899, is shown in Annexure C, from which it will be seen there was then a cash balance in hand of some £17,514 17s.

22. If your Honourable Court decide to authorise a distribution being made, regardless of any recurrences on directors or others, such distribution would be at the rate of 8s. 6d. (eight shillings and sixpence) in the £, leaving a balance of £400 to be carried forward for future distribution and adjustment of certain small claims under the trust account shown in Annexure C.

23. The only disputed claim, so far, is that of Mrs. Mar a E. C. Moor, who claimed £140 7s. 9d. from the society, her fixed deposit account in the books being a debit balance of £89 8s. 1d. Mrs. Moore owed the society a bond of £325, plus certain charges; and, on an adjustment being made, our claim against her stands £323 17s. 6d.

24. The property bonded was sold by auction, with consent of liquidators, and the net proceeds, £333 12s., paid to the South African Association, to be held in trust, pending a settlement. The account has from its commencement been falsified by J. W. Moore (bookkeeper to the society and husband of claimant), and the matter is one of some intricacy. Mrs. Moore has now written, through her attorney, offering to compromise the matter if the liquidators will pay her £100 in full settlement of her claim; but, without further proof as to the amount actually due, the liquidators regret they cannot see their way to any recommendation on the offer.

25. As the liquidation has now lasted some time, and many of the depositors and others are greatly inconvenienced by being unable to obtain payment of even a portion of their claims, liquidators have gone somewhat fully into the facts, in the hope that their so doing may facilitate your Honourable Court in deciding the principles to be adopted in conducting the further winding up of the society and distribution of assets in their hands.

26. In September last, your liquidators were approached by Mr. Paul de Villiers, as attorney of the directors of the society, with an offer of the sum of £5,351 2s. 10d. (five thousand three hundred and fifty-one pounds, two shillings and tenpence) sterling, as a compromise and in full discharge from all the claims on the part of creditors, shareholders, or depositors of the society. As the subject was before the Court in the matter of Langford v. the Directors of the Society, we could not see our way to place this before your Honourable Court specially at the time. Copy of the correspondence with Attorney Paul de Villiers on this subject is attached hereto, see Annexures D, E, F, and G.

27. In view of the amount of work already performed, the liquidators would now ask your Honourable Court to fix their remuneration for the period ended 31st July, 1899—some twelve months—and respectfully suggest that they be allowed the sum of £1,500 each in this respect.

28. The liquidators desire an Order of your Honourable Court on the following points:

- (a) Authority to admit the two claims mentioned in paragraph 4.
- (b) Any instructions on paragraphs 22 and 25, which your Honourable Court may see fit to make.

(c) To fix remuneration to liquidators for period ended 31st July, 1899.

Dated at Cape Town this 7th day of November, 1899.

G. W. STEYTLER,  
Secretary,

Colonial Orphan Chamber and Trust Co.  
HY. GIBSON,  
Secretary,  
South African Association.  
Official Liquidators.

#### ANNEXURES.

The report contains the following annexures:

Annexure A.—Reconstructed balance-sheet at 31st July, 1897.

#### LIABILITIES.

To deposit account ... ..	£83,364	
Subscription account ... ..	8,963	
		£92,327
Standard Bank—Overdraft with bankers ... ..		447
		£92,774

#### ASSETS.

By advance accounts... ..	£55,291	
Properties of society... ..	9,471	
		£64,766
Office furniture, ... ..	£53	
Premiums on fire insurance premiums due ... ..	61	118
		£64,884

Balance deficit.—W. J. Hancock's defalcation account, 1895-97 ... ..	31,929	
Less: M. and C. Fund balance as per B-S, July 31, 1895 ... ..	4,269	
Plus: Net profits, 1895-96 ... ..	61	
	4,329	
Less: Net loss, 1896-97 ... ..	290	4,039
		27,890
		£92,774

Management and Contingent Fund (reconstructed) for year ending 31st July, 1897:

To advertising, printing, &c....	£103
„ Auditors and directors' fees	272
„ Incidental expenses...	84
„ Office furniture, 10 per cent. depreciation ... ..	5
„ Pensions, Mr. Hinsbeock ...	101



„ Properties: Loss on sales...	307	
„ Salaries ... ..	570	
„ Suspense account, loss account, Williams ... ..	36	
	£1,480	
„ Dividend to shareholders ...	421	
	£1,901	
By application fees ... ..	£3	
„ Entrance fees... ..	50	
„ Fines ... ..	1	
„ Interest account, balance ...	896	
„ Pass-books and rules ... ..	2	
„ Properties, balance of rent account ... ..	657	
	£1,611	
„ Balance: Net loss ... ..	290	
	£1,901	

# ANNEXURE B.—EXCESSIVE BORROWING.

This is an extended table showing the state of the various accounts in each year from 1878 to 1897, and the amount by which the directors exceed the borrowing powers conferred upon them by rule 22. It will be seen that the amounts enormously increased during the Hancock period:

July 31, 1878 ... ..				
1879 ... ..	£2,438	11	5	1-3
1880 ... ..	3,777	5	2	
1881 ... ..	8,357	9	1	1-3
1882 ... ..	8,091	0	9	1-3
1883 ... ..	11,010	0	7	2-3
1884 ... ..	10,031	14	8	1-3
1885 ... ..	7,123	19	6	2-3
1886 ... ..	6,970	14	1	
1887 ... ..	11,135	0	10	
1888 ... ..	12,140	11	0	1-3
1889 ... ..	14,800	8	7	2-3
1890 ... ..	15,884	15	5	
1891 ... ..	16,422	8	5	
1892 ... ..	15,205	13	1	2-3
1893 ... ..	13,508	1	1	
1894 ... ..	14,451	5	5	1-3
1895 ... ..	14,907	14	8	1-3
1896 ... ..	18,933	14	0	2-3
1897 ... ..	40,186	11	2	3
	£245,377	1	2	1-3

# ANNEXURE C.—FIRST LIQUIDATION ACCOUNT COVERING PERIOD JULY 26, 1898, TO JULY 31, 1899.

## EXPENDITURE.

Standard Bank of South Africa (Limited).	
To proceeds of bonds held by Standard Bank of South Africa (Limited), and paid to them pending adjustment of their claims ...	£3,531

Liquidation expenses.	
Cost special auditors' report	£255
Salaries... ..	392
Advertising ... ..	142
General expenses, including postages and petties ...	22
Law charges, as per taxed bills of costs ... ..	450
	1,264
	5,094
Balance in Standard Bank ... ..	47,514
	£52,609

## RECEIPTS.

Assets realised—	
Cash found in Bank of Africa ... ..	£676
Mortgage bonds collected ...	37,153
Landed property sold ... ..	13,752
	51,582
Interest earned ... ..	9
Trust account—	
Amounts received from Hancock's estate for division among creditors — the larger portion will be available on the society's claim ... ..	£1,017
	£52,609

## MEMORANDUM.

The unrealised assets are—	
11 Mortgage bonds by 9 debtors held by the liquidators for a total of ...	£7,676
Guarantee Policies—	
Hancock ... ..	£1,000
Moore ... ..	500
	1,500
	£9,176

# ANNEXURES D, E, F, AND G.

Cape Town, September 9, 1899.

To the Official Liquidators of the Cape of Good Hope Permanent Building, Land and Investment Society, Limited (in Liquidation), Church-square, Cape Town

Dear Sirs,—The action which was brought against the directors of the Building Society, Langford v. the Directors, was, as you know, set down for the May term and part heard. The August term passed without advancing the case any further,

and now there appears no possibility of the case being heard until next November. Some of the directors are no longer young, and most of them are in business, and this protracted delay, through no fault of anyone, is most harassing and also most embarrassing to business. Under these circumstances, the directors would prefer to pay a sum of money, and thus put an end to all differences between them and former shareholders. They are, therefore, prepared to offer (of course without any prejudice whatever, should it be found that the offer cannot be accepted) the sum of £5,351 2s. 10d. sterling, upon receiving a discharge from all claims on the part of creditors, shareholders, or depositors of the Cape of Good Hope Building Society. This amount is based upon the last annual report submitted to shareholders. The reason why we are addressing you is, first, because you would be in a better position than the directors would be to obtain the necessary discharge; and, secondly, because the Court threw out the suggestion that a compromise might be arrived at between all the parties by the payment of a somewhat similar amount. Trusting you will see your way to bringing about this arrangement, which might require the Court's sanction, and thus putting an end to this protracted delay.—I have, &c.,

(Signed) PAUL DE VILLIERS,  
Attorney for the Directors.

#### ANNUAL REPORT FOR 1897.

Deposit accounts	...	...	...	£53,276
Two-thirds share of assets amounts to	...	...	...	44,594
				£8,681
Landed property	...	£10,421		
Realised...	...	13,752		
			3,331	
Balance	...	...	...	5,351

Assets ... .. £66,891  
South African Association, 6, Church-square, Cape Town, 13th September, 1899.  
Paul de Villiers, Esquire, Attorney, Cape Town.

Dear Sir,—We have already explained that the subject of your letter of the 9th inst. (written as attorney for the directors of the society) was being submitted by us to our counsel for his advice on the request made by you that we should place before the

Supreme Court for their consideration an offer made (without prejudice should it not be accepted) of the sum of £5,351 2s. 10d. (five thousand three hundred and fifty-one pounds, two shillings and tenpence) sterling in full settlement of any amount which might be found to be due by the directors to Mr. Langford or other creditors, shareholders, or depositors. We have now been able to consult with counsel and regret that upon his advice we cannot interfere at the present stage of affairs. The matter of Langford v. the Directors is still before the Court, and has been postponed for the production of further information and evidence as to the actual state of the Building Society's books, and further particulars of the defalcations by the late secretary. You will understand, therefore, that this is our reason for being unable to make a report to the Supreme Court on the subject at the present moment. We quite sympathise with the directors in so far as they may be embarrassed by the present position, but would point out that this position was not of our making, and we are doing our utmost to expedite the examination of the society's books. This is, however, a task of considerable magnitude, and requires great care and considerable skill on the part of the staff entrusted with the work. We trust, however, to be in a position to make at all events a partial or preliminary report by the 12th proximo, and if this should, unfortunately, prove impossible of attainment we think there is little doubt of our being in a position to make a report to the Court not later than the 1st November next. When our report is presented we are advised it may then be possible to bring to the notice of the Court the position in which the directors now find themselves and their desire to end the suspense now experienced. We can only repeat that no effort will be spared on our part to accomplish this.—Yours faithfully,

(Signed) H. Y. GIBSON,  
Official Liquidator.

South African Association, 6, Church-square, Cape Town. 13th September, 1899.  
Paul de Villiers, Esq., Attorney, Cape Town.

Dear Sir,—Referring to the conversation of this morning between yourself, Mr. G. W. Steytler, and the writer, when you assented to a copy of your letter of the 9th September last (although written without prejudice) and our reply of the 13th diem, being annexed to a report we are about to present to

the Supreme Court on the affairs of the society, we shall be glad if you will send us a formal consent to that course being adopted, as we understand your object is to bring the matter before the Court as quickly as possible.—Yours faithfully,

(Signed) H. Y. GIBSON,  
For Official Liquidators.

12, Wale-street, Cape Town,  
November 3, 1899.

Gentlemen.—In reply to yours of yesterday's date, I beg to state that I have no objection to my letter to you, dated 9th September last, being annexed to the report of the liquidators of the Cape of Good Hope Building Society, to be submitted to the Hon. the Supreme Court.—Yours faithfully,

(Signed) PAUL DE VILLIERS,  
The Liquidators, Cape of Good Hope Building Society, Cape Town.

**ANNEXURE H.—W. J. HANCOCK'S  
DEFALCATIONS, 1895-1897.**

1895.	Debit.	Credit.
August ...	£743 12 3	
October ...	1,136 8 10	
November ...	712 17 5	
December ...	793 11 8	
1896.		
January ...	434 0 10	
February ...	34 14 4	
March ...	£21 1 9	
April... ..	136 17 2	
May ... ..	876 17 5	
June .. ...	1,102 16 4	
July ... ..		418 5 8
August ...	3,132 3 8	
September ...	1,870 19 5	
October ...	2,181 4 9	
November ...	918 14 5	
December ...		1,631 2 5
1897.		
January ...		1,861 2 6
February ...	2,291 19 4	
March ... ..	1,866 16 4	
April... ..	6,257 18 7	
May ... ..	6,353 14 2	
June ... ..	2,719 6 9	
July ... ..	1,654 8 6	
	£35,890 3 11	£3,960 10 7
Less credit total ...	3,960 10 7	

K 3

Net amounts of  
W. J. Hancock's  
defalcation account ... .. £31,929 13 4

Dated at Cape Town, this 7th day of November, 1899.

G. W. STEYTLER, Secretary,  
Colonial Chamber and Trust Co ;

H. Y. GIBSON, Secretary,  
South African Association ;  
Official Liquidators.

The supplementary second report presented on the 9th December was as follows :

1. In view of the remarks which fell from your Honourable Court on 1st instant, the liquidators submit this short supplementary statement referring to the distribution of assets. Seeing that all the obligations of the society (except a few amounts due to outside creditors for office requisites, &c.) were incurred subsequent to the date when the directors exceeded the borrowing powers granted under the trust deed, the liquidators have felt some difficulty in the matter of the recognition of any other persons as creditors. In view of the fact that all who proved as depositors lent their money to the society after the directors had exceeded their borrowing powers, and that from the books it is impossible to distinguish between the different depositors in the way of showing exactly what deposits benefited the society, and what were the subject of the embezzlements it is extremely difficult, if not impossible, to apply the principle of subrogation.

2. Under the above circumstances the only equitable and feasible distribution appears to be that all depositors should be treated equally in the proposed distribution. In the case of the Standard Bank of South Africa (Limited), which has proved a claim on overdraft, the judgment of the Court of the 1st June, 1899, reserved to the bank the right to certain securities to the extent to which the bank can prove the society has benefited.

3. The society's account having been continuously in overdraft, it seems to us that any sums coming under this head paid to the bank from time to time must have gone primarily to reduce the society's overdraft, and consequently, so far as these securities are concerned, the award to the bank should be the amount such securities realised. For the remainder of their claims it is proposed

to rank the bank concurrently, their position not being distinguishable from that of depositors.

4. The amount to be dealt with is:

Held in trust by Standard Bank	£3,830 9 6
Cash balance held by liquidators	47,514 17 0
	<hr/>
	£51,345 6 6

5. Following the lines indicated above, we would propose that your Honourable Court authorise a distribution as follows:

Trade creditors—For advertising office supplies and the like	£125 15 4
Standard Bank of South Africa—Claim on overdraft (subject to adjustment for interest)	7,408 13 8
On which is awarded:	
Proceeds of securities	3,830 9 6
Leaving	3,578 4 2
To rank as a concurrent claim	3,830 9 6
Other claims:	
Standard Bank	3,578 4 2
Deposits, fixed	57,803 8 8
Do. floating	39,478 18 10
	<hr/>
	100,860 11 8

A dividend of 8s. 6d. in the £ (leaving open the question of the directors' liability)	42,865 15 0
Liquidators' commission	3,000 0 0
Balance to next account	1,523 6 8
	<hr/>
	51,345 6 6

Your liquidators are not now in a position to give full details of all the items included in Hancock's defalcations, and under the circumstances already referred to it is doubtful whether any useful purpose could be served by the completion of the expensive investigations which would be necessary. They would, however, remark here that the labour of investigation has been very heavy, and as mentioned in the second report the work of unravelling Hancock's operations during the last few months prior to his absconding is already proving more arduous than the work already done. They deemed it best therefore to report to your Honourable Court at the present time in the hope that the Court might grant an order authorising a distribution of the assets. Many of the depositors are in poor circumstances, and find themselves unable to

borrow on their claims owing to the failure on the part of possible lenders to understand the legal position regarding claims.

Dated at Cape Town this 8th day of December.

G. W. STEYTLER, Secretary,  
Colonial Orphan Chamber  
and Trust Company;  
H. Y. GIBSON, Secretary,  
South African Association;  
Official Liquidators.

Mr. Graham: It has already been decided that deposits are included in the borrowed sums referred to in rule 22. *In re Cape of Good Hope Permanent Building Land and Investment Society* (8 Sheil, p. 360). Directors are personally liable for any amount borrowed in excess of their borrowing powers. *Chapleo and wife v. The Brunswick Permanent Building Society* (6 Q.B.D., p. 696).

[De Villiers, C.J.: In that case it was clear that the directors had knowledge of the excessive borrowing.]

Hancock's defalcations were occasioned by his receiving and appropriating deposits which were in excess of their borrowing powers.

[De Villiers, C.J.: Supposing Hancock received these amounts without the directors being reasonably able to discover the fact can you say that they are liable?]

Yes, because they have exceeded their borrowing powers.

[De Villiers, C.J.: Yes, perhaps, to a slight degree. But if there had been no defalcations there would have been sufficient assets. You have to show that the deficiency was caused by the excessive borrowing. Here it was caused by the defalcations.]

Immediately borrowing powers are exceeded directors are liable to the extent of the excess. *Chapleo's case* (p.p. 700, 716.)

[De Villiers, C.J.: Independently of defalcations, would the borrowing powers have been exceeded at the time that the plaintiff made his deposit?]

The plea admits that the loan account and deposit account together exceeded two-thirds of the amount secured by mortgage.

H. Gibson, recalled by the Court said that at present, owing to the state of the books, it was difficult to give a clear statement of the position at the date of plaintiff's first connection with the society.

Mr. Graham: *Cross and others v. Fisher and others* (1892, 1 Q.B.D., p. 467; 65 L.T. p. 114). In that case the borrowing was by means of deposit.

[Maasodorp, J.: Was not the Statute upon which the judgment was based passed with the object of making directors liable who were not liable before.]

Mathew, J., was of opinion that they would have been liable under the common law. *Wurtzburg, The Law Relating to Building Societies* (p. 78). *Bridges v. Williamson* (6 Q.B., p. 276); *Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co.* (29 Ch.D., p. 902); *Re National Permanent Benefit Building Society, ex parte Williamson* (5 Ch., App., Cap., 339.)

[Buchanan, J.: The Blackburn Society had no borrowing powers.]

The principle is the same where there has been an excess of the borrowing powers. There has been no ratification of the excessive borrowing.

Further argument was postponed.

*Postea* (9th December.)

De Villiers, C.J.: Has the plaintiff proved in the liquidation of the society?]

Mr. Upington: He proved but his proof was refused by the liquidators because his deposit had been made after the borrowing powers had been exceeded; subsequently he brought this action, and ultimately he was allowed to prove as a concurrent creditor in the liquidation.

[De Villiers, C.J.: A director can be sued as an unauthorised agent who has held out an authority which he had not and on the ground that there is no claim against the principal. But if the plaintiff proceeds against the principal his right against the agent disappears. He cannot sue both the directors and the society.]

If only part of his claim is good against the society he can recover the balance from the directors.

Sir H. Juta: (1) As to the authority of the directors. If the society has given them as agents authority or instructions which are so dubious that more than one interpretation can be given to them and the directors have *bona fide* given a possible interpretation to them the society cannot contend that it is not liable. (2) If it is held that the directors have exceeded their instructions the question of the measure of damages and the question of subrogation will arise. On the one hand the plaintiff contends that the directors had no authority and on the other hand he claims against the society. The English authorities do not apply to this case since they depend upon statutory, either 6 and 7 Will IV. C. 32 or

37 and 38 Vict. C. 42. Under the former statute there are no borrowing powers at all in the society and therefore there can be no ratification; under the other statute the borrowing powers are limited by statutory regulation and there can be no ratification by a majority.

[De Villiers, C.J.: It would be better to argue the plea in abatement first.]

If the society is liable, the directors are not. If an agent has exceeded his authority the person suing him must be put into the same position in relation to the agent as he would be if the contract were a valid one made by the principal. *Wright v. Williams* (8 Juta, p. 166.) The *causa causans* of this action is the defalcations of the secretary and if the over-borrowing had been authorised by the shareholders, the society would nevertheless have been unable to meet the plaintiff's claim owing to the defalcations: he could therefore not recover from the directors. He can only claim to be put in the same position as if the directors were the society: but he cannot recover from the society because it has no money. The principle of subrogation is that a man cannot derive some benefit from another's wrong and at the same time take advantage of it. If it can be shown that the principal has derived benefit from the agent's excess of authority the agent cannot be held liable for it. The whole life of the society has been derived from this excess of authority: the interest, the deposits and the dividends have all been paid out of excess borrowing. The plaintiff cannot hold both principal and agent liable.

[De Villiers, C.J.: Cannot the balance, after payment of a dividend by the society, be recovered from the directors. The plaintiff may say that to the extent of the dividend the society has benefited by his deposits.]

The plaintiff cannot say that the society is a principal up to the amount of the dividend. He might say it was a principal for two-thirds of the amount and not one-third. The defendants had authority to borrow up to two-thirds and to that extent the plaintiff cannot complain.

[De Villiers, C.J.: When they borrowed from him, there was already an excessive borrowing; therefore the whole of the borrowing from him was illegal.]

The depositors must be taken as a whole. Supposing that the total of deposits amounted to £12,000, the directors would be empowered to borrow £8,000. The depositors could not contend that the directors were

liable for the whole of the £12,000, they could not claim more than £1,000 from them. The plaintiff, however, has not claimed merely for the difference, he has claimed against the directors for the whole amount as if they were the only debtor. But he has in the first instance claimed against the society as his debtor, even if he were to claim against the directors afterwards for the difference it could only be on the ground that the society was not the debtor. He cannot blow hot and cold.

[De Villiers, C.J.: The plea in abatement does not go as far as that.]

[Maasdorp, J.: If the plaintiff proceeded against the society and recovered nothing, could he not then proceed against you?]

Yes, but he could only recover from us what he would be entitled to recover from the Society if the contract with it had been a valid one. That is the measure of damages. As the society was insolvent at the time, the plaintiff can recover nothing from us. *Wurtzburg*, p. 96. *In re National Coffee Palace Company* (24 Ch. D., p. 367; 53 L. J. Ch., p. 67); *Meek v. Wendt & Co.* (21 Q.B.D., p. 127).

[De Villiers, C.J.: There is no doubt as to the English law, the only question is whether what is the statutory liability of directors in England under the Act of 1874 is the common law liability in the Colony.]

I submit that that is not our common law. The shareholders knew the rules of the society and ought to have known its position. The plaintiff was a shareholder. The deficiency being due to the defalcations the amount of the defalcations should first be discovered. In *Wright v. Williams* (8 Juta, 166) it was clearly laid down that a creditor cannot be in a better position as against the agent than as against the principal.

There is also the further question as to whether there has been any excess of authority at all. None of the reported cases is similar to this one except the case of the *Blackburn B.B. Society v. Cunliffe Brooks & Co.* (29 Ch. D., 902), but there the directors had no authority to borrow at all.

The Court intimated that it was not necessary to hear counsel for the defendants upon the further questions at present.

*Postea* (11th January, 1900).

Mr. Graham in reply to the Court stated that the liquidators had provided for a dividend of 8s. 6d. in the £ and that they believed a further dividend would be paid

making in all 10s. 4d. in the £. The total amount of defalcations was about £61,000, and the deficiency was a little over £50,500.

[De Villiers, C.J.: The point upon which the Court wishes to hear Mr. Graham is the question as to what is really the measure of damages. We are inclined to agree with the view that if the society had been able to pay, but was not legally bound to do so, in that case the directors would be liable for the whole amount. In this case, however, the society can not pay more than 10s. 4d. in the £, and the question is, can the directors be held liable for more than 10s. 4d. in the £?]

Mr. Graham: If it is the fault of the directors that only that amount can be paid they are liable.

[De Villiers, C.J.: There is no charge of negligence in the pleadings. Moreover the plaintiff has made his claim upon the society and also claimed upon the directors.]

The claim was originally made upon the society as the directors were looked upon as the authorised agents of the society, but the society repudiated it; then we claimed against the directors. It is questionable whether the award made by the liquidators is a valid award, or whether the depositors cannot claim the full amount from the directors. In *Chapleo's* case the directors were held liable. Although the directors there were liable under a statute, the statute was only declaratory of the common law.

[De Villiers, C.J.: The judgment of Bowen, L.J., in *re National Coffee Palace Company* is very much against you.]

In that case the society was insolvent, here, if the illegal borrowings are set aside, the society was solvent when the deposit was made.

[De Villiers, C.J.: What damages has the plaintiff sustained?]

Twenty shillings in the £, for if the society were liable a call could have been made upon the shareholders and he would have recovered the full amount of his deposit. *Wright v. Williams* appears to be in favour of the plaintiff. The directors professed to act for the society, but had no authority to act: therefore they are liable.

[De Villiers, C.J.: Is there any evidence as to what a call would have realised?]

No. In their first report the liquidators recommended a call of £20 a share, which they thought would have been sufficient. *Cross v. Fisher* (66 L.T. p. 111) is very much in the plaintiff's favour and Matthew J. said that directors would have been liable under the Common Law.

[De Villiers, C.J.: That was only an *obiter dictum*: the Court of Appeal did not go upon the grounds. In *Chaplev's* case the action was instituted against both the society and the directors: the court held that the society was not liable and therefore the directors were liable. You must elect as to whom you will proceed against.]

We have no claim on contract against the society: if it is liable, on the doctrine of subrogation, to the extent to which it has been benefitted, then the measure of damages is the balance of the full claim.

[Buchanan, J.: But the doctrine of subrogation means that although the contract was not originally made with the society it has received the benefit of it and has ratified it and taken liability. If the society is liable on that doctrine the directors would not be liable.]

We cannot say whether the plaintiff will get what the liquidators award: the sanction of the court has not yet been obtained. The directors cannot shelter themselves behind their own wrong even if they are not sued for negligence. If the directors had not exceeded their borrowing powers the call recommended by the liquidators would have been allowed. *Re Cape of Good Hope Permanent Building Society* (8 Sheil, p. 360). It was said there that if the rules of the society had been properly carried out it would have been impossible for it to have become insolvent.

[De Villiers, C.J.: There is one point raised by Mr. Graham which requires some answer. His contention is that if the company had been liable to pay this amount it would also have been able to pay because the shareholders could have met this £500.]

Sir H. Juta: But there is nothing to show that the shareholders could have paid the full amount of the liabilities. A call if made would have gone into the funds of the society. But it is not clear that a shareholder in a Building Society can be made liable to a call. In the original application with regard to this society the court very carefully refrained from deciding whether a call could be made. It was intended that the society should be registered as a limited liability company but the intention was not carried out and the rules do not provide for a call (8 Sheil, p. 367.) There is no authority in English law upon this point. The deficiency is not caused by the excess of borrowing powers. The society would be perfectly solvent were it not for the defal-

cations, but this action is not for negligence and therefore the directors cannot be held liable for the defalcations of the Secretary.

Mr. Graham, in reply, admitted that the plaintiff had made a second claim against the society after the repudiation of the first claim.

*Cur ad vult.*

*Postea* (January 12th, 1900).

De Villiers, C.J.: The plaintiff seeks to recover from the directors of the Cape of Good Hope Permanent Building Society, in their individual capacity, the sum of £500, being the amount of two deposits made by him with the society. At the date of each deposit the amount of money borrowed by the society, including sums received on deposit, was in excess of two-thirds of the amount secured to the society by means of mortgages passed in favour of the society. The plaintiff alleges that the acceptance of the deposits from him was wrongful and illegal, as being contrary to one of the rules of the society, and he claims the right on that ground to recover back the money paid by him. As an alternative count the plaintiff alleges that the defendants wrongfully, unlawfully, falsely, and fraudulently represented to the plaintiff that they were authorised to borrow the money, and that as he was induced by such false representations to lend the money he is entitled to recover it back. It may be stated at once that there exists no ground whatever for charging the defendants with fraud. The failure of the society was caused by the gross dishonesty of the secretary, Hancock, whose defalcations amounted to upwards of £60,000. The society having been ordered to be wound up, the plaintiff has proved his claim against the liquidators, who report that if all the creditors are paid *puri passu* there will be available the sum of about 10s. in the £ for the creditors, including the plaintiff. It is clear that in case he should receive from the liquidators any portion of his claim he will not be entitled to recover from the defendants—if he succeeds in the present action—more than the balance due on his claim. The only ground on which he can succeed against the defendants is that he deposited the money with them upon their representation that they were authorised to accept it on behalf of the society, and that he has sustained damages by reason of having deposited the money with the society in the belief that the defendants

were the duly authorised agents of the society in accepting the deposits from him. The main difficulty in his way is that he has proved his debt against the society, and that his proof of debt has been recognised by the liquidators. Having so proved he cannot aver, as against his own act, that he is not entitled to proceed against the society by reason of the defendants not having been duly authorised to accept the deposits. But I have no doubt that he would be willing to withdraw his proof and confine himself to his action against the directors if he were assured that he would recover from them the full amount of the deposits instead of a dividend of only 10s. in the £. I proceed, therefore, to the consideration of the questions: firstly, whether the acceptance of the deposits by the defendants was unauthorised; and, secondly, if it was unauthorised, what the measure of damages to be awarded to the plaintiff should be. In considering these questions, I shall assume that the plaintiff has withdrawn his proof in liquidation, and proceeds against the defendants alone. The answer to the first question mainly depends upon the construction placed on the 22nd rule of the society. That rule provides that "the Board of Directors shall have power to borrow any sum for the purpose of the society to advance to their members, either from their bankers or any other source, not exceeding two-thirds of the amount secured to the society by mortgages from its members." But for the 75th\* rule, to which I shall presently refer, there would, in my opinion, have been no doubt that the acceptance of a deposit would be an exercise of the directors' borrowing powers, and that those powers are subject to the two-thirds limit. To persons conversant with the phraseology of the Roman law the term "deposit" does not convey the meaning of a loan. The "depositum" was a contract by which one person gave another a thing to keep for him gratuitously, and to return it on demand. It was distinguished from *mutuum*, because the ownership and the legal possession remained with the depositor. The so-called "deposits" made with the society were in the nature of a "*mutuum*," that is to say, they were loans of money made to the society on condition that the same amount, but not the same coins, should be

restored to the lender, and that interest at a certain rate be paid to the lender for the use of the money by the society. This view is supported by the definition of the word "depositors" in the 79th rule as meaning "persons who lend money at interest to the society." To all intents and purposes then the directors borrowed the money on behalf of the society from "another source" than their bankers. On reference to the English Act of 1874, which was in force at the time of the establishment of the society, I find that the term "borrowing" is there used in exactly the same sense. The 15th section enacts that with respect to the "borrowing of money" by societies under this Act the following provisions shall have effect: "(1) Any society under this Act may receive deposits or loans, at interest, within the limits in this section provided. . . . (2) In a permanent society the total amount so received on deposit or loan and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members." But it is contended, on behalf of the directors, that the effect of the 75th rule was to give them an unlimited power of borrowing by way of deposit. This rule provides that "the directors may receive from time to time deposits from shareholders and others of not less than 2s. 6d., upon which 5 per cent. interest will be allowed. . . . Shareholders to have the preference." If, however, the acceptance of deposits amounts to borrowing, this rule must be read by the light of the 22nd rule, and cannot be construed as qualifying its express provisions. The amount of deposits receivable under the 75th rule must be restricted to the limit imposed on the borrowing powers of the directors by the 22nd rule. The provision that "shareholders are to have the preference" tends to show that the power of receiving deposits was not intended to be indiscriminately exercised, and it, at all events, does not assist the construction contended for by the defendants. It is unfortunate that the two rules were so detached and far apart as not to direct the directors' attention to the intimate connection there was between them. It appears that from the earliest establishment of the society the directors have ignored the connection between the two rules, and have regarded the 22nd section as referring only to borrowing by other means than the acceptance of the deposits. It does not appear that legal

[\* NOTE.—The numbers given are those appearing in the old Book of Rules.—R.E.P.]



advice was ever taken on the point, but if, as men of business, they had given their attention to the matter, they must have found that the reason for the restriction is equally applicable whether the borrowing is by way of deposit or by way of overdraft on their bankers. There would no doubt have been some delay at first in obtaining funds to make extensive advances on mortgage to members, but that would have been a lesser evil than diminishing the security of the shareholders and of depositors. Moreover, if the limit imposed by the 22nd rule had been strictly enforced, it would have been impossible for Hancock, the secretary, to embezzle the large sums which he is proved to have embezzled. In my opinion the directors must be held to have exceeded their powers as agents of the society in allowing any deposits to be received after the borrowing limits had been reached. They allowed the secretary to receive the money and entrusted him with depositors' pass-books on the face of which the signature of the secretary or a director is held out as sufficient. The plaintiff having lent £ 00 at a time when the society could not borrow it, is entitled, on the principle laid down by this Court in *Wright v. Williams* (8 Juta, 168), to recover from the directors such damages as he can be proved to have sustained by reason of the society not being legally bound by the defendants' unauthorised act. The second question then arises, how are these damages to be estimated? Should the measure of damages be the amount actually paid by the plaintiff to the secretary, or should the measure be the loss sustained by the plaintiff by reason of his having no recourse against the society with which at the time of making the deposits he believed he was contracting? If there had been any proof of fraud on the part of the defendants, the Court might have been justified in treating them as if they had received the money for their own use, and consequently ordering them to repay it to the plaintiff. In the absence, however, of fraud it is impossible to impose upon the defendants a liability for a greater amount than the society itself would have been able to meet if the borrowing had been duly authorised. In the case just cited it was pointed out that the ground of an agent's liability in respect of an unauthorised contract made by him on behalf of his principal with a third party differs somewhat in our law from the

ground on which a similar liability rests under the English law, but it does not follow that the measure of damages is different. Under either system the person dealing with the agent cannot claim to be placed in a better position than if the agent had full authority to act. The true principle for measuring the damages cannot be better stated than in the following words of Bowen, L.J., *re National Coffee Palace Co.* (24 Ch. Div., 374): "It is said, sometimes, that the agent promises that the fact which he asserts exists. That is not strictly correct. He affirms that the fact exists, and promises that if the fact does not exist the other party shall be put in as good a position as if it did exist. Another way of looking at it is that there is a promise made by the agent to indemnify the other party against any damage which he may incur by acting on the representation. The latter view is a reasonable one, but it is not that which was acted upon in *Spedding v. Nerall*, and *Godwin v. Francis*. It was held in those cases that the person who contracts with the agent is entitled to be put in the same position as if the representations made were true. Mr. Boli argued that we ought to look at it as if the contract were binding on the principal, and to consider what would have been recoverable from him in an action for breach of it. The expression 'recoverable' is ambiguous; it cannot mean recoverable in the sense of the amount which a jury would have been directed to assess for breach of the contract. If so the plaintiff would be getting as much damages against the agent for an insolvent as against the agent for a millionaire; but that clearly does not represent the loss to the plaintiff in each case. The fact is that an agent does not promise that his principal shall carry out the contract, but only that he shall be bound by it. What the company has lost is a binding contract, whether also it was a valuable contract must depend upon the character of the contracting party." The reasoning of this Court in the case of *Wright v. Williams* is not inconsistent with the views of Bowen, L.J. The Court there differed, as Bowen, L.J., does, from the view that the agent promises that the authority which he professes to have does in fact exist. The Court held that the agent for a principal, from whom he had no authority, is liable on the contract, but in estimating the damages which the other contracting party can claim, the Court cannot lose sight of the fact that he intended to give credit to

the principal and not to the agent. If the principal is able but not liable to pay, the agent must make good the loss, but if the principal is neither able nor liable to pay, there is no loss to make good. The evidence in the present case, so far as it goes, tends to show that the society was in no better position at the time when the plaintiff made his deposits than it was at the time when it was ordered to be wound up. It is said that the unadvanced members, of whom the plaintiff was himself one, would have been able to repay his deposits, but on this point there is no evidence. The difficulty still remains that the plaintiff has proved his claim against the society, and that the liquidators, as representing the society, have recognised the validity of his claim. The very basis of his action against the directors is that he has no claim whatever against the society, and therefore so long as his proof of debt stands undisputed he cannot succeed in his present action. There must be absolution from the instance, each party to pay his own costs.

Buchanan, J : The plaintiff in April, 1898, deposited a sum of money with the Building Society. In July the society was placed under liquidation. The plaintiff alleges in this action that at the time of the deposit the directors had exhausted the borrowing powers conferred upon them by the 22nd rule of the society, that they had unlawfully accepted this deposit from the plaintiff, and that the plaintiff had in consequence lost his money, and he therefore claimed to recover it from the directors. There was an alternative claim based on the ground of fraudulent misrepresentation but this may at once be dismissed, as no evidence was led of any fraud or negligence by the defendants, and indeed that portion of the declaration has not been relied upon. To succeed on these pleadings it is evident that plaintiff must show that he had lost all claim against the society. The statutory liability imposed by the English Building Society's Act of 1874 upon directors, does not avail here, and most of the cases relied upon to support the plaintiff's claim are founded upon the terms of that Act. We must therefore decide this case on the ordinary principles of law. Assuming that the directors stood in the position of agent for the society, the excess of authority to borrow would not necessarily dispose of the case. I did not sit in the case in which the construction of the 22nd rule was first considered, and from which case it may be gathered that the Court was of

opinion that deposits at interest must be included in reckoning the amount of money borrowed but on full consideration I am prepared fully to concur in that view, and with the construction which His Lordship has given to the rule in the judgment just delivered. But granting that the borrowing powers were exceeded the society could not take the benefit of the money so borrowed and repudiate all responsibility for the same. The official liquidators, whose reports have been admitted in evidence, have fully investigated the dealings of the society, and they acknowledge that the society has benefitted by the deposits of the plaintiff and others. They are not prepared to state the exact extent of this benefit, but I see that when the liquidators' report was before the Court for confirmation it was suggested that the whole amount went into the pocket of the society and it was thereafter embezzled therefrom by the Secretary. At any rate the liquidators have admitted the claim made on the society by the plaintiff, and propose to distribute the assets to him equally with the depositors. I think it clear that the plaintiff cannot enforce his claim against both the society and against the directors personally. I also concur with the view stated by the Chief Justice as to the measure of damages, consequently if the plaintiff accepted his dividend from the society, even if he should be entitled to a judgment against the directors, the verdict would be a barren one, as it would be for nominal damages only. The effect of this action is to attempt to make the directors personally liable for the frauds of the secretary: but it must be remembered that the secretary was the servant of the whole body of members, including the plaintiff himself, and not the agent of the directors only: and in the absence of fraud or negligence on their part, which is not relied upon in this action, the directors personally cannot be held liable exclusively for the default of the agent of the whole body. Coming back to the simple issue on which the case must be decided, I concur in granting absolution, as it has not been proved that the plaintiff has, through any default of the defendants, lost his claim against the society.

\* [Plaintiff's Attorney, Messrs. J. & H. Reid & Nephew; Defendants' Attorney, Paul de Villiers.]

\* NOTE.—Maudorp J., did not sit on the 11th and 12th January.

## SUPREME COURT (IN CHAMBERS.)

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

REGINA V. BOTHA. { 1899.  
                                    { July 4th.

Criminal appeal—Expiration of statutory period—Leave refused.

This was an application for leave to set down for hearing an appeal from the conviction and sentence of the applicant by the Assistant Resident Magistrate of Sterkstroom. The applicant was tried for perjury and an appeal noted on the 19th May, 1899.

The affidavit of J. B. Kayser, his attorney, set out that on the 10th June, a letter reached him with instructions to appeal but the papers were not sufficiently in order to enable him to get the case down for hearing on the 12th June and to give the Attorney-General the necessary forty-eight hours notice. On the 24th June set down for hearing on the 12th July was tendered to the Registrar, who refused to accept it. Dependent thereupon telegraphed to the applicant's Attorneys at Sterkstroom and was informed that the accused understood he was entitled to six weeks in which to appeal, and consulted a legal practitioner in Queenstown before giving the necessary instructions to his Sterkstroom agent to proceed with the appeal, and that the delay had thus been caused.

Mr. Searle, Q.C., for the applicant.

Mr. Ward for the Crown.

De Villiers, C.J., said: The Court must observe its previous decision, not to allow any applications of this nature unless special circumstances are shown to justify an extension of the time within which appeals can be prosecuted. In the present case the reasons given for the delay are very unsatisfactory. It is said that it was necessary for the appellant to consult a legal adviser, but a legal adviser could have been consulted within the time, and the papers could have been sent to Cape Town in time for the next sitting of the Court. The application must therefore be refused.

Buchanan and Maasdorp, J.J., concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buismanné.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA V. PETERS. { 1899.  
                                    { July 12th

Maasdorp, J., said a case tried by the Resident Magistrate of Stellenbosch, had come before him for review. The accused was charged with theft, and pleaded guilty. He was found guilty, and was sentenced to receive fifteen lashes. It was only in cases where there had been a previous conviction within two years of the subsequent conviction, that a Magistrate could impose lashes for theft. In this case the previous conviction was five years before the subsequent conviction, and the sentence was illegal and must therefore be quashed. The case would be sent back to the Magistrate to pass a legal sentence, and the Magistrate, in passing sentence, should take into consideration the period of imprisonment which the accused had already suffered.

### ADMISSIONS.

Johannes Christoffel Stegmann was admitted as an advocate.

Herbert Kennelly Dell was admitted as attorney and notary.

### REHABILITATIONS.

The following insolvents were rehabilitated: Jacobus Hendrik Malan, Matthys Michiel Basson, and Heinrich Grunder.

### PROVISIONAL ROLL.

#### HASSERIS V. ISAACS.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £22 4s. 6d., and that the property specially hypothecated be declared executable.

The defendant was in court, and consented to judgment, which was entered accordingly.

#### HAYBITTEL V. BACE.

Mr. Molteno applied for provisional sentence upon a mortgage bond for £400, and that the property specially hypothecated be declared executable.

Granted.

## VAN DER BYL &amp; CO. V. LAX.

Mr. Molteno applied for provisional sentence upon two promissory notes, one for £60 4s. 1d. and the other for £92 1s. 6d., less £40 3s. 11d. paid on account.

Granted.

## COLE V. KORTE.

Mr. Close applied for the provisional order of sequestration of the defendant's estate to be made final. The defendant appeared in person.

Granted.

## ALBERTYN V. SWART AND OTHERS.

Mr. Maskeu applied for provisional sentence on a mortgage bond for £450, and that the property specially hypothecated be declared executable.

Granted.

## KEEP BROS. V. KENNEDY.

Mr. Buchanan applied for the final adjudication of the defendant's estate.

Granted.

Subsequently Mr. E. R. Syfret was appointed provisional trustee with power to carry on the business and collect outstanding.

## VAN WYK V. GREEFF.

Mr. Uppington applied for provisional sentence upon a mortgage bond for £1,000, and that the property specially hypothecated be declared executable.

Mr. Benjamin appeared for the defendant, who claimed £250, and £21 for damages, and items of £30, £32, and £40 for a cart, produce, and other articles.

The plaintiff repudiated defendant's claims.

The Court held that the case was not one for provisional sentence. The application was refused, plaintiff to go into the principal case with leave to include in his declaration certain items not specified in the summons; costs to abide the result.

## FLETCHER'S WHOLESALE AND OTHERS V. DE WILDT.

Mr. Brown applied for the final adjudication of the defendant's estate.

Granted.

## KLINK V. OCTOBER.

Mr. Buchanan applied for provisional sentence on a promissory note for £124, less an amount paid on account.

The Court granted provisional sentence for £81.

## GOTT AND CO. AND OTHERS V. DANVERS AND JOYNT.

Mr. Uppington applied for a final adjudication of the defendant estate.

Granted.

## VERSTER V. SCHELHASE.

Mr. Uppington applied for a decree of civil imprisonment upon an unsatisfied judgment for £320 11s. 6d.

Mr. Brown applied for the sequestration of the estate.

It appeared that application for an order of sequestration had been made to the Chief Justice in Chambers and refused. The Chief Justice now said that he would accept the surrender and the application for civil imprisonment was accordingly refused.

## MILLER V. HULBERT.

Mr. Buchanan applied for provisional sentence upon a mortgage bond for £600, and that the property specially hypothecated be declared executable.

Granted.

## TWENTYMAN AND CO. V. LOUW AND SMIT.

Mr. Molteno applied for provisional sentence upon a promissory note for £17 19s. 11d.

Granted.

## ENGBRECHT AND CO. V. VAN ZYL.

Mr. Jones applied for a decree of civil imprisonment upon an unsatisfied judgment.

Granted.

## TABORSKI AND CO. V. BROOKS.

Mr. Buchanan applied for judgment under Rule 329D for the sum of £42 6s. 11d., for goods sold and delivered. Defendant's husband appeared and consented to judgment, less £17 on the ground that £17 was due by him and not by the defendant, and £7 was not yet due.

The Court gave judgment as prayed, with costs.

BELL AND MOORE V. SWART. { 1849.  
July 12th.  
Aug. 1st.

Promissory note—Prescription—Part payment of debt—Acknowledgment of debt—Lord Tenterden's Act—Consideration.

*Part payment of a debt, after it has been barred by prescription,*

*does not take the cause of action out of the operation of the Prescription Act 1861*

*An acknowledgment of a debt does not take the cause out of the operation of the Act unless made in some writing signed by the party chargeable thereby.*

This was an application for provisional sentence upon a promissory note for £63 11s. 11d. less £5 7s 7d. paid on account. The note was dated 15th November, 1890, and was payable one month from date. On the back was endorsed :

"December 22.—By cash, £5 17s. 7d."

The defendant filed an affidavit alleging that the promissory note he was summoned for was over eight years old and therefore he was not liable for the same by prescription.

That he never paid anything on account of the said promissory note, and the endorsement thereon of £5 17s. 7d. on the 22nd December, 1898, was not made by defendant or at his request.

On behalf of the plaintiffs the following affidavit was filed by H. I. Dempers one of the partners of the firm of Dempers & Van Byneveld, plaintiff's attorneys :

1. That on the 10th instant we received an affidavit made by defendant, disputing the debt sued on.

2. My firm had no time to communicate with our clients, by letter, and we advised our clients by wire that the claim would be disputed on the ground of prescription, in answer to which I received the wire hereunto annexed marked A:—Rosa Catherine Bell makes oath and says am plaintiff in case Bell and Moore against Hendrik Swart. Made settlement with Swart on 22nd December, 1898, as follows Swart's shop account £20 19s. 11d., credit by work done to building £26 17s. 6d., balance to his credit £5 17s. 7d. This credit he asked to be deducted from promissory note in dispute. This was marked on the back of note: he said at the time that he could not pay whole promissory note and asked me to let him off the balance. This I declined to do. Swart has since receiving summons again admitted the debt, and made the same proposal which I did not accept.

Mr. Miller for the plaintiff: The part-payment takes the case out of the Statute of Limitations, even though the prescriptive period has expired,

Mr. Howel Jones for the defendant: An acknowledgment of debt after the prescriptive period has run may be binding as creating a new debt, but it does not revive the old debt. *Leake's Elementary Digest of the Law of Contracts*, p. 988.

[Buchanan, J.: Must not the acknowledgment be in writing?]

Yes, under Lord Tenterden's Act (9 Geo. IV. C. 14, section 1) which is made applicable by Act 6 of 1861, section 8. The creditor then must rely on the new promise not on the original debt. It appears from *Leake* (p. 99), citing *Latouche v. Latouche* (3 H. and C., p. 576), that a promise may be made after the expiration of the period of limitation. Where a part payment is made whilst the period of limitation is running, that is an acknowledgment that the whole debt is due, but where made after such period it does not acknowledge anything more than the right to claim the amount actually paid. In any case a payment, in order to take the case out of the statute, must be made under such circumstances as to amount, in fact, to an admission that a larger debt was then due and a promise to pay the residue. *Leake* (992).

[De Villiers, C.J.: Payment in this case is only consistent with an acknowledgment that the debt was due.]

There was no actual payment, there was merely a set-off of money due to the defendant.

[De Villiers, C.J.: *Latouche v. Latouche* is not in point. There the question was one of consideration.]

The point was discussed in *Nel's Executors v. Nel* ("Cape Times" August 1891).

*Postea* (August 1st).

De Villiers, C.J., said: The promissory note in the suit became payable on the 15th of December, 1890. On the back there is an endorsement, made by or on behalf of the plaintiff himself, dated 22nd December, 1898, giving credit for a part payment on that day of £5 17s. 6d. This was the balance of an account owing by the plaintiff, and he states that the amount was deducted from the note at the request of the defendant, who at the time stated that he could not pay the whole note. The plaintiff further states that since service of the summons the defendant has again admitted the debt, but he does not state that the admission was in writing. The defence raised is that the debt is barred by prescription, and the reply is that there was an acknowledgment of debt or, at all events, a part payment which

takes the cause of action out of the operation of Act 6 of 1861. Under the eighth section of the Act the effect of the alleged acknowledgment or payment must be judged of according to the law of England. The acknowledgment, not having been made in some writing signed by the defendant, cannot be relied upon as taking the case out of the operations of the Act. This is clear from the first section of Lord Tenterden's Act. But the proviso to that section adds that "nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." The question therefore to be decided is whether the payment, on account of the debt, made by the defendant seven days after the debt had been barred by prescription prevents the operation of the Act. On principle, as I remarked during the argument, I fail to see how payment made after the lapse of eight years can undo the effect of the lapse of time. The prescribed debt may be good consideration for a fresh promise to pay, but such a promise must be in writing, and mere payment does not amount to such a promise. The question appears to me to have been virtually decided by the Court of Appeal in England in the case of *Nash v. Hodgson* (6 de G. M. and G.). In that case the defendant being indebted to the plaintiff on three promissory notes, one of which was for £200, paid him £5 on account generally. At that time the £200 note was the only one of the three notes which was not barred by the Statute, and the plaintiff appropriated the £5 to payment of interest on that note. The Court held that the payment took the note out of the Statute. The remarks of Lord Chancellor Cranworth are very instructive in the present case. "What," said he, "I deduce from the cases is that, where a payment is made as principal, the effect of it will be to take out of the Statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred. . . . Exactly the same principle applies if the payment is made in respect of interest. It appears to me that in this case, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred, and if this were not so, the only effect would be to treat it as a payment on account of all, so that in either case the £200 note would be kept alive."

The obvious inference from the Lord Chancellor's remarks is that, even if there had been a part payment of the two notes which were already barred, the holder would not have been entitled to recover. On principle, as well as authority, therefore, I am of opinion that the plaintiff is not entitled to succeed, and that provisional sentence must be refused.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Dempers & Van Ryneveld; Defendant's Attorney, C. W. Herold.]

#### CHUBB AND MAXWELL V. JOHNSON.

Mr. Benjamin applied for the final adjudication of the defendant's estate.

Granted.

#### ILLIQUID ROLL.

#### TENNANT V. VAN ZYL.

Mr. Molteno applied for judgment under Rule 329 for £200 5s. 1d., for professional services rendered and fees disbursed.

Granted.

#### COMBRINK V. LUCKE.

Mr. Buchanan applied for an order for the transfer of certain property.

Granted.

#### COLONIAL GOVERNMENT } 1899. V. LEVISEUR } July 12th.

Mr. Ward applied for judgment for £46 7s. customs duty upon 13,000 cigars imported by defendant from Germany.

De Villiers, C.J., said he had received in a somewhat irregular way a letter from the defendant, who claimed that he was a French subject residing in the Free State, and that the Supreme Court of this Colony had no jurisdiction.

The Court gave judgment for the Government, the defendant to have leave to reopen the case if he had good grounds for doing so.

De Villiers, C.J., observed that the jurisdiction of the Court had been confirmed by means of the attachment of the property.

#### SOUTH AFRICAN MINERAL WATER COMPANY V. LUCKE.

Mr. Molteno applied for judgment for £63.

Granted.

**ANGLO-AMERICAN ADVERTISING COMPANY  
V. SOUTH AFRICAN ADVERTISING COM-  
PANY.**

Mr. P. Jones applied for judgment for £62 7s. 3d., for goods sold and delivered and work done.

Granted.

**GOLDSTEIN V. VAN WYK.**

Mr. Buchanan applied for judgment for £9 15s., for medical attendance and medicine supplied.

Granted.

**GOLDSTEIN V. JOUBERT.**

Mr. Buchanan applied for judgment for £3 15s., for medical attendance and medicine supplied.

Granted.

**BOHMAN AND OTHERS V. ROBERTS.**

Mr. Miller applied for judgment under Rule 329 for £71 2s. 3d., the balance of the purchase price of goods sold and delivered.

The defendant appeared in person, and objected to the claim. He said that during his absence in Johannesburg, plaintiff entered his shop and sold the goods to another party.

The Court gave judgment as prayed, execution to be postponed until August 7, defendant in the meanwhile to be given an opportunity of defending the action

**MACNAB V. SCOTT.**

Mr. Buchanan applied for judgment for £32 2s. 8d., for board, money paid, services rendered, and cash advanced.

Granted.

**GREEN V. LUCKE.**

Mr. P. Jones applied under Rule 329 for an order for the transfer of certain property at D'Urban-road.

Granted.

**W. AND G. SCOTT V. PETERSEN.**

Mr. P. Jones applied for judgment under Rule 329 or £55 5s. 11d., for goods sold and delivered.

Granted.

**W. AND G. SCOTT V. RACE.**

Mr. P. Jones applied for judgment under Rule 329 for £97 17s. 8d., for goods sold and delivered.

Granted.

**DE SOUZA V. JOHNSON.**

Mr. Miller applied for an order compelling defendant to take transfer of certain ground at Diep River, and for judgment for £110, the purchase price of the property.

Granted.

**RIDDELSDELL V. JOHNSTON.**

Mr. Gardiner applied for judgment under Rule 319 for £12 5s., for rent.

Granted.

**MILLS AND SONS V. BROWN.**

Mr. Close applied for judgment for £30, cash advanced, and £5 17s. 6d., goods sold and delivered.

Granted.

**GENERAL MOTIONS.**

**SIGIDI'S ESTATE V. MATUMBU.** { 1899.  
July 12th.

Rule of Court 26—Purging default —  
Pleading.

Mr. Innes, Q.C., applied for (1) discharge of set down, (2) removal of bar, and (3) removal of cause for trial to next Circuit Court, to be holden at Butterworth.

Sir J. Juta, Q.C., appeared for the respondent.

Mr. Innes stated that the action was one for ejectment of the defendant from a kraal and a claim for £1,500 in respect of stock.

De Villiers, C.J., said: The words of the 26th Rule of Court are that there should be an affidavit of merits. I don't take that to mean that the Court should be of opinion that the applicant would succeed in the case. It means that the Court should be satisfied that there is a *bona fide* defence. In this case it seems that the defendant has a *bona fide* defence, and the only reason that it was not raised before was the neglect of the attorney employed by the defendant. The Court will allow the defendant to purge his default, and allow him to plead within a fortnight from this date, the case to be set down for hearing next term. Defendant must pay the costs.

HILDEBRAND V. THE DIVISIONAL COUNCIL OF KING WILLIAM'S TOWN. 1899. July 12th.

Act 27 of 1894, section 2—Divisional Council Notice of action.

*Leave granted to sue a Divisional Council for damages although no notice had been given within the period required by Act 27 of 1894, section 2.*

Mr. Searle, Q.C., applied for special leave to sue the said Council for £50 as and for damages, notice not having been given under Act 27 of 1894, section 2.

The petition set forth that the petitioner, the wife of F. Hildebrand, of Keiskama Hoek, was with her children riding in a cart driven by her husband along the main road. When near the drift the cart capsized, as a result of which petitioner sustained serious injuries, and the cart was damaged. The petitioner alleged that the accident was due to the negligence of the respondents, who had caused a quarry to be opened near the road, thereby rendering the approach to the drift steep and dangerous.

Affidavits filed on behalf of the respondent Council alleged that the accident was the result either of neglect or want of skill on the part of the plaintiff's husband, and that had the cart not struck the stone, it would have been drawn up the bank at the side of the road, and would have been overturned.

Mr. Graham, Q.C., for the respondents.

De Villiers, C.J. said: There has been no satisfactory explanation as to why notice of the application was not given by the plaintiff to the defendants within the fourteen days required by the Act, but it is difficult to see that the Council has been prejudiced by the delay, and under the circumstances leave will be given to bring the action, on the condition that security to the amount of £50, to provide for costs, be given by the plaintiff to the defendants, to the satisfaction of the Registrar of the Court; costs to be costs in the cause.

Buchanan and Maas torp, J.J., concurred.

*Ex parte NEETHLING.* 1899. July 12th. Aug. 1st

Will—Construction.

This was an application by Johannes Henoch Neethling H. Son of Stellenbosch, which set out:

1. That about 1740 petitioner's great grandfather settled in this Colony and died here, leaving issue Hendrikk Ludolph Neethling, petitioner's grandfather, Johannes Henoch Neethling, his grand-uncle and other sons besides a daughter, as would be seen from a genealogical table annexed.

2. About 1791 Johannes Henoch Neethling, petitioner's grand uncle, married Anna Catherina Smuts and a list of his descendants is appended.

3. On the 18th March, 1794, the said grand-uncle and his wife made a will whereby the first dying appointed the survivor together with any children born from their marriage sole heirs. But not having issue they amended their will by various codicils.

4. About June, 1838, the testator died and his widow died in June, 1850, having in the meantime made separate testamentary dispositions bearing date 19th September, 1839, and 29th November, 1848. The said wills and codicils were lodged with the Master of this Court and filed in the suit between the Dutch Reform d Church and the South African Association heard on the 27th May, 1891.

5. The South African Association was in 1838 confirmed in their appointment as Executors Testamentary and continued to administer the estate until 1871, when the funds appertaining thereto were paid into the Guardian Funds.

6. The petitioner referred to the instrument which concluded thus: "Thus willed at Cape Town on the 27th April, 1836, with the express authority that in case any difference of opinion may arise as to the meaning or intention of this will that such difference of opinion or disagreement shall be submitted *de plano* by the executors on motion or petition to the Supreme Court of this Colony, and the decision or judgment of the Court shall be binding, without the right of higher appeal."

7. According to the decision given by the Supreme Court on the 27th May, 1891, two separate funds were created by the said testamentary dispositions: the first, for convenience designated the subsidiary fund created under codicils of 17th and 21st April, 1836, and 2nd June, 1838, and referred to in the testatrix will of 19th September, 1839, as the Poor Fund of the Family: the second, or Main Fund created by codicil of 27th April, 1836.

8. The subsidiary fund amounted in 1840 according to the executors first liquidation account to R.64,400.8.0, and in August, 1870, and June, 1871, when the account was trans-



ferred to the Guardians Fund the executors paid in £3,925, which fund had since increased to about £5,513 7s. 3d.

9. This subsidiary fund has to be dealt with roughly as follows:

(a) The interest is to be applied to the relief of the aforesaid brothers and sisters and their children as may be needy and deserving, in the discretion of the executors, who are to consult the vestry of the Dutch Reformed Church, Cape Town.

(b) The nominal heir to the capital sum of this fund is the senior member of the testator's father's progeny who shall be named J. H. Neethling.

(c) After the death of the testator's said brothers and sisters and their children the fund is to be divided into two parts, the amounts originally paid in by the relations of the testatrix then going to her lawful heirs, and the amount originally paid in by the relations of the testator going to the nominal heir aforesaid, subject to the following conditions:

(1.) He is to take for his own use one-fourth of the interest derived from such last-mentioned amount.

(2.) He is to divide a second fourth part between himself and those of his progenitor's (testator's) male progeny who are related to him within the sixth degree of consanguinity.

(3.) From the third-fourth part an annual allowance of £15 to the Dutch Reformed Church is to be deducted, and the balance to be devoted to the relief of needy persons, presumably of the name of Neethling related to the nominal heir within the sixth degree of consanguinity. If there are no such needy persons, then such balance is to be added to the capital of the funds.

(4.) The remaining fourth part is to be applied towards the expenses of administering the fund, and the balance is to go to the trustee of the fund. As there are no such trustees the balance must presumably be added to the capital as provided in paragraph (3).

10. All the trustees nominated in the codicils are dead, and no others have been appointed in their stead.

11. All the original contributories to this subsidiary fund are dead, but from the annexed genealogical tables, it is clear that a very long time must yet elapse before all the children of the testator's brothers and sisters are dead.

12. The following persons are at present deriving benefit from the fund, viz.:

(a) Hendrik L. Neethling, a son of testator's nephew, £36 per annum.

(b) Adrietta A. M. Neethling, a daughter of testator's brother, £24 per annum, which amounts do not absorb the whole yearly interest.

13. The Master contends that the subsidiary fund cannot be divided in pursuance of paragraph 9, sub-section c., until all the brothers and sisters of the testators and their children are dead.

14. The petitioner contends that the fund was devisable upon the death of the last of the brothers and sisters and their children, who in the year 1836 were indebted to either of the testators.

15. Wherefore the petitioner prays for a decision *de plano* of the Court upon the contentions, and in the event of his view being supported for an order authorising the Master to pay out the sum of £ to the lawful heirs of the testatrix, and giving directions regarding the administration and control of the balance of £ appertaining to the Neethling family, and the appointment if need be of trustees.

16. The main fund constituted by the testator's "further testamentary" "distribution and substitution with *fidei-commis-sum*" . . . "as to what shall be done after the death of both with their joint estate" dated 27th April, 1836, and which the testatrix in her own will of the 19th September, 1839, expressly desired to annul and "be considered void, and of no force or effect whatever" consists of a capital sum of £13,531 17s. 4d. deposited by the executor, the South African Association with the Master about August, 1870, and has been administered by him since June, 1871.

17. Of the relations and godchildren mentioned by the testators in the instrument of 27th April, 1836, and appointed usufructuary heirs, only

(a) F. de Wet, a godson of the testator.

(b) The Rev. Johannes Henoch Neethling, of Hopefield, and

(c) The petitioner, the Rev. Johannes Henoch Neethling of Stellenbosch, both sons of nephews of the testator, survive.

18. As soon as the number of the usufructuary heirs was reduced to less than six, the right of accretion amongst them ceased, and the shares of those who die thereafter have devolved upon the petitioner as the eventual heir to the capital fund for disposal in accordance with the testator's behests, viz.:

(a) One half of the interest accruing thereon is to be applied to the support of the

most needy grandchildren of the testator and bearing either of their family names of Neethling or Smuts, and thereafter upon the death of all such grandchildren

(b) To aid those of the family related to the eventual heir in the sixth degree of consanguinity.

(c). All subject to the supervision of the executors and certain trustees (all of whom are dead and none have been nominated in their stead) with an appeal in case of dispute to the consistory of the Dutch Reformed Church, who receive an annual sum of £15 as a contribution to their Poor Fund in consideration of their services.

19. The Master holds that the heir eventual to the capital is only entitled to administer the shares of usufructuary heirs as may from time to time be unappropriated, that the whole of the capital of the fund must remain in the hands of the executors until all the usufructuary heirs (including the petitioner) have died out and is desirous that the fund be returned to the South African Association for administration, who raise objections to receiving it.

20 The petitioner is prepared to abide by whatever decision may be arrived at hereon by this Court, and desires a judgment accordingly.

21 The petitioner is at variance with the Master regarding the force and effect of the second prelegacy in the instrument of the 27th April, 1836, bequeathed in the following words:

<p>Tweeden. Verma- ken wij aan Hendrik Johannes Neethling, behalve zijn erfdeel als doopzoon, een somma van Drie Honderd Rixdollars's jaars mits den naam van Erfgenaam (bij <i>fidei commis</i> even- tuaal) aanwas dende,</p>	<p>Secondly. We be- queath to Hendrik Johannes Neethling, besides his hereditary portion as Godson, a sum of twenty-two pounds ten shillings yearly, together with the name of Heir, accruing to him (eventually by <i>fidei</i> <i>commisum</i>.)</p>
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22. By the instrument of the 27th April, 1836, the testators instituted as heirs to the capital of their estate: First Johannes Henoch Neethling (petitioner's late father) and after him the eldest descendant of the testator's father, who shall then bear the name of Johannes Henoch Neethling (and if that name should no longer exist, then in another manner,) provided each heir allow the capital to devolve undiminished on the next heir and so on.

23. The petitioner's late father having survived the testator drew the yearly allowance prelegated until May, 1863, when he died, and thereafter the petitioner was duly recognised as the nominal heir in his father's stead, and has claimed payment of this annual allowance of £22 10s. as a prelegacy attaching to and running with the heirship, both from the Executors and also from the Master, but without success.

24 Wherefore the petitioner prays that it may please your Lordships to order that this annual payment be made in future, and that the arrears due since the death of his father in the year 1863 be also paid to the petitioner either out of the main fund or from the accumulated interest in the subsidiary fund or otherwise in such manner as may be deemed proper.

Mr. Searle, Q.C., appeared for the petitioner.

Mr. Innes, Q.C., applied on behalf of the South African Association to be formally relieved from the administration of the funds as they had been virtually relieved from the same for twenty-five years.

*Cur ad. vult.*

*Postea* (August 1st.)

De Villiers, C.J., in delivering judgment, said: The whole of this matter is somewhat complicated. According to the will and codicils, two funds were created by the testators, one being a subsidiary fund and another a main fund. One of the questions now raised is whether this subsidiary fund is already divisible in pursuance of the ninth paragraph of the petition. It is held by the petitioner that this fund is now divisible, but the Master, on the contrary, contends that the subsidiary fund cannot be divided until all the brothers and sisters are dead. It is certainly a strange circumstance that there are alive grandchildren of testators to a will dated so far back as 1794, and there are still six grandchildren entitled to share in the subsidiary fund. It was clearly the intention of the testators, in the opinion of the Court, that the distribution of this subsidiary fund should not be made until these grandchildren were dead. With regard to the main fund, the petitioner claims that the sum of £22 10s., which was annually payable to his father, with the arrears of that amount, should now be payable to him. That is not the true reading of the will. The finding of the Court is that this was an annual payment to the petitioner's father alone. There is nothing, in the opinion of the Court, which justifies the petitioner's view

that he, being the nominal heir, is also entitled to this annual gift which his father enjoyed. Therefore the claim of £22 10s. and arrears cannot be allowed. The next question is with regard to the manner in which this estate should hereafter be distributed. It amounts to a considerable sum, several thousands of pounds. In the year 1871 the whole of this amount was handed over by the Association, who are the executors and administrators of the will, to the Master of the Supreme Court. Strangely enough, the Master accepted the trust. Doubtless there were reasons which induced him to do so, but they do not now exist. There seems to be no reason whatever why the Master of the Supreme Court should be saddled with the administration of this estate, connected with which there are the involved will and codicils to which I have referred. At my request the Master has communicated with the Association which had previously administered the estate, inquiring if it would take back the duty of doing so, but thinking it had had quite enough of the will and estate, it refused to do so. It is advisable that not only an administrator, but a trustee should be appointed, as the matter may well last for another century or more. The will made no provision for the appointment of fresh trustees, but that duty is important and necessary. It has been ascertained that the Board of Executors is willing to take over the trust. The Court will therefore appoint the Board of Executors the administrators and trustees of the funds of this estate, and direct the Master to pay over the money into their hands. The costs of the motion to come out of the estate.

[Applicant's Attorneys, Messrs Van Zyl & Buissonné; Attorneys for the South African Association, Messrs. Sauer & Standen.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

HUGO V. COLONIAL GOVERN- ( 1899.  
MENT. (July 13th

Mr. Molteno moved that the awards of the arbitrators in two matters be made rules of Court.

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Mr. Ward, for the Government, consents. The order was granted.

IN THE ESTATES OF THE LATE THEUNIS ERASMUS SMIT AND MARIA MAGDALENA SMIT.

Mr. Close moved for an order for partition transfer.

The Court granted the order.

IN THE MATTER OF THE FRESH FISH AND FRUIT SUPPLY COMPANY, LIMITED, IN LIQUIDATION.

Mr. De Waal presented the liquidators' report, and asked that the petition that the provisional liquidators be appointed permanent or official liquidators be added to the report.

The Court made the usual order and granted the application.

COLONIAL GOVERNMENT V. SYMONS AND TAYLOR.

Mr. Ward asked for leave to sue by edictal citation for the forfeiture of £1,000 deposited by the defendants for the construction of a railway from St. Johns, which had never been commenced. The offices of the defendants were in London and leave to attach the money *ad fundandam jurisdictionem* was also applied for.

The Court granted an order to attach the money deposited to found jurisdiction and leave to issue edictal citation.

PALMER V. MOLTENO.

Sir H. Juta, Q.C. (with whom was Mr. Graham, Q.C.), applied that the rule for the withdrawal the Somerset East election petition be made absolute, and for the return of the money (£300) deposited as security.

Mr. Searle, Q.C. (with whom was Mr. Currey), appeared for the respondent.

The Court granted the order, each party to pay his own costs.

TRUTER V. JOUBERT'S ESTATE.

Sir H. Juta applied for an order authorising taxation of the bill of costs of appellant's local agent in this appeal from Britstown at the same tariff as an attorney on the ground that there was only one attorney at Britstown and he was engaged to act for the respondent in the case.

The Court granted the order.

**IN THE ESTATES OF THE LATE ABRAHAM  
AND FRANZ GOLIAD.**

Mr. P. Jones applied for leave to transfer certain property.

The Court granted the order, subject to the terms of the Master's report.

**RAYNER'S TRUSTEE V. RAYNER.**

Mr. Buchanan applied for leave to sue by edictal citation in an action to declare a mortgage bond for £759 18s. 4d. to be null and void.

The Court granted the application together with an order for the attachment of the bond to found jurisdiction, and directed that the interdict and notice of trial be served upon the defendant with the citation.

**SWANSON V. SWANSON.**

Mr. Buchanan moved that the rule *nisi* calling upon defendant to show cause why a decree of divorce should not be granted against him be made absolute. The defendant had not returned to or offered to receive his wife within the specified time.

The defendant was in default.

The Court granted a decree of divorce, with costs.

**HUTTON V. GREEFF.**

This was an application for an interdict restraining respondent from transferring certain property.

There was no appearance for the applicant.

Mr. Graham, Q.C., appeared for the respondent, and asked for costs for his client.

The Court made no order, except that the applicant pay the costs.

**ANDREKA V. KRINGEL.**

Mr. McGregor applied for removal of trial to the next Circuit Court to be holden at King William's Town.

The Court granted the application.

**WHEELER V. CAPE TOWN TRAMWAYS  
COMPANY.**

Mr. Benjamin applied for leave to sue the respondent company *in forma pauperis* in an action for damages.

The application was referred to counsel for a certificate.

**IN THE MATTER OF THE PETITION OF  
RICHARD BERRY, AS PRESIDENT OF  
THE CONSISTORY OF THE DUTCH RE-  
FORMED CHURCH AT CALITZDORP.**

Mr. Buchanan applied for a rule *nisi* under the Derelict Lands Act, 1881, to be made absolute.

Granted.

**BLACK'S EXECUTORS V. COLONIAL  
GOVERNMENT.**

Mr. Innes, Q.C., applied for a certain award of arbitrators to be made a rule of Court.

Mr. Ward for the Government consented.  
The Court granted the application.

**LAKE V. LAKE.**

Mr. Buchanan applied for a decree of divorce owing to the defendant having failed to comply with an order for the restitution of conjugal rights.

The Court granted the application, the plaintiff to have the custody of the minor children of the marriage.

**IN THE MATTER OF THE EAST LONDON  
CO-OPERATIVE SOCIETY, LIMITED.**

Mr Buchanan applied for an order placing the said society in liquidation, and stated that the liabilities were £1,553, and the assets £718. The assets would cover the outside creditors, and the liabilities would therefore fall upon the shareholders.

The Court granted the order, and appointed Mr. McDonald liquidator, the liquidator to find security to the amount of £500 to the satisfaction of the Resident Magistrate of East London.

**THOMPSON V. COLONIAL GOVERNMENT.**

Mr. Molteno applied for a certain award of arbitrators to be made a rule of Court.

Mr. Ward for the Government consented.  
The Court granted the application.

**IN THE MATTER OF THE PETITION OF HENRY  
HERBERT PHEAR.**

Mr. Searle, Q.C., applied for an order removing petitioner's name from the roll of attorneys, in order to place him in a position to be called to the bar.

The Court granted the application.

IN THE MATTER OF THE PETITION OF ABDOL WAHABP SALIE, PRIEST IN CHARGE OF THE MALAY COMMUNITY OF PORT ELIZABETH.

Mr. Gardiner applied for a rule *nisi*, granted under the Derelict Lands Act, 1881, to be made absolute.

The application was granted.

IN THE ESTATE OF THE LATE CAREL MARTIN GYSBERT CARELSE.

Mr. H. Jones applied for an order relieving one of the executors of his trust.

The Court granted an order in terms of the Master's report.

*Ex parte* THE MINOR ELLIOTT. } 1899.  
July 13th.

This was an application for an order authorising the Master of the Supreme Court to pay out to the applicant, a minor, the amounts of certain inheritances bequeathed to him, and for a declaration that the applicant had attained his majority.

The petition set out that the applicant was nineteen years of age on the 30th June, 1898. That he had been trading in his own right for the past two years as a sheep-farmer and was now desirous of taking a farm jointly with his brother, a major, for the purpose of carrying on business as sheep-farmers &c. An amount of £78 had been lately paid into the Guardian's Fund as his share of inheritance from his father's intestate estate. An amount of £112 16s. 1d. had also been paid into the hands of the Master as his inheritance under the will of his grandfather who had directed his executor to pay the amounts due to his grandchildren into the hands of the Master, that the interest should be added to the share of each and the grandchildren who had attained the age of majority to be paid out. These were the amounts referred to in the petition. Affidavits were filed supporting the statement that the applicant was of sufficient capacity to carry on the business proposed.

Mr. Howel Jones appeared for the applicant.

The Court granted a rule, returnable on August 1, calling upon the petitioner's mother to show cause why he should not be discharged from the tutelage, and why the amount due to him by his father's estate should not be paid to him, but the Court

refused the application as regarded the inheritance due from the grandfather's estate.

The Chief Justice intimated that there would be no need for a further application if the mother raised no objection.

IN THE ESTATE OF THE LUNATIC } 1899.  
JAMES BELL. } July 13th.

Mr. Howel Jones applied for an order authorising the Master to pay to four of the sons of James Bell a lunatic, the sum of £500 each, as advances on account of inheritances eventually devolving upon them out of their father's estate, in order to enable them to commence business for themselves. It appeared that the father had been declared a lunatic on the 13th September, 1886, and the Superintendent of the Asylum in which he was confined, held out no hope of his recovery. The capital amount of his estate in the Guardians' Fund amounted to £15,462. There were eight children, of whom three girls were minors. James Bell had apparently made no will, and his wife, to whom he was said to have been married in community, was still alive.

The Court refused the application.

De Villiers, C.J., in giving judgment, said: The Court has no power to distribute a lunatic's property, even amongst his children. It is said that this is a hopeless case, but I suppose that there have been "hopeless cases" in which persons have recovered notwithstanding a doctor's fiat. The application must be refused. The curator should enter into some arrangement with the children for lending them a sum of money at a reasonable rate of interest, and no doubt the Court would be prepared to confirm any such arrangement.

IN THE MATTER OF THE ALLEGED } 1899.  
LUNATIC, FLORIS JOHANNES } July 13th.  
MOMBERG.

Mr. Uppington applied for the appointment of a *curator bonis* and a *curator ad litem*.

Affidavits set forth that Momberg was blind, and that he purchased things regardless of cost. He laboured under the delusion that he was possessed of the devil, who would provide him with horses and he had been heard to express the opinion that God had punished him for calling in a doctor

when his children were sick. He proposed to make large purchases of goats, in order, he said, to prevent his money from rusting.

The Court appointed the petitioner (Momborg's wife) *curator bonis* and the Resident Magistrate of Aberdeen *curator ad litem*, for the purpose of an action to have Momborg declared to be of unsound mind, the summons to be made returnable on the 3rd of August, the evidence to be taken on affidavit.

*In re KANNEMEYER* (No. 2) } 1899.  
   } July 13th.  
   } Aug. 1st.

Presumption of death—Probability—  
 Distribution of inheritance—  
 Executors—Security.

*On a renewed application for the payment to K's heirs ab intestato of an inheritance due to him out of his mother's estate it was proved that he had been absent from the Colony for twenty-eight years, during the last twenty-four of which he had never been heard of, notwithstanding every possible effort made by his relatives and friends to find him.*

*Held, that the probability of his death was so great as to justify an order for the distribution of the inheritance among those who would be his heirs ab intestato if he were dead upon their respectively giving their personal undertaking to the Master of the Supreme Court that they would restore the capital sums received by them respectively in case he should thereafter be found to be alive.*

*Held further that there was no legal presumption of his death and that consequently the distribution of his inheritance should be made directly by the executor of his mother without appointing executors of his own estate.*

*Semble, that if the probability of his death had not been so great*

*the personal security of the next of kin would not have been sufficient.*

*Vide Re Kannemeyer* (7 Juta 322).

This was an application by James Colombo Kannemeyer who set out in his petition:

1. That he was the son of Laurence and Johanna Magdalena Kannemeyer, both of whom were deceased.

2. That there were seven children of the said L. and J. M. Kannemeyer, of whom five were living. The petitioner was one of the said seven children and Louis Frederick Kannemeyer was another.

3. That there was £900 to the credit of the said Louis Frederick Kannemeyer in the hands of the executors testamentary of his late mother.

4. That the said L. F. Kannemeyer left Cape Town for New York in 1871 when he was nineteen years of age and from that date to the present time he has only been heard of once, to wit, in the year 1875 at Callao, South America. A reply sent to that communication was returned through the Dead Letter Office.

5. That petitioner believed that the said L. F. Kannemeyer was dead.

6. That advertisements calling for his whereabouts in London and America failed to elicit any information respecting him.

7. That in the year 1890, the petitioner made an application to this Court, more or less on similar lines to this, when the Court stated that it was not in a position to make an order but that the matter might be mentioned again.

8. That since this the petitioner had noticed that a somewhat similar application was made in the matter of C. Kirby, jun., on the 5th May last and that the Court had granted an order in terms of the prayer of the applicants.

9. That this, coupled with the fact that the Court had in 1890 stated that application might be made again had influenced the petitioner in renewing his application.

Wherefore he prayed for an order authorizing the Master to call a meeting of next-of-kin and creditors in the estate of the said Louis Frederick Kannemeyer for the election of an executor and for an order empowering the executor when elected to distribute the sum of £900 aforesaid

amongst the petitioner and his brothers and sisters now living, or such other order as might seem meet.

The petition was supported by the affidavit of the sole surviving executor of J. M. Kannemeyer.

Mr. Upington for the applicant referred to *Re Kannemeyer* (7 Juta, p. 322). *In re Kir'g* (9 Shiel, p. 217). *In re Lavin* (3 E.D.O. p. 435).

*Postea* (Aug. 1st.)

De Villiers, C.J. said: The executor of the estate of the late widow Kannemeyer holds in his hands the sum of £900, owing by her estate to her son Louis Frederick Kannemeyer. She died in 1873, and her son Louis left Cape Town for New York in 1871, when he was nineteen years old, and he was heard of again in 1875 as being then at Callao in South America. Since that time he has not been seen or heard of by any of his relatives or friends. A letter sent to him at Callao was returned to the writer through the Dead Letter Office. Advertisements inquiring after him in London and America have failed to elicit any information about him. In 1890 an application was made to this Court for the payment of the money to his next of kin, but the application was not then entertained, although the Court intimated that the application might be renewed. The question now is whether after the further lapse of nine years the Court should order the distribution of the money. In my opinion it is in the highest degree probable that Louis Kannemeyer is dead, but there is no legal presumption to that effect. The Court cannot therefore declare him to be dead or order executors to be appointed of his estate. If his inheritance is to be distributed amongst his next-of-kin, they must give security to the Master for the repayment of the money in case he should hereafter be found to be alive. If the probability of death had been less than it is, it would have been desirable to have substantial security other than that of the next-of-kin themselves; but after an absence of twenty-eight years, during the last twenty-four of which he has never been heard of, notwithstanding the efforts made to find him, such strictness is unnecessary and may be dispensed with. The Court will direct the executor to distribute the inheritance amongst those persons who would be his heirs *ab intestato* in case he were dead, upon their giving their personal undertaking to the Master of the Supreme Court that they will restore to Louis Kannemeyer the capital sums respec-

tively received by them in case he should hereafter be found to be alive. This course is quite consistent with the views expressed in the cases of *In re Booyesen* (Poord's Report, 187) and *Re Kannemeyer* (7 Juta, 322). The costs of this application may be paid out of the fund.

[Applicant's Attorneys, Messrs. Van Zyl & Buissiné.]

IN THE ESTATE OF THE LATE MARY LOCKE.

Mr. P. Jones applied for leave to sell certain property.

The Court granted an order in terms of the Master's report of June 6.

MADSEN V. SCOTT.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), applied for leave to the defendants to appeal to the Privy Council.

Mr. Searle, Q.C. (with whom was Mr. Molteno), for the respondents, offered no objection, provided that the appellants gave security for the judgment of this Court and the costs of appeal.

The Court granted the application.

GRIEG V. GRIEG.

Mr. Gardiner applied for a decree of divorce against the defendant, on the ground that he had failed to return to or receive his wife within the specified time ordered by the Court.

The Court granted a decree.

IN THE MATTER OF THE PETITION OF THE CONSISTORY OF THE DUTCH REFORMED CHURCH AT MARAISBURG.

Mr. Buchanan applied for an amendment of the order granted under the Deictic Lands Act.

The Court granted the order on condition that only one search in the Deeds Office was to be allowed in the costs.

CARDINAL V. CARDINAL.

Mr. Upington presented for confirmation the report of the receiver appointed in connection with an action for divorce.

The Court made the report a rule of court.

*Ex parte* IN THE ESTATE OF THE LATE SOPHIA MARIA WILLIAMS.

Mr. Graham, Q.C., applied for the transfer of certain property from the name of S. M.

Williams to the petitioner without the production of the usual power of attorney. The property had been purchased in May, 1897, from Lizzie Williams who had inherited it. That the purchase money had been sent to her at Johannesburg, but all efforts to trace her since had failed.

The Court made no order but suggested that the application be made under the Derelict Lands Act of 1881.

#### KORLER V. KORLER.

Mr. Close applied for leave to sue for restitution of conjugal rights by edictal citation.

It appeared that an order for restitution of conjugal rights had already been granted, but that the return day had lapsed, owing to the plaintiff having amended certain statements made to attorneys, and the Court extended the original return day from May 15 to August 17.

#### HEYMAN V. HEYMAN.

Mr. Jones applied for a decree of divorce, the defendant having failed to return to or receive his wife within the specified date.

The Court granted a decree of divorce.

#### IN THE MATTER OF THE MINOR CAIRNCROSS.

Mr. Benjamin applied for an order authorising the Master to make certain payments towards the minor's education.

The Court granted the order.

#### ELLIOTT BROS. V. LE GRANGE.

Mr. Benjamin moved for an extension of the return day of the edictal citation until August 31.

The Court granted the extension accordingly.

#### FRAETAS V. WATSON. *Re* 1899. WATSON V. FRAETAS. July 13th.

This was an application for the discharge of an order of attachment of certain property belonging to the applicant levied by virtue of the judgment in the action *Watson v. Fraetas* (9 Shiel, p. 266) in which he was the defendant, on the ground that an amount sufficient to satisfy the judgment had already been tendered but refused.

D. F. Berrangé, applicant's attorney, alleged on affidavit that prior to the action being tried, the respondent and her attorney both agreed to the deduction from her claim of

£20 if she won the case. That the Court having given judgment in favour of the respondent, deponent had sent to her attorneys a cheque for the amount claimed after deducting the £20 and £4 8s. 1d. being respondent's share of the costs. That the cheque was returned with a letter stating that the whole amount had to be paid by the judgment of the Court and that by a prior order of Court this amount had to be paid over to the Registrar (See *Watson v. Watson*, 8 Shiel, 524) and therefore nothing could be deducted even if the plaintiff consented and that if the plaintiff agreed to pay the £20 claimed she could only pay it out of the money which had to be paid to her out of the sum to be paid into Court. That subsequently the sheriff had seized and laid under attachment certain articles specified in the annexure.

Other affidavits in support were filed.

H. R. Tredgold, the respondent's attorney, in an answering affidavit admitted the allegations therein as being generally correct but said that to the best of his recollection applicant's attorney was mistaken as to what was said by the deponent. He was in fact under the impression until after the judgment that the claim to set off the £20 alleged to be due by the plaintiff had been dropped. The judgment had been obtained after much delay and it was necessary to carry it into effect as expeditiously as possible and he had felt that he had no alternative but to enforce the judgment by the execution of a writ.

Mr. Graham, Q.C., for the applicant.

Mr. Buchanan for the respondent.

The application was granted with costs.

#### IN THE ESTATE OF THE LATE HENRY EDWARD DAVIS.

Mr. Graham, Q.C., applied for an order authorising the Master to pay over the amount in his hands to the executor for investment.

The Court granted an order in terms of the Master's report.

#### KNUPPEL V. KNUPPEL.

Mr. Benjamin asked for leave to sue for restitution of conjugal rights by edictal citation.

The applicant's affidavit stated that the parties were married at Wynberg in March, 1898. Defendant deserted her on July 13, and was believed to be in Germany.



The Court granted the application, personal service to be effected on the defendant, the return day being fixed for October 12.

IN THE MATTER OF THE CAPE COLONISATION COMPANY, IN LIQUIDATION.

Mr. Searle, Q.C., presented the liquidator's report for confirmation.

Mr. Molteno appeared for the trustees debenture-holders.

Re THE CAPE COLONISATION ( 1899.  
COMPANY (IN LIQUIDATION). ( July 13th.

Mr. Searle, Q.C., asked for the confirmation of the liquidator's further report and an order for the distribution of the assets in terms of the report as amended by an affidavit filed by the liquidator.

Mr. Molteno appeared for the trustees of debenture-holders.

An affidavit was attached to the report, sworn to by W. O. Clough and F. Brinsley, trustees for debenture-holders alleging that the debentures issued by the company amounted to £11,910 at 6 per cent. interest and that this amount together with the interest since 1st January, 1897, was still due, that the company promised to each of the said trustees a remuneration of £25 per annum and other costs and charges. This remuneration had only been paid up to 1st January, 1897, and the costs and charges amounted to £105. For all these amounts on behalf of the debenture-holders and themselves the trustees claimed to prove in the liquidation.

The official liquidator now filed an affidavit stating that the debentures were not registered here, that he was prepared to admit as a concurrent claim the claims made by certain of the debenture-holders, that he was not prepared to admit the claims made on the debentures allotted to the vendor as fully paid up with the exception of those transferred to third parties.

The Court granted the confirmation of the report, ordering a distribution of the assets in terms of the recommendation made in the report of the liquidator, as supplemented by his affidavit of July 10, 1899, interest also being recognised up to the date of the liquidation, the costs to come out of the liquidation. The Court ordered that the liquidator be remunerated in the sum of

REGINA V. JOSEPH. { 1899.  
{ July 13th.

Master and servant.—Act 15 of 1856, Ch. IV, section 12—Female servant — Husband's authority — Act 18 of 1873, section 4, sub-section 6; section 7, sub-section 2.

*Where a female servant, married during the currency of her service, was taken away by her husband without notice, the conviction of the servant for contravening sub-section 6, of section 4 of Act 18 of 1873 was quashed on appeal.*

This was an appeal from the conviction of Griet Joseph, wife of Abraham Joseph, by the Resident Magistrate of Calvinia of the crime of contravening section 4, sub-section 6 of Act 18 of 1873 in that she did depart from her master Herman Cohen's service with intent not to return thereto.

The evidence of the complainant was to the effect that the appellant had been in his service for nine months as a monthly servant, paid at the end of each month. During her period of service her marriage took place, on the 16th of January, and four or five days afterwards her mother gave notice to complainant that the appellant was going to leave his service in consequence of her marriage. She continued, however, in his service, and did not give notice again in February. On the 22nd April the appellant told him that her husband wanted her to go on a visit to the Bokveld. Complainant allowed her to go till the 15th May, when she was to return again. She never returned. He sent for her and she still said she was intending to return. Her husband was present, and undertook that she would return. She received thirty shillings advance of wages up to the end of July.

Abraham Joseph, appellant's husband, said that on the 25th April he went to the complainant and told him he had come for his wife and the complainant said he might take her. The complainant understood that he was taking her away for good.

The appellant in her evidence stated that she had given notice on the 9th February, but that she had stayed on to make up a certain time during which she was ill: after that she had agreed to serve by the day until her husband came for her. When her hus-

band took her away he did not say that she would come back again.

The appellant was found guilty and sentenced to pay a fine of ten shillings or to be imprisoned for ten days.

She appealed on the ground that she was not criminally liable since she was lawfully married during the currency of her service and that she was removed from such service by her husband, who was entitled to do so in terms of section 12 of Chap. IV of Act 15 of 1856, or in the alternative, that she had given proper notice of her intention to leave.

Mr. McGregor for the appellant. The appellant was charged under sub-section 6 of section 4 of Act 18 of 1873. But section 7 provides that that section shall not extend to any but servants or apprentices engaged in agriculture or employed to work on farms. Act 30 of 1889 section 2 extends the scope of the section, but only to any man-servant employed as a domestic servant, &c.

[De Villiers, C.J. : Sub-section 2 of section 7 would apply to her and the fine could be imposed.]

The summons does not set out the offence contemplated by sub-section 2 of section 7 : "Without leave or lawful cause" are important words. Act 15 of 1856, Chap. IV, section 12, provides that when any female servant is married during the currency of her service her husband may remove her. Even if it were not denied that the husband concurred in her promise to come back, that would not be a re-engagement. In any case leave was granted to her to go away in the first instance and therefore there was no departure without lawful cause.

There was no appearance for the prosecutor, the master.

The Court allowed the appeal.

De Villiers, C.J., in giving judgment, said : If there had been a clear contravention of section 7 sub-section 2, which amounted substantially to the offence with which the appellant was charged, the Court would not have quashed the conviction. With regard to what was said by her husband that was a promise that the appellant should go back on a certain day. She was allowed to go away for some weeks and then it was agreed, her husband consenting, that she should go back, but that was an entirely fresh contract. The contract which she was alleged to have broken was at an end at the time when she was said to have contravened the Act. The appeal will be allowed and the conviction quashed.

[Appellant's Attorneys, Messrs. Walker & Jacobsen.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

*Ex parte BISSET.* } 1899.  
} Aug. 1st

Mr. Molteno moved for the admission of Mr. Murray Bisset as an advocate of the Court.

The application was granted.

### PROVISIONAL CASES.

#### BANK OF AFRICA V. WOLFF.

Mr. Searle, Q.C., moved for provisional judgment on a mortgage bond of £4,000 with interest, and further sums of £3,453 5s. 5d. and £1,431 19s. 2d. (overdrafts), and £1,357 2s. 5d., an overdraft of a firm secured and guaranteed by defendant.

Provisional sentence granted, with costs.

#### BERRIMAN V. TREGELLAS.

Mr. P. Jones for the plaintiff applied for a decree of civil imprisonment. Defendant, in person, denied the debt, which was for forage supplied at Johannesburg.

Decree of civil imprisonment granted with costs, to be suspended on payment of £4 a month, first payment to be made at once.

#### WELCH V. DEAN.

Mr. P. Jones moved for provisional sentence with costs, against the defendant for £200, balance of purchase price of certain property at Rondebosch.

Granted.

#### HAUPT V. MILLER.

Mr. Buchanan for plaintiff. Provisional sentence granted, with costs, on a promissory note for £500, with interest.

#### GOUS V. VINK.

Mr. Maskew moved for provisional sentence against defendant for £200 on mortgage bond.

Granted with costs.

WATSON, TENNANT AND CO. AND OTHERS V. VIVIER. 1899. Aug. 1st.

Mr. Buchanan moved for the final adjudication of defendant's estate, the provisional order having been granted on 4th July last.

The Court made the provisional order final.

The Chief Justice said: The insolvent admitted that in order to induce his creditors to accept a deed of assignment he made a false statement of his assets, asserting that he had a certain number of sheep which he knew at the time he did not own. Under that deed of assignment only 10s. in the £ was to be paid. If the property was really worth the full amount of his debts no doubt defendant would get back the balance out of the estate, but the probabilities were entirely against such an idea.

HERTZOG V. MAGMOET.

Mr. Benjamin moved for provisional sentence, with costs, on two mortgage bonds for £400 and £500 respectively.

Granted.

*Ex parte* NEETHLING.

Mr. McGregor moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Ordered.

*Ex parte* MEYER.

Mr. Graham, Q.C., moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Ordered.

*Ex parte* FLANAGAN.

Mr. Miller moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Ordered.

*Re* JOHN COLLINS & CO.

Mr. Benjamin moved that the rule *nisi* granted under on May 1st, dissolving the firm, be made absolute.

Ordered.

BRAUDE V. BRAUDE.

Mr. Graham, Q.C., applied for the removal of this cause for trial at the Circuit Court of Oudtshoorn.

Mr. Searle, Q.C., for the respondent.

The application was granted.

FREDERICKS V. GIBSON. 1899. Aug. 1st.

This was an application for an interdict that one Le Roux should be restrained from parting with to the respondent so much of the sum of £800 as would cover the applicant's claim against the respondent amounting to £302 16s. 5d. and costs of an action about to be instituted against the respondent pending the result of the said action. It was alleged that the greater portion of the amount was due to the applicant under a sub-contract for the performance of certain work in the erection of a boarding-house which the respondent had contracted to build for the said Le Roux; that the applicant believed the respondent to be in serious financial difficulties; that £800 was to be paid by Le Roux to respondent in terms of the aforesaid contract on the 3rd August, and the applicant believed he would be seriously prejudiced if it was handed over to him.

Mr. Miller appeared for the applicant.

The Court granted a rule *nisi* returnable on the 10th August, to be served on Le Roux as well as on the respondent, and to operate as an interim interdict.

*Postea* (11th August).

Mr. Molteno appeared to show cause.

Mr. Miller for the applicant.

The Court made the rule absolute for the amount of £235. Costs to abide the result of the action.

ORSMOND V. SNYMAN. 1899. Aug. 1st.

This was an application for provisional sentence upon a mortgage bond for £1,386 8s. 10d.

Mr. Maskew, for the plaintiff, consented to the provisional order being refused, but not with costs, and applied that the parties be ordered to go into the principal case.

Mr. Graham, Q.C., for the defendant, denied the debt. The property had been sold in execution a considerable time ago, and a portion of the money thus realised had been paid to plaintiff. In addition, an agreement had been entered into between plaintiff and defendant, on 31st January, 1896, under which the proceeds derived from the sale of the property were to be accepted by the former as a full and complete settlement.

The application was refused, with costs.

## ILLIQUID ROLL.

## FLETCHER V. WHITE.

Mr. Graham for plaintiff.  
Judgment under R. 319 for £5,966 7s. 11d.

## SMITHERS V. CAREY.

Sir Henry Juta for plaintiff.  
Judgment under R. 319 for £308 2s. 6d.

## WHITE, RYAN AND CO. V. COLEY.

Mr. Buchanan for plaintiff.  
Judgment for £97 14s. 7d.

## JONES AND CO. V. DEAN.

Mr. Currey for plaintiff.  
Judgment for £167 19s. 6d.

## TEUBES V. FOUCHE.

Mr. H. Jones for plaintiff.  
Judgment for £137.

## COLONIAL GOVERNMENT V. VISAGIE.

Mr. Ward moved for judgment for £205 3s. 5d., the value of certain Colonial stores, sold by defendant at Kuruman on behalf of the Government, after the Langberg campaign.

## MILLS AND SONS V. VERVEY.

Mr. Close for plaintiffs.  
Judgment for £118 12s.

## SCOTT V. TOUT.

Mr. P. Jones for plaintiff.  
Judgment for £10 13s. 10d.

## SALT RIVER CEMENT WORKS V. COLEY.

Mr. P. Jones for plaintiff.  
Judgment for £62 10s. 8d.

## DE JAGER V. DE JAGER.

This was an action instituted by Josephine Sarah Jane de Jager, for divorce by reason of the adultery of her husband, Charles Johannes de Jager, a butcher, residing in Hanover-street. The parties were married on 6th November, 1891, first before the Resident Magistrate of Cape Town, and subsequently at the Dutch Reformed Church. There were three children of the marriage, and proof was led to show that the husband had misconducted himself with a number of women.

Mr. Benjamin for the plaintiff.

The defendant was in default.

A decree of divorce was granted with costs, the defendant to pay £1 per month for each of the children until they attain the age of sixteen, and Mr. J. E. P. Close was appointed receiver of the joint estate on behalf of the applicant.

## MILLIGAN V. MILLIGAN.

This was an action for restitution of conjugal rights instituted by Margaret Catherine Milligan, against her husband who had come out to the Colony in 1891, and been admitted to practice as an Attorney of the Circuit Courts of the Colony.

Mr. Howell Jones appeared for the plaintiff.

The defendant was in default.

Margaret Catharine Milligan, stated that she was married to respondent on 5th September, 1882, at New Brighton, Chester. The parties at first lived at Aberdeen, and afterwards in Glasgow, where, in 1891, defendant got into trouble, and suddenly left for the Cape, leaving her penniless. He wrote to her at long intervals from South Africa, and when she came out in 1896, she ascertained that he had left Cape Town for the Transvaal, having again become seriously involved in difficulties. Subsequently it was ascertained that he had gone to Natal, and all efforts to trace him had failed.

Decree of restitution of conjugal rights with costs was granted, defendant to return to or receive the plaintiff on the 12th September, or show cause on the 12th October why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

## PIETERS V. PIETERS.

This was an action for restitution of conjugal rights, on account of the wife's malicious desertion. The parties were married on October 14, 1890. The plaintiff, B. H. J. Pieters, stated that when he married his wife she was a widow, her previous husband being his own cousin. At first they lived on her farm in Tundee district, Natal, but in 1894 they had a difference, and the wife sent all his things away from her homestead and farm—sheep, cattle, horses, clothing, all his belongings. Elders of the Church, as well as plaintiff, remonstrated with her on account of her conduct, and there was a temporary reconciliation.

After, however, having lived together again for a brief space of time, one evening on returning home plaintiff found that he was locked out, and he had to find shelter in a neighbour's house. In 1897 she went to the baths with one Labuschagne and sent plaintiff's things away. After that he went to live at Dundee and asked her to come and live with him but she refused. Plaintiff was now living at Caledon in this Colony. She had persistently refused to return to his bed and board, although he had offered to pay all expenses.

Application for restitution of conjugal rights was granted with costs, defendant to return on the 12th September or show cause on 12th October why a decree of divorce should not be granted.

[Plaintiff's Attorney, P. De Villiers.]

*Re* THE INSOLVENT ESTATE OF DU TOIT.

Mr. McGregor applied for an order setting aside the election of the trustee, and for the appointment of another trustee, with power to liquidate the estate.

Mr. Close for the respondent trustee.

The Court confirmed the appointment of Mr. A. P. de Villiers as trustee in the insolvent estate; applicants to pay their own costs, and the costs of respondents to come out of the estate.

*Ex parte* KYLE.

On the application of Mr. Graham, Q.C., permission was given to A. L. Harrington Kyle to withdraw his petition in connection with the last Stellenbosch election, applicant to pay costs.

FINLAYSON, OTHERWISE TULLY V. TULLY.

Mr. Benjamin made application on behalf of Mary Finlayson, who had been married to one Tully in Stranraer, Wigtownshire, and who was now deserted by her husband for leave to sue him for nullity of marriage by edictal citation. Leave was granted, November 1 being fixed as return day.

REGINA V. VAN DYK. { 1899.  
Aug 1st.

Sentence — Imprisonment — Binding over to keep the peace

*Where a Magistrate convicted a prisoner of assault and sentenced him to a fine of £5 or one*

*month's imprisonment with hard labour, and to find security for £10 for good behaviour towards the person assaulted for three months.*

Held, on appeal, that the Magistrate was justified under the circumstances in imposing such sentence.

This was an appeal from the conviction and sentence of the appellant by the Resident Magistrate of Barkly East, upon a charge of assault committed upon one J. B. Murray.

The Magistrate sentenced the prisoner to a fine of £5 or one month's imprisonment with hard labour, and to find security for £10 in two sureties for good behaviour towards J. B. Murray for three months.

In his reasons he said that he was satisfied that the assault was an unprovoked one. He bound the prisoner over to keep the peace because after the assault he threatened to strike the complainant on some future day. As authority for his action he referred to *Regina v. David Petre* (1 Sheil, p. 282).

The prisoner appealed on the ground that the Magistrate had no power to bind him over to keep the peace in addition, and that the evidence did not justify that portion of the sentence. He also appealed generally.

Mr. Searle, Q.C., for the appellant: In *Regina v. August* (5 Juta, p. 216), it was held that this was not an illegal sentence, but that it should not be lightly given. There should be something serious on the record which would justify a Magistrate in passing such an additional sentence.

Mr. Ward for the Crown was not called upon.

The Court dismissed the appeal.

De Villiers, C.J., said that as pointed out in the previous case of *Regina v. August* (5 Juta, p. 216), the binding over to keep the peace was ordered by the Magistrate in his capacity as a Justice of the Peace. The Court had found that he was justified in doing so where there was evidence of a threat. Under those circumstances the Magistrate was justified in the present case in binding over the appellant to keep the peace, and the appeal must be dismissed.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

## SUPREME COURT

[Before the Chief Justice (Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAANDORP.]

LUFF V. HARE. { 1899.  
{ Aug. 2nd.

### Negligent driving—Damages.

This was an action brought by John Thomas Luff, Woodstock, in his individual capacity and as the father and natural guardian of his son Edward Luff, against William Hare, also of Woodstock, for £750 damages, on account of injuries sustained by the child owing to the negligent driving of a wagon by a native driver in defendant's employment. The defendant pleaded that the injury was caused by the carelessness and negligence of plaintiff's son in moving across the road.

Mr. Innes, Q.C., and Mr. Upington appeared for the plaintiff.

Sir Hy. Juta, Q.C., and Mr. Benjamin for the defendant.

Mrs. Luff, the mother of the boy, stated that he was now nearly seven years old. She remembered the accident, and on being told of it she went to the spot and found her child lying on the ground.

Cross-examined: She went to see Mr. Hare in February, after her husband had issued a summons for £250. She wanted Mr. Hare to pay something for the expenses incurred through the accident, but he said the matter was in the lawyer's hands. She did not say to Mr. Hare that it was not her husband who was bringing the action, but that Mr. Mills, of Darling-street, was helping them.

By the Court: The child suffered a great deal of pain, and the injured leg still required constant attention.

Wilhelm Schneider, a shopkeeper, of Greatmore-street, Woodstock, said that he witnessed the accident, which occurred close to his shop. A cart belonging to Mr. Holloway, a farmer, of Kuil's River, was standing outside the shop, when a wagon loaded with bricks passed close to the cart. Mr. Schneider, who was standing at his shop door, heard a scream and saw little Luff lying on the ground about a foot from the wheel of Mr. Holloway's cart. He called out to the driver of the brick wagon, and also signalled to him to

stop, but the native whipped up his horse and drove off at a trot towards Salt River. A man called De Villiers ran after the driver.

Hamilton M. Roberts, of the firm of Walker & Jacobsohn, spoke to a photograph being taken of the spot where the child was hurt. Greatmore-street was 21½ feet wide at that part, and broadened out towards Albert-road until it became about 31 feet wide. The straight portion was of a uniform width of 19 feet 1 inch, but at Mr. Schneider's corner it narrowed down to 17 feet.

Edward James Holloway, whose cart was standing at Schneider's shop when the little boy was knocked down, deposed that, hearing a scream, he saw the child lying on his side, with his head close to the cart. There was no traffic in the road, and he did not see the brick wagon.

Cross-examined: He did not see any child standing on the wheel of his cart.

Mrs. Broad said that she saw the child standing in the road close to Mr. Holloway's cart when a wagon laden with bricks passed along. The horse was walking. She noticed that if the driver was not over careful the child would be knocked down, and she called out "pas op" for the child" both in English and Dutch. The driver turned round and looked at her stupidly, then the little fellow was knocked down as the brick-wagon was driven away at a trot. She turned her head away when the affair happened, as she could not bear the spectacle. There was plenty of room for the brick-wagon to pass without going over the child.

Peter de Villiers deposed that when the brick-wagon was a considerable distance away he noticed the child standing on the felloe of the farmer's cart, but when he was knocked over he had been standing on the ground.

Thomas John Luff, the father, employed as a miller by D. Mills & Sons, said, after the accident his child was sent to Somerset Hospital on the recommendation of Dr. Hewat. Drs. Parsons and Hewat had a conversation, and it was their opinion that the leg should be amputated, but Dr. Kohler took the view that it might be saved, and attended the child for fourteen months. In June, 1898, the child was taken to the hospital to have some more bones extracted from the injured limb and skin grafted over it. He remained as an in-patient until September, went back to the hospital on 30th October, and was discharged in January last. Witness issued the

first summons for £250 in February. The child still walked lame, and had to be well looked after. His expenses had been very heavy in connection with {doctors' and hospital charges, &c., considerably over £100.

By the Court : Mr. Hare had never offered to pay anything.

Examination continued : Witness went to see Mr. Hare several times, and asked if he would pay something towards the expense he had been put to. The defendant merely said the driver had been discharged, but he would see about it. As the result of the accident, the child's life had been in serious danger twice.

Cross-examined, plaintiff denied that he had gone to Mr. Hare the worse for drink, or was insolent to that gentleman. He told Mr. Hare he was a poor man, and defendant promised to send Mrs. Hare to his house to see if he and his family were in need. He denied that he ever demanded £50 at once from Mr. Hare.

Dr. John Hewat said the child had sustained a compound fracture of the leg, both bones being smashed in several pieces. Symptoms of gangrene were apparent, and his opinion was that the limb should have been taken off. The child was sent to Somerset Hospital for that purpose, but was in so critical a condition that the surgeons in charge refused to perform the operation. The leg would be of little use for years, and would always be subject to the risk of giving way if it got knocked or bruised, or even if the boy walked too much.

Dr. Kohler, who treated the boy after Dr. Hewat for more than twelve months, said the injured leg would never be as sound as the other one. It would always be liable to ulceration, and the skin had been destroyed from the ankle to the knee.

Dr. C. T. Anderson, surgeon in charge at Somerset Hospital, said the leg that had been broken would be very liable to future injury owing to the skin being so very weak and taut, although if great care were taken of the child for several years, it was hoped that the limb would be quite saved.

This closed the case for the plaintiff.

For the defence William Hare, the defendant, said the native driver of the brick-wagon had a high character for carefulness. On this account he had been placed in charge of the horse which drew the wagon in question, the animal being valued at a hundred pounds. The native, Roolland by name, had been in his employment off and on for several years.

The wagon was loaded with 3,000 lb. weight of bricks, and if the horse had been driven at a trot a number of the bricks would inevitably have fallen off. The driver had been discharged from custody after being in gaol for four or five months, the Attorney-General refusing to prosecute. Witness had attempted to trace this native, having sent a clerk to the Eastern Province with this object, but had not succeeded. There was a great deal of traffic in the street where the accident occurred. The plaintiff came to him several times and asked him to pay the expenses he had incurred, but defendant told him he did not think he was liable. At the same time defendant had made up his mind to give the plaintiff something as an act of charity, only Luff came to him again and was very insolent and threatening, demanding £50 there and then. Defendant then told him that if he wanted anything he would have to go to the Court for it.

Cross-examined: Defendant admitted that if he could have relied upon Mrs. Broad's evidence he would decidedly have given plaintiff something, but he now repudiated liability.

John O'Loughlin, a clerk in Mr. Hare's employment, corroborated defendant's evidence.

Counsel having addressed the Court,

De Villiers, C.J., in giving judgment, said : I can quite understand the position taken up by the defendant in the present case. He is the owner of several vehicles, and he has really no control over the drivers. He has therefore adopted the principle of not holding himself liable for damages unless the negligence of his driver is clearly proved. In connection with this occurrence a long inquiry was conducted by the Resident Magistrate, and ultimately the Attorney-General refused to prosecute. Upon that the defendant took up the position that he was not legally liable. In my opinion that was a wrong position. The act of the Attorney-General in refusing to prosecute is no proof to this Court that there has been no negligence. No doubt it is of some assistance in deciding the point, but it is no conclusive proof, nor if the driver had been tried and acquitted would the acquittal have been conclusive proof. Now in this Court, there were two very material witnesses who were not examined in the Magistrate's Court. I feel convinced that if the defendant himself had been aware beforehand of the nature of

the evidence which would be given by these two witnesses, Mrs. Broad and the boy Japie, he would not have allowed the case to come into court, but would have paid some damages for the injury done to this child. A great deal has been said about the delay which has occurred, but under the peculiar circumstances I think that delay is quite capable of explanation. This unfortunate child was ill for a very long time, and until the issue of that illness was known, it was impossible for the parents to know exactly what damages they should claim, and what the nature of their action would be. It is not until the present year that the child was declared to be cured, and when the action was brought and came on for hearing last term, there was so much business in the Court that it was impossible to hear it. It was, however, quite clear now that, even if the case had been heard on the day for which it was set down for trial, the defendant's witness would not have been present, and therefore the postponement, in that respect at all events, had no prejudicial effect upon the case. In cases in which persons are charged with negligent driving, it is always an important matter to consider how the driver behaved afterwards. Almost invariably if a man was driving carefully and without negligence he will stop and make inquiries to see if he can render assistance. When the driver believes that he has not been careful, but negligent, he will generally drive on. An extraordinary circumstance in this case is that the native driver, who must have known that he had driven over this unfortunate little child, callously drove on, and took no notice whatever of the child. Mr. Hare has spoken of the man as being a very careful driver, but, to my mind, he was a most callous driver. If he did not know of the accident, it only showed in what manner he was driving, neither looking to the right nor left. It has been said that it must have been a case of intentional, deliberate driving over the child rather than negligence, but that does not follow. It seems to be a case of utter callousness, for the driver took no trouble to stir himself, but sat with his elbows on his knees and the reins loose in his hand, and refrained from drawing one rein in order to give way for the child. There can be no doubt as to the gross carelessness of the driver. All the evidence is to the effect that the child stood quite still and did not move across the road as it

alleged in the defendant's pleadings. At the same time this is not a case for heavy damages. Sir Henry Juta has commented upon the carelessness of the parents—gross carelessness in fact, in allowing two little mites of children to be walking by themselves through the streets. Even the sister, who is two years older than the injured boy, is a very tiny child. I endorse counsel's remarks on that point, but that does not excuse the defendant's servant, who should not have taken the risk of injuring the child. Judgment will be given for £110 with costs, which will enable the father to pay all expenses. The money must be paid into the hands of the plaintiff's attorneys, who will pay over the amounts due to the doctor, hospital, &c., and the balance will then be given to the plaintiff.

Buchanan, J., concurred, and also alluded to the gross carelessness of the parents, almost amounting to misconduct, and said that therefore the damages awarded should not be more than sufficient to cover expenses.

Maasdorp, J., also concurred.

In reply to a remark by Sir Henry Juta, that in the ordinary course the cheque would have been paid to the plaintiff's attorneys.

The Chief Justice said he was specially desirous that Dr. Kohler should be paid, as he deserved very great credit for the manner in which he had treated this case.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn: Defendant's Attorneys, Messrs. J. and H. Reid & Nephew.]

LOOTS V. VAN WYK. } 1899.  
Aug. 2nd.

Spoliation — Possession — Ownership  
— Onus probandi.

*A horse having been taken by the defendant out of the possession of the plaintiff under circumstances amounting to spoliation.*

*Held, that, in an action brought in a Magistrate's Court for the recovery of the horse or its value the burthen of proving ownership or other right superior to the plaintiff's lay upon the defendant.*

This was an appeal from a decision of the Resident Magistrate of Gordonia in an action in which the plaintiff (now appellant)



claimed payment of the sum of £20 as the value of a certain horse, his property, or its restoration.

From the evidence of the plaintiff it appeared that he went to the farm Koogo-hoop in August to take away a Mr. Hicks. When he arrived he outspanned. Defendant asked Hicks where he got the horse. Hicks said it belonged to the plaintiff. Defendant then asked the plaintiff where he got the horse and plaintiff said he bred it. Defendant said it was his horse and he had bought it. He took the horse while plaintiff was inspanning. Hicks asked him to hire him the horse: he refused but offered to hire it to plaintiff. Plaintiff refused to hire his own horse and refused to give it up and threatened proceedings. Defendant took off the bridle and halter and took the horse. Plaintiff left and had a summons issued. It was further proved that about two years previously the plaintiff had lost a young stallion a year old and he and his witnesses stated that the horse in question was the one which was lost and afterwards recovered. The defendant proved that the horse was his own property, that he bought it nearly two years before and had possession of it ever since until it was taken by the plaintiff.

Numerous witnesses were called on each side and the Magistrate after hearing all the evidence and seeing the horse came to the conclusion that the defendant had made out the stronger case and gave judgment for him with costs.

The plaintiff appealed.

Mr. McGregor appeared for the appellant.

Mr. Benjamin for the respondent.

De Villiers, C.J.: I quite agree with Mr. McGregor that the onus of proving his ownership lay upon the defendant. He took the horse not exactly by force but under circumstances which might readily have led to a breach of the peace. The horse was being used by the plaintiff as one of a pair for his cart, and although at the time it was taken away, it was outspanned, it must be deemed to have been in the plaintiff's possession. Under similar circumstances this Court would have the power to order a restitution of the horse before the defence of ownership could be raised. The point does not arise whether the Court below had a similar power, but I am quite satisfied that the plaintiff, having possession of the horse, was entitled to succeed in his action to recover the horse or its value unless the defendant succeeded in proving his ownership or other right superior to that of the

plaintiff. Upon the question of ownership a great deal of evidence was taken, the effect of which was to satisfy the Magistrate, as it has satisfied this Court, that, although the plaintiff may have honestly believed that the horse was his, it really belonged to the defendant. The appeal must therefore be dismissed with costs.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### ADMISSION.

{ 1899.  
Aug. 3rd.

On the application of Mr. Close, Mr. James McIndoe was admitted as a conveyancer.

### PROVISIONAL CASES.

#### DE GOUVEA V. KRUSKAL.

Mr. Upington moved for provisional sentence for £1,300 and interest, on a mortgage bond.

Granted, with costs.

#### MOMBERG V. MOMBERG.

{ 1899.  
Aug. 3rd.

This was an action *de lunatico inquirendo*, the alleged lunatic being one Floris Johannes Momberg, of Aberdeen.

Mr. Upington appeared for the plaintiff.

The evidence, which had been taken on commission, showed that the defendant was subject to strange delusions, imagining that he had been visited by the devil, who made him liberal promises. He expressed his determination to purchase a railway train, refused to wear clothing, and was under the impression that he had been Divinely informed that if he only planted one muid of wheat he would reap sufficient to pay all his debts. It was further stated that the unfortunate man was totally blind.

The Court appointed the brother-in-law of the lunatic curator of his person and the wife and brother-in-law curators bonis.

*Ex parte* HAYWARD.

Mr. Howel Jones moved that a rule *nisi*, granted to John Jacobus Hayward under the Derelict Lands Act, be made absolute. Order granted.

#### JENNINGS V. JENNINGS

Mr. Buchanan applied, on behalf of Emanuel Thomas Jennings, for the appointment of a commission to take evidence in an action which he had instituted for a divorce. The petitioner was formerly in the employment of the Cape Copper Company, and was also engaged in farming pursuits in the district of Springbokfontein, Namaqualand, but was now living at the Rand, and had frequently remitted money to his wife. He had ascertained that she was living in open adultery with a Hottentot farm servant, and she had declared that she would not defend the action, and did not pretend to deny the charges set forth in the declaration.

The Resident Magistrate of Springbokfontein was appointed commissioner to take the necessary evidence, previous notice to be given to the defendant.

#### ESTATE OF LATE PRETORIUS.

Mr Benjamin applied for the appointment of an additional trustee under the terms of the will of the late Matthys Jacobus Pretorius, in consequence of the death of one of the trustees, and Mr. Van de Sandt de Villiers, sen., was appointed.

*Re* THE MINORS McLAREN. { 1899.  
Aug. 3rd.

This was an application by the Board of Executors, the executors testamentary in the estates of P. J. Hugo and his wife, and set forth that the Surveyor-General had recently approached them with a view to the expropriation of certain land registered in the name of the minors McLaren bequeathed to them and registered in their names. The minors were in England and their father had left the Colony and his whereabouts were unknown. The petitioners approached the Master for the appointment of a tutor but had been informed that the will of the minors' grandfather made no provision for such an appointment. The minors' mother predeceased her father, the testator, and the minors' father could not be communicated with and the addresses of the minors were unknown to the petitioners. Wherefore they applied for the appointment

of a tutor or guardian to represent them at the arbitration to be held for fixing the amount of the compensation to be paid for the land and for some order as to the investment of the proceeds.

The Master reported that the property was bequeathed to the minors' mother on condition that she should have the usufruct for life and that at her death it should devolve on her children but the testator did not tacitly exclude the father by appointing a curator nominate to administer the property during their minority. He referred to *in re* minor Clarke (3 Sheil, 395).

Mr. Close for the petitioners.

The Court appointed the Board of Executors as *curator-ad-litem* for the purposes of the expropriation and authorized the Master to proceed to the appointment of a curator dative. Costs out of the minors' funds.

DE WE' V. THERON. { 1899.  
Aug. 3rd.

Resident Magistrate's Court Acts—  
Jurisdiction — Counter claim—  
Unliquidated damages.

*In an action in a Magistrate's Court for £30 for rent the defendant excepted to the jurisdiction on the ground that he had a counter claim for £35 being damages for an alleged breach of agreement on the plaintiff's part. The Magistrate, although finding that the counter claim was unliquidated, sustained the exception.*

*On appeal, the action was remitted to the Magistrate's Court for trial with a direction to try the counter-claim also in case the defendant should reduce it to the amount claimed by the plaintiff in his summons.*

De Jager v. De Jager (3 Juta, 69), approved.

This was an appeal from the judgment of the Resident Magistrate of Aliwal North, in an action in which the appellant was the plaintiff and the respondent the defendant. The action was for £30, six months' rent of the farm Botha's Dam, the property of the plaintiff. The defendant put in a counter-

claim for £35 damages, for breach of an agreement under which the plaintiff was to receive payment of the rent—£5 per month—from the then lessee and pay it over to the defendant. The payments, amounting to seven months' rent, had not been made. The defendant then excepted to the Magistrate's jurisdiction on the ground that the counter-claim was beyond his jurisdiction. Judgment was given for the defendant and the plaintiff appealed on the ground that the Magistrate had no authority to take the counter-claim into consideration, in that it was for unliquidated damages and beyond his jurisdiction.

The Magistrate in his reasons said that he found that the counter-claim was unliquidated.

Mr. Searle, Q.C., for the appellant: It seems clear from the Magistrate's reasons that he was wrong. A claim for unliquidated damages outside the Magistrate's jurisdiction cannot be set up against a liquid claim within his jurisdiction. *Smith v. Ramsbottom* (1878, p. 98); *Scott v. Barnard* (9 Jut., p. 323). *De Jager v. De Jager* (3 J., p. 69). I admit that if the counter-claim had been for £30 only the Magistrate would have had jurisdiction. The counter-claim here was clearly unliquidated.

[De Villiers, C.J.: Is not the proper test that given by Pothier, viz.: an amount easily ascertained and without long enquiry?]

That test laid down in *Kruger v. Van Vuuren's Exerutrix* (J. 5, 168) is whether it is evident "that it is due and to what amount, *cum certum est an et quantum debetur.*"

De Villiers, C.J.: The Magistrate having found that the counter-claim was unliquidated he ought not to have allowed the exception to his jurisdiction. The action was to recover the sum of £30 for rent due to the plaintiff, and the counter-claim was for £35, being damages sustained by the defendant by reason of the plaintiff's breach of an agreement. If the counter-claim had been for £30, the Magistrate would have had jurisdiction to entertain it, for although the amount is in excess of his ordinary jurisdiction for illiquid claims, yet he may try a claim in reconviction for any amount not exceeding the amount claimed by the plaintiff in his summons. Such is the effect of the decision in *De Jager v. De Jager* (3 Jut., 69). That case was decided under the 2nd section, Act 21 of 1876, but the subsequent Act No. 43 of 1885, section 5, does not alter the principle. The appeal must be

allowed and the action remitted to the Magistrate's Court for trial, it being understood that if the defendant should reduce his counter-claim to £30 the Magistrate will try the counter-claim as well as the plaintiff's claim. The costs of the appeal are also remitted to abide the result.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn.]

SOUTH AFRICAN ELECTRIC PRINT-  
ING COMPANY V REDFERN, } 1899.  
MOREISON AND CO. } Aug. 3rd.

Resident Magistrate—Jurisdiction--

Counter-claim—Set-off or compensation—Unliquidated claim.

*The jurisdiction of a Magistrate's Court is not ousted by reason of a counter-claim which is not pleadable by way of set-off or compensation.*

This was an appeal from a decision of the Resident Magistrate, Cape Town, in an action in which the plaintiffs sued for £12 0s. 8d., goods sold and work and labour done, and the defendants advanced a counter-claim of £178 1 s., made up of three separate items, namely £50 and £28 10s. cash advanced and £500 damages for breach of contract, owing to the plaintiffs having failed to print a certain number of copies of a directory which they had contracted to do. They excepted to the jurisdiction. The Magistrate held that the counter-claim was a *bona fide* one, but in excess of his jurisdiction, and dismissed the plaintiffs' claim with costs. An action for damages was pending in the Supreme Court for the alleged breach of contract in connection with the printing of the directory.

The plaintiffs appeal.<sup>1</sup>

Mr. Graham, Q.C., for the appellants.

The respondents in default.

Mr. Graham said that this case was similar to that of *De Wit v. Theron* just decided.

De Villiers, C.J.: It was not seriously denied in the Court below that the amount sued for by the plaintiff was due but the defendant excepted to the jurisdiction on the ground that a very much larger sum was owing to the defendant by the plaintiff. If any portion of the counter-claim had been of such a nature as to admit of compensation then to that extent the plaintiff's claim would have been extinguished. But the whole of the counter-claim is really for

damages and those damages are of such an uncertain nature as not to be capable of being pleaded in compensation. The appeal must therefore be allowed.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn.]

WIGGINS V. COLONIAL GOVERNMENT. — { 1899.  
Aug. 3rd.  
„ 7th.

Railway official — Freight — Undercharge — Tariff rate — Mistake — Illegality — *Restitutio in integrum* — Railway Regulation Act, 1861.

*The consignor of goods by railway, who has paid the freight demanded by the proper railway official (which owing to a mistake for which such official was alone responsible was less than the tariff rate) and would not have sent the goods if the tariff rate had been demanded, cannot, after the goods have been forwarded to their destination, be compelled to pay the difference, notwithstanding that the law prohibits any reduction of rates in favour of any person using the railway.*

This was an appeal from a decision of the Resident Magistrate of Tulbagh, in an action in which the defendant (now respondent) sued the plaintiff (now appellant) for £18 15s. 10d., being the freight or carriage due for the conveyance of 285 watermelons by railway from Piquetberg Road Station to Johannesburg, less £5 6s. 10d. received on account, leaving a balance due of £13 9s. The summons alleged that the defendant undertook to pay the ordinary current rates, and that the said rates amounted to £18 15s. 10d. The defendant pleaded that before the watermelons were forwarded by the Railway Department, he specially contracted with the agent of the plaintiff's railways for the conveyance of the consignment for £5 6s. 10d., which amount was duly paid and accepted by the agent in full payment for its conveyance. He denied that it was received as part payment. He said that he was unacquainted with the ordinary current rates and denied that he undertook to pay the ordinary current rates.

It appeared that the defendant was told on handing the melons to the clerk at the station that the freight was £5 6s. 10d., and paid this amount at the time. Subsequently to the conveyance of the goods it was discovered that this was an error, and £18 15s. 10d. was the proper charge. The defendant was informed of this but declined to pay the balance.

The Magistrate gave judgment for the plaintiff and in his reasons said as follows: "It appears that the railway clerk at Piquetberg Road Station, who received the amount, charged the freight under a wrong tariff as laid down in the official hand-book, i.e., he charged as if for fruit packed in bags instead of sent loose. As soon as the mistake was discovered the defendant admits he was informed of the undercharges by the railway authorities. In my opinion the defendant is liable for the undercharges which appears to be a mistake made by the clerk at the time, and therefore recoverable from the defendant.

The defendant appealed.

Mr. Currey for the appellant: The evidence shows that there was a duly concluded agreement. The appellant says that the clerk saw the water-melons: he denies that but he signed the consignment note. If the defendant had known what the real tariff was he would not have sent the goods at all.

Mr. Ward: There was no special contract. The tariff is fixed in the Government Railway Tariff Book and nothing less can be legally accepted. No special contract could be entered into. The goods were received to be carried according to the Railway regulations. A mistake was made in charging for the goods as if packed in bags. It is clear that if an over-payment is made through mistake of fact it can be recovered: an underpayment through mistake should also be recoverable. The principle of *Durham v. Ecclesiastical Commissioners of England and Ireland* (50, L.J.Q.B., p. 30) should apply. That was a question of title, which is contract, and the landlord was undoubtedly prejudiced. The railway clerk in this case was not a collector of revenue as regards anything else but the rates fixed in the tariff book.

Mr. Currey: This is a case of mistake *Kerr* (p. 279).

[Maasdorp, J.: You entered into a contract which was illegal. That contract is therefore invalid. But if the goods have been carried you should pay the rate.]

But the rates are perpetually being altered.

[Mr. Buchanan, J.: You could not turn up the statute book and find out the rate.]

One cannot discover the real rate except by inquiry. This is specially the case where goods have to be carried over different systems of railways.

*Cur. ad. vult.*

*Postea* (August 7th.)

De Villiers, C.J. said: This appeal raises an important question as to the respective rights of the Railway Department and a consignor of goods in the case of an undercharge for freight made by an official of the department. In February, 1898, the defendant, who is a farmer in the Tullagh district, brought 285 melons to Piquetberg-road Station for conveyance to Johannesburg. He delivered them to Picknill, the railway clerk, whose duty it was to make out the invoice and collect the charges. He made out the invoice and forwarding note in due form and charged the defendant the sum of £5 6s. 10d., being at the tariff rate for fruit packed in bags. The defendant paid this amount, and the clerk wrote an acknowledgment of the payment on the forwarding note. The melons were duly conveyed to Johannesburg, and were there received and sold by the defendant's agent. It was subsequently discovered by the department that the clerk ought to have charged £18 15s. 10d., being at the tariff for fruit sent loose, and the defendant was called upon to pay the difference. Upon his refusal an action was brought against him in the Magistrate's Court, the ground of the action being that, in consideration of the conveyance of the melons to Johannesburg, he had undertaken to pay the ordinary current rate of the Railway Department for such conveyance. The Magistrate gave judgment for the plaintiff, and against this judgment the defendant has appealed. It is not alleged that the defendant in any way misled the department or knew that the clerk was making an undercharge. The defendant states that he would not have sent the melons if he had known what the proper charge was, and this statement is fully supported by the rest of the evidence. The only undertaking he entered into was to pay the charge mentioned by the clerk, and he did, in fact, pay the amount. It has not been seriously contended that the clerk was not the proper official to receive the goods and give intending consignees the requisite information in regard to the freight payable for the conveyance of the same. There

is an English case (*Pickernell v Janberry*, 3 F. and F. 217), in which the master of a ship signed bills of lading for the conveyance of 4,000 boxes of oranges at 3s. 6d. per box. The shipowner had, however, previously agreed with the defendant to convey the oranges at 4s. 6d. Erie, C.J., told the jury that the master would have no authority to sign bills at a lower rate of freight than the owner had contracted for, and left it to them whether the owners in England had contracted for a higher freight. That case would have been in point in the present case if, before the melons were sent, the General Manager of Railways had contracted with the defendant for the conveyance of the melons at the tariff rate. According to *Abbott* (Merchant Ships, 10th ed., p. 95), and other text writers, the master of a trading ship, entrusted to his command for the purpose of procuring goods on freight, cannot bind the owners by an engagement to carry goods free of freight. The case of *Dewell v. Moran* (1 Taunt., 391), is cited as their authority, but on reference to the report of the case itself I find that the point was not definitely decided, but even if it had been it would not have supported the plaintiff's claim in the present case. There is a wide difference between an undertaking to carry goods free of freight, which on the face of it suggests an excess of authority, or even collusion, and an undertaking to carry goods at a rate which, on the face of it, does not appear to be unreasonable. The defendant could not be fairly expected to have known that there would be such a great difference between the charge for carrying fruit in bags and the charge for carrying loose fruit, and he was quite justified in accepting the rate quoted by the clerk as the correct freight. Reliance is, however, placed on the 26th section of Act 19 of 1861, which prohibits any reduction of rates directly or indirectly in favour of or against any person using the railway. The reduction, it is argued, from the tariff rate in favour of the defendant was illegal, and does not bind the department. This argument would have been conclusive if the question in the present case had been whether the defendant could enforce an agreement to carry his goods at a reduced rate. But the Court has to deal with an executed agreement in regard to which it is impossible to replace the defendant in the position in which he would have been if the clerk had not made the mistake. The

defendant would not have sent the goods at all if the correct rate had been charged, but the goods having been sent at the reduced rate, he is asked to pay as if he had agreed to pay the correct rate. The summons indeed alleges that he undertook to pay at the tariff rate, but of this allegation there is not a particle of proof. If nothing had been said at the time of the consignment as to the amount of freight payable there would no doubt have been an implied undertaking to pay the tariff rate. But such an undertaking cannot be implied in the face of the fact that the agreement was to pay at another rate. If that agreement was illegal, then there was no agreement at all, but the Court has no power to substitute for it another agreement, which the defendant, who had no knowledge of the correct tariff, never intended to enter into. The action is based on an alleged contract, but even if relief in the nature of a restitution *in integrum* had been sought on the ground of the clerk's mistake, the plaintiff would have failed. The clerk's mistake was not a *justus error*, for he knew that the melons were not in bags, and he had the tariff-book to guide him as to the rate which he should charge. From whatever point of view the case is regarded, it is impossible to support the Magistrate's judgment. It may be said that the defendant has had the benefit of the conveyance of his melons from Piquetberg-road to Johannesburg, and should pay for the benefit. But he has paid £5 16s. 10d., and there is no evidence that on a *quantum meruit* this would not be a fair remuneration for the conveyance. The appeal must be allowed with costs in this Court, and judgment entered for the defendant with costs in the Court below.

Buchanan, J. said: In this case the equities are altogether with the appellant. The appellant, a farmer, went to the station-master and inquired the freight payable for sending watermelons to Johannesburg and was told that it was about £3 a ton. Acting upon this the farmer brought the melons, and they were loaded up, and the railway clerk filled up the way bill, and charged the freight at the rate stated by the station-master. The farmer paid the freight, and the melons were sent and sold. It now appears that as the melons were not put in sacks they were liable to a tariff for unpacked fruit, which was nearly three times greater than the rate charged. If the farmer had been told at the time he would

either have put his melons into sacks or not have sent them. If they had been put in sacks they would have been carried for the rate charged. Hence if this was a question of *quantum meruit* the evidence would not support the claim now made. The principles which apply to a case of this kind are exactly the same as if the railway belonged to private persons instead of to the Government. The fact that it was a Government line gave it no special advantage beyond what was secured to it by statute. I am glad, however, that the Magistrate's judgment can be set aside on clear legal grounds, such as have just been stated by the Chief Justice, in whose judgment I concur.

Maasdorp, J., in concurring, said: It is urged that the contract entered into was illegal, and that the rate charged did not cover the rate which should have been paid according to the tariff. If the contract was illegal, the plaintiffs cannot recover under that contract, and if an express contract was entered into which was illegal I cannot understand upon what principle the plaintiffs can now set up a legal contract which was never entered into. Even upon the question of illegality, it seems to me that the position of the plaintiffs is not improved. It had been argued for the plaintiffs that in the case of an overcharge the person overcharged can obtain redress by having the amount reduced in court if he claimed such reduction, upon the ground that the overcharge was illegal. It is therefore urged that if an owner of goods can obtain such redress, it would only be equitable that the same favour should be shown to the carriers. But in my view the cases are different, for the carrier must reasonably be supposed to know what were his own charges, whereas the owner of goods may be, and frequently is, ignorant of the arrangements and charges of the carrier. The owner of goods is therefore allowed to recover for an overcharge, but I do not think that the carrier can be legally allowed to recover any deficiency in case of an undercharge.

[Appellant's Attorney, V. A. Van der Byl. Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

GEDDES V. COLLINS. } 1899.  
 } Aug. 4th.

Damages—*Injuria sine damno*.

*The plaintiffs being unable to pay their hotel bill, the proprietor of the hotel detained their luggage, which included a bicycle. When they subsequently tend red payment of the bill he was unable to restore the bicycle, as it had been claimed by and delivered to a third person. The plaintiffs therefore refused to accept restitution of any of their luggage, and were in consequence compelled to purchase other articles to replace those detained. Three days later the proprietor of the hotel offered to deliver all the luggage including the bicycle. In an action for damages instituted by the plaintiffs, held, that no damage at all had been sustained.*

This was an action for damages brought by the plaintiffs (husband and wife) against the proprietor of the Woodstock Sanatorium on account of the unlawful detention of luggage, goods, and chattels. The plaintiffs lodged at defendant's hotel for some weeks, and left on January 26, being indebted to the defendant for £29 3s. 4d. for board, &c. The defendant thereupon detained their luggage and other effects, which included a bicycle. They alleged that they had offered payment of the bill, but that the defendant refused to deliver up the goods in question. They claimed £20 damages for the detention, by reason of which they had been compelled to buy certain articles to replace those detained by defendant.

The defendant in his plea alleged that when the plaintiffs offered to pay the bill he was unable to restore the bicycle as it had been claimed by a third party and

delivered to him. He had, however, offered delivery of the rest of the goods, which was refused. He now tendered delivery of all the plaintiffs' property, including the bicycle.

Mr Uppington appeared for the plaintiffs; Mr. Searle, Q.C., and Mr. Molteno for the defendant.

Mrs. Geddes, one of the plaintiffs, gave evidence in support of the declaration, and said that when payment of the balance of account due to the defendant was offered, he expressed his willingness to surrender all the articles left as security at the hotel, with the exception of the bicycle, as it had been claimed by the sellers, Messrs. Burrell & Co. This was not satisfactory, and as the plaintiffs could not get the whole of their property, witness was compelled to purchase a quantity of articles, amounting in value to about £8. The bicycle was purchased for about £16.

Cross-examined by Mr. Searle, witness admitted that she, her husband, and their daughter stayed at defendant's hotel for a little over a month, and nothing was paid for board and lodging, and they left at different times. Defendant had allowed her to take articles from her boxes. There were two bicycles, one intended for her husband and the other for her daughter; but the former was not used at all, as her husband could not ride, and was returned. No money was paid for either of these bicycles, but her husband could have paid if he had liked.

De Villiers, C.J., pointed out that there was no action on behalf of the daughter of the plaintiffs.

Mr. Uppington said she was a child of twelve.

Charles Geddes, the other plaintiff, an enrolled law agent, said he was present when tender was made of £15 3s. 4d., balance of his account for board and lodging at defendant's hotel. Defendant offered to restore all the goods detained with the exception of the bicycle, which he did not have in his possession. The price of the bicycle was to be £15 15s., and it was bought on credit. He had been pestered to purchase it by Mr. Woollan, the representative of Messrs. Burrell. Witness refused to take back only a portion of his goods, and he was compelled to buy a number of articles of wearing apparel, for which he paid cash, and therefore had no invoices.

Cross-examined: Witness admitted that he was defendant in an action brought by Mrs. Muff for the sum of £683. He did

not plead that he had paid this money into her account at the bank. The money had been paid in when that action was brought, but it had been appropriated by his partner.

He had settled his liability to Mrs. Muff by promissory notes, some of which had been paid. He denied that he went to Mr. Woollan, the bicycle agent, and told him that he had been advised to take bicycle exercise.

De Villiers, C.J.: Why did you not take all your other goods, pay the defendant's account, and then sue him for the bicycle?

Witness, in reply, said he did not see why he should part with the whole amount owing by him, unless all his goods were restored. By doing so he considered he would have compromised himself.

Mr. Searle applied for absolution.

Mr. Upton having addressed the Court,

De Villiers, C.J., in giving judgment, said: The plaintiffs resided at the defendant's hotel, and left without paying their bill. The defendant, as he had a right to do, detained their luggage as a lien for the hotel bill, but he allowed the plaintiffs access to their boxes to take out necessary articles. But there was a bicycle amongst the property which had not been paid for by the plaintiffs themselves to the person from whom they bought it. Subsequently the defendant parted with the bicycle to the original seller. Technically, no doubt, he had no right to do so, although, as has been suggested by counsel, to call it theft would be rather an exaggeration. On the 21st April the plaintiffs tendered payment of their account and claimed the production of their luggage, but unfortunately the defendant, having parted with the bicycle, could not restore it, and tendered the rest of the goods. The plaintiffs, however, refused to agree to this, and now say that they purchased a number of articles which they needed at that time, and they claim an amount for damages sustained, through having to purchase these articles although they admit that they are still in their possession. On the 24th the defendant was quite willing to hand over all the articles, including the bicycle. Not a tittle of evidence has been given as to any damage whatever. It has been decided before that where purely nominal damages are claimed, and no evidence whatever is given of actual damages, the Court is not bound to give any damages. In this case certainly even the smallest coin of the realm would not

represent the damages, because there are none whatever. The judgment will be for defendant with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorney, C. Brady; Defendant's Attorneys, Van Zyl & Buissinne.]

KRIEL V. KOTZEE. { 1899.  
Aug. 4th.

Costs—Magistrate's discretion.

This was an appeal from a judgment of the Resident Magistrate of Gordonia in an action in which the plaintiff (now respondent) claimed the sum of £4 7s. The summons set out that the plaintiff was employed by the defendant to make for him 12,000 bricks at 1/6s. per thousand, the defendant undertaking to make certain advances to the plaintiff during the progress of the work, that when the plaintiff had partly completed the making of the bricks, the defendant prevented him completing the same and refused to pay him the sum of £6 for the 12,000 bricks. The plaintiff accordingly claimed £4 7s. being £6. less £1 13s. paid him on account. The defendant pleaded the general issue. It appeared from the evidence that before proceedings were taken the defendant offered the plaintiff £1 2s. 6d. in full payment, but the plaintiff refused to accept this. The Magistrate after hearing evidence gave judgment for the plaintiff for £1 2s. 6d. and costs. He said in his reasons that when the defendant's attorney pleaded the general issue the original tender made by the defendant before demand and issue of summons, must fall to the ground inasmuch as it had never been repeated on receipt either of demand or of summons. He referred to *Jones v. Borradaile & Co.* (1875, p. 38); *Moxter v. Fuller* (1875, p. 32); and *McDonald v. Bramson* (1875, p. 40).

The defendant appealed.

Mr. McGregor appeared for the appellant.

The Court dismissed the appeal with costs.

De Villiers, C.J., said that if the Magistrate had ordered each party to pay his own costs, the Court would not probably have interfered. The general issue having been pleaded, and no tender, the Magistrate no doubt thought it well to give costs, and in such cases the Court did not think it right to interfere with the discretion exercised by the Magistrate.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn.]



TERBLANC V. BORMAN { 1899.  
Magistrate's jurisdiction — Future { Aug. 4th.  
rights — Ejectment—Trespass—  
Value of right of occupation—  
Magistrate's Court Act 1856,  
section 10.

*In an action in a Magistrate's Court upon a contract under which the defendant was to have certain rights of pasturage in consideration of his deepening a well on the plaintiff's land the plaintiff claimed £20 as damages for breach of contract and for trespass after such breach. The defendant excepted to the jurisdiction on the grounds that future rights would be bound and that the subject matter of the suit was beyond the jurisdiction.*

Held, on appeal; that future rights would not be bound and that the proviso to the 10th section of the Magistrates Court Act 1856, does not apply to actions for trespass.

Held, further, that inasmuch as the defence denying any breach of contract on the defendant's part was bona fide and involved the question as to his right of occupation, the exception would have been good upon satisfactory proof that such right of occupation was of the clear value to him of more than £20, but that, as the value was doubtful, the Court below ought not to have allowed the exception.

The principles laid down in the case of *Bertram v. Wood* (10 Juta, 177) held applicable to the present case.

This was an appeal from a judgment of the Resident Magistrate of Gordonia in an action in which the plaintiff (now appellant) claimed from the defendant £20 damages for breach of contract and trespass. The ground of the action was the defendant's failure to deepen

a certain well on plaintiff's farm Breesjes Poort in accordance with agreement and his trespass upon the said farm Breesjes Poort.

The defendant excepted to the jurisdiction on the ground the rights in future under paragraph 4 of the agreement would be bound: this gave the defendant certain rights of pasturage on the farms in consideration of his deepening the well. The Magistrate over-ruled this exception. The defendant then excepted on the ground that the subject in dispute was of greater value than the limit of the Court's jurisdiction. Evidence being called he proved that the right under the contract was worth £5 a month to him for some months each year and that the agreement was to run for three years. He also swore that he had paid £30 for expenses in connection with the work which he had to do under the contract.

The Magistrate upheld this exception.

The Plaintiff appealed.

Mr. Molteno appeared for the appellant.

Mr. McGregor applied for leave to appear on behalf of the respondent but said his attorney had no warrant to defend.

Mr. Molteno not objecting the Court allowed Mr. McGregor to argue the case for the respondent on condition that the respondent should not in any case get his costs.

Mr McGregor: In *Bertram v. Wood* (10 Juta, 177) it was held that as soon as the Court finds future rights are involved the Magistrate's jurisdiction is ousted.

[De Villiers, C.J.: Where the total value of the future rights does not exceed the amount of the Magistrate's jurisdiction I do not see why the Magistrate should not try the case.]

I do not think that has ever been laid down.

Mr. Molteno: In *De Wet v. Jonste* (9 Juta, 239) the point was discussed.

Mr. McGregor: In that case, *Lindenberg v. Bosman* (1870, p. 50) was referred to. See also *Le Roes v. Goldie* (12 S.C.R., 371).

The appeal was allowed.

De Villiers, C.J.: *Prima facie* this case was within the Magistrate's jurisdiction. It was an action upon a contract under which the defendant was to have certain rights of pasturage in consideration of his deepening a well on the plaintiff's land and the plaintiff claimed no more than £20 as damages for breach of the contract and for trespass after such breach. Exception was, however, taken to the jurisdiction on the grounds that future rights would be bound by the action and that the subject matter in dispute exceeded the

jurisdiction. As to the first ground the action is clearly not of such a nature as to bind rights in future. As to the second ground the Magistrate seems to have held that an action for trespass stands on the same footing as an action for ejectment under the 10th section of the Magistrate's Court Act 1856, and moreover that the matter in dispute exceeded his jurisdiction. The evidence upon this point was exceedingly vague and unsatisfactory and did not in my opinion support the Magistrate's finding. I do not wish it to be understood, that in the opinion of this Court, the proviso to the 10th section of the Magistrate's Court Act 1856, is applicable to the present case, which is an action not for ejectment but for damages for trespass. I would rather apply the principles laid down in *Bertram v. Wood* (10 Juta, 177) and, therefore, the defence being a *bona fide* denial of the breach of contract, if there had been satisfactory evidence that such defence involved the decision of questions beyond the jurisdiction I would have been prepared to support the judgment. If there was a breach of contract on the defendant's part he would no longer be entitled to any right of occupation, and therefore if that right of occupation were manifestly of the value of more than £20 the decision of a question beyond the jurisdiction would be involved. But in the absence of satisfactory proof of such value, the Court below ought not to have sustained the exception, but ought to have heard the case on its merits. No injustice could be done to the defendant for it would be competent to him to appeal to this Court in case the judgment should be adverse to him. There is a tendency on the part of defendants in the inferior Courts to evade just demands by excepting to the jurisdiction on plausible but insufficient grounds, and this Court has no desire to encourage that tendency. The appeal will be allowed, and the case remitted to the Court below to be tried on its merits; the question as to the costs of appeal and of the previous hearing to abide the result in the Court below.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Van Zyl & Buissine.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice).  
the Hon. Mr. Justice BUCHANAN and  
Mr. Justice MAASDORP.]

CREAGH V. CREAGH. { 1899.  
Aug. 7th.

This was an action for divorce.

Mr. Benjamin appeared for the plaintiff, a medical practitioner residing at O'okiep, Namaqualand. The marriage took place at St. Pancras, London, before the Registrar, on November 30, 1856, and there was no issue. A portion of the evidence, by leave of the Court, was given on affidavit. Plaintiff submitted medical certificates setting forth that he would run great physical risk by making a journey from O'okiep to Cape Town, as he is suffering from consumption in the second stage. It was alleged on affidavit that defendant had committed adultery with one Edward H. Knight, at Mowbray, the said Knight having been divorced from his wife in consequence, and also that defendant was intemperate.

Mrs. Elizabeth Twine, residing at Mowbray, deposed that she gave evidence in the case of Knight v. Knight in which the present defendant, Mrs. Creagh, was alleged to have committed adultery with the man Knight. She identified her from a photograph produced. Mrs. Creagh lodged in her house for six or seven weeks, during which time she was visited very frequently by Knight, who sometimes remained in her (defendant's) bedroom all day. On account of her conduct in the house witness was obliged to order her away.

There was no appearance for the defendant, and a decree of divorce was granted.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

PHILIPS V. THE BULAWAYO MARKETING AND OFFICES COMPANY, { 1899.  
Aug. 7th,  
" 10th.  
LIMITED.

Contract—Implied term—Necessary implication—Consideration.

*The defendants entered into a contract by which they undertook, in consideration of the plaintiff erecting a proscenium and drop curtain for a stage in their Market hall, to give him the sole right to use*

or let the drop curtain for advertising purposes. They afterwards found that owing to the almost prohibitive premium charged for insuring the hall while used for public entertainments it was impossible to find a theatrical tenant and they accordingly let it to C. to be used as an auction mart with liberty to C. to let it for theatrical performances on condition of his paying one-half the fees received by him (not being less than the extra premium) and of his exhibiting the drop curtain at such performances.

Held, that only such terms should be implied as are necessary to give the transaction its intended efficacy, and to prevent such failure of consideration as could not have been contemplated.

Held, further, that the only terms to be implied in the contract were that the drop curtain should be exposed to public view whenever performances were given and that the defendants should afford reasonable facilities for the giving of such performances.

Held, further, on the facts, that there had been no breach of contract on the part of the defendants.

This was an appeal from the judgment of the High Court of Southern Rhodesia in an action for damages for breach of contract instituted by the present appellant.

The plaintiff's declaration was as follows:

1. The plaintiff is a painter, residing at Bulawayo; the defendants are a company, duly incorporated under the Companies Act, England, and carry on business at Bulawayo.

2. The defendants are the owners of a certain building known as the Market Buildings, which said building at the time of the matters hereinafter set out contained a hall, with a stage and accessories necessary for holding public entertainments, for which use the defendants had intended the said hall.

3. On or about the 12th day of September, 1898, it was agreed and contracted between

the plaintiff and defendants that in consideration of the plaintiff supplying the defendants at his (the plaintiff's) own cost and expense, a proscenium and drop curtain for the said stage and erecting same, the defendants would allow and give the plaintiff the use of the drop curtain on the said stage for advertising purposes for and during a period of two years.

4. The plaintiff duly fulfilled his part of the contract, and the defendants were in duty bound under the said agreement to keep the said hall open and prepared for all such entertainments as might reasonably be held there, but in failure and breach of such duty, and in breach of the said contract, the defendants have wrongfully and unlawfully removed the proscenium, including the drop curtain, and rendered the hall unfit for the holding of public entertainments, and have put it out of their power to hold or allow to be held any such entertainments by reason of their having parted with all control of the said hall.

5. The plaintiff has suffered great loss and damage in the cost of the proscenium and drop curtain and their erection, and in loss of profits derived from advertising and otherwise, and is now entitled to sue for the same.

Wherefore the plaintiff claims: (1) Payment of the sum of £132 as and for damage sustained; (2) further and other relief; (3) costs of suit.

The defendant pleaded in the following terms:

1. The defendants admit the allegations in paragraph 1, and deny those in paragraph 5, of the declaration contained.

2. The defendants admit the allegations in paragraph 2 contained, save and except that they say that the said hall was intended by them to be used for any purpose whatsoever, and only for the holding of public entertainments should occasion for holding such entertainments arise.

3. The defendants admit the contract set out in paragraph 3.

4. The defendants admit that the plaintiff performed his part of the said contract and that they have removed the said proscenium, but say that the same can be replaced whenever its replacement should become necessary, and that the said curtain is still hung on the said stage, and is used by the plaintiff for advertising purposes. Save as aforesaid, the defendants deny the allegations in paragraph 4 contained.

5. The defendants gave no guarantee that the said hall should be used for public entertainments.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

The replication was general.

The contract between the parties was said to be contained in the following letters :

The Bulawayo Market and Offices Company (Limited), Bulawayo, 9th September, 1898.

E. Phillips, Esq., Bulawayo.

Dear Sir,—Adverting to our conversation, we herewith accept your offer to erect proscenium and drop curtain to fit the Market-hall stage now in course of erection, it being understood that same shall be erected and ready for use by the 26th inst., in exchange for which we give you the use of the drop curtain for advertising purposes for two years from the 26th inst. An acknowledgment will oblige.—Yours faithfully,—G. L. Fields of Matabeleland (Limited).

Per (signed) H. P. Desmoulins, secretary.  
12th September, 1898.—To the Secretary of the Bulawayo Market and Offices Company (Limited).

Dear Sir,—Re yours of the 9th inst., accepting our offer to erect proscenium to fit Market-hall stage, in consideration of which I shall have sole right to use or let drop curtain for advertising purposes for the period of two years from the 26th inst., I also agree to have the same erected and ready for use by the 26th inst., with the exception of completion of the decoration, provided that the stage is ready by the 19th inst.— Faithfully yours, — (Signed) E. J. Phillips.

After hearing the evidence, Mr. Justice Vincent delivered the following judgment :

In this case the plaintiff sues the defendant company for the sum of £412 as and for damages sustained for breach of contract.

The defendant company is the proprietor of a block of buildings in this town known as the "Market Buildings." In those buildings there is a hall, which has since its erection from time to time been used for various purposes, such as a market hall and a place for entertainments of all kinds.

It appears that in September last Mr. Searelle, who had brought an operative company to Bulawayo, entered into an agreement with the defendant for the lease of this hall for operative purposes for a period of two weeks with the option of a renewal for a

further two weeks. By this lease the company undertook to erect a stage and proscenium in this hall, and to supply electric light, including footlights. The defendant company thereupon duly erected the stage, and entered into negotiations with the plaintiff with regard to the erection of a proscenium and a drop curtain, the result being that the plaintiff undertook to erect a proscenium and to fit the stage with a drop curtain at his own cost in consideration of the company granting him the use of this curtain for advertising purposes for two years, dating from September 26, 1898.

The plaintiff duly erected the proscenium, provided the drop curtain, and obtained through his agent, Gladwin, a certain number of mercantile and other advertisements, which were painted on the curtain. This curtain was used during the period of Searelle's lease. The cost of the erection of the proscenium, fitting curtain, and painting of advertisement thereon amounted to about £50. Shortly after Searelle's lease Mr. Vernon Reid applied to the defendant company for a lease of this hall for theatrical and concert purposes for a period of six months. No binding agreement seems to have been entered into, several terms of the proposed lease having been allowed to stand over for final settlement. In December the company insured the Market Buildings for £25,000; one of the terms of the policies of insurance entered into being that in the event of the hall being used for theatrical, &c., entertainments, an extra premium at the rate of 10s. per cent. per month would be payable, i.e., £125 per month. It was previously proposed that Reid should pay rent at the rate of £30 per month. The defendant company on discovering the above-mentioned terms of the policies, ceased negotiations with Reid, Reid refusing to pay this extra premium, and by way of compensation for whatever claims Reid might have against the company, paid him the sum of £150.

Shortly after this the company removed the proscenium to a hall at the police camp, which is used by the members of the force for entertainments. The stage in the Market-hall was left and is still there, and the curtain has been hung on the wall at the back of the stage, where it is visible to all persons frequenting the hall.

This hall was shortly after the removal of the proscenium leased to Mr. Colenbrander, an auctioneer. This lease has been put in

in evidence. Clauses 6 and 17 thereof appear to me to be of importance in the consideration of this case. This lease does not prevent Colenbrander from letting the hall for theatrical purposes, and it is specially provided that the curtain is to remain where it is at present, and is to be hung in front of the stage in the event of any performances taking place at which a drop curtain is usually employed. It thus appears to me that the defendant company have been careful by this lease to safeguard whatever rights the company considered the plaintiff had with regard to this curtain.

The plaintiff contends that the defendant company have by removal of the proscenium and the drop curtain broken their contract and have rendered the hall unfit for the holding of public entertainments. And further, that the company by the lease to Colenbrander have rendered performance of its part of the contract impossible.

At the close of the plaintiff's case, defendant's counsel applied for absolution from the instance. I took time to consider this application, and eventually decided to hear evidence for the defence.

It transpired in the course of this evidence that since the adjournment of the case a concert had been given in honour of the English cricket team (Hawke's) at this hall, that the curtain had actually been hung in front of the stage, and that the proscenium had been re-erected in a very short time for the purposes of this entertainment.

Now, if the evidence which was led with-out objection be admissible (and I have doubts as to its admissibility), it is clear that there was no verbal and actual guarantee as to the hall being permanently used as a theatre, but actually the reverse. The evidence of Hughes with regard to his conversation with Gladwin—plaintiff's agent—shows that Gladwin would not give a guarantee as to the length of time the curtain would be hung in front of the stage.

What is the contract? It is contained in the letters of the 9th and 12th September, and its effect to my mind shortly is that in return for plaintiff's erecting the proscenium and drop curtain defendants give to plaintiff the sole right to use this curtain for advertising purposes for the period of two years.

Now with regard to the proscenium, I am of opinion that it at once became the exclusive property of the defendant company, and

that the plaintiff cannot in law complain if the company remove, or lend, or even destroy it.

Is there a necessary implication that the defendant company warranted to hold entertainments at this hall, or that the hall would not be let for other purposes? I am clearly of opinion that this question must be answered in the negative.

It seems to have been fully understood that the hall was one for general purposes, and that entertainments would be the exception rather than the rule. It is true that the erection of the stage (which I find to be movable) proscenium and a drop curtain might lead one to expect that something in the nature of theatrical performances might take place fairly frequently, but that in the nature of things must be a mere chance, and it appears to me that that chance plaintiff took.

It can hardly be urged that the company was bound to take any class of performers who applied for the hall as tenants for the mere purpose of exhibiting the curtain, or that, with the same object, the company should let the hall for performance at a loss! And in this respect Vernon Reid's case is an example.

In my opinion the contract means that plaintiff's drop curtain must be exhibited (and this is a necessarily implied warranty) at any entertainments on the stage which the company might think it advisable to allow.

The company took the chance of procuring that class of tenants, and the plaintiff took his chance that the company would do so frequently enough to make his advertising business pay.

I quite realise that the heavy insurances charges payable in the event of theatrical, &c., performances being held, under existing circumstances make the leasing of the hall for such purposes well-nigh prohibitive, but I do not consider that that fact can be used by the plaintiff against the company. I do not think that either party to the contract contemplated this possible check. It is, however, by no means impossible that before the expiration of the two years the hall may be fairly frequently used for theatrical purposes, and in the event of this occurring it is clearly provided by the lease to Colenbrander that the curtain is to be used. As I have already mentioned, the curtain was actually used at the concert given in honour of the cricket team last March. In all these circumstances, then, I am of opinion that

plaintiff has no reason to complain; he entered into a speculative contract, and must accept all the risks attaching to such a bargain. I am therefore of opinion that there must be judgment for the defendant, with costs.

The plaintiff appealed.

Mr. Searle, Q.C. (with him Mr. McGregor), for the appellant: The contract was that the hall should be in the market for entertainments from time to time. That was implied by the expense incurred in erecting the proscenium and painting the curtain. There was an implied contract on the defendants to keep the hall in *statu quo* for a period of two years. The defendants, however, have committed a breach of the contract by the lease to Colenbrander in that they have deprived themselves of the right of deciding whether or not entertainments are to be held in the hall and have made Colenbrander the sole arbiter. It is not necessary to put the case on the ground of guarantee. The defendants by the lease to Colenbrander have placed it out of their power to continue the consideration of their contract with the plaintiff. The removal of the proscenium is only evidence of the defendant's intention not to use the hall any longer for theatrical purposes.

*Tuff Vale Railway Co. v. McNab* (22 L.J. (N.S.), p. 158) dictum of Lord Colonsay, *The Moorcock* (14 P.D., p. 64); *Turner v. Goldschmidt* (1, Q.B.D. 1891, p. 514); *Hamlyn & Co. v. Wood & Co.* (2 Q.B.D. 1891, p. 488); *Stirling v. Maitland* (5 B. and S., p. 810; per Cockburn, J. at p. 852); *McIntyre v. Belcher* (14 C.B. (N.S.), p. 654).

Mr. Innes, Q.C. (with him Mr. Benjamin): The letters, on the face of it, do not contain the whole contract. They themselves show that there must have been other conversations between the parties both before and afterwards. The question whether there is any implied warranty or guarantee depends always upon the circumstances of each case, and there is strong evidence that the defendants would not give any guarantee of permanence. All that the letters show is that the defendants undertook that if the plaintiff painted and erected the drop curtain that curtain would be used at all the theatrical performances which took place in the hall. There is nothing to compel them to let it for theatrical purposes. The hall appears to be used now for the same purposes for which it was used at the time of the contract. The only difference is that Colenbrander is now

the lessee. It cannot be held that the contract between the parties prohibited the defendants from giving a full lease to anybody. *Rhodes v. Forwood* (1 App. Ca., p. 266); *Turner v. Goldschmidt* is distinguished from that case. In *Hamlyn & Co. v. Wood & Co.* (Lord Esher, at p. 491) laid down the rule that an implied contract must be a necessary implication, looking at what parties did and said, that what one says exists does in reality exist. There is nothing to show that Colenbrander will not carry out the defendant's obligations if any offer is made to him for the hire of the hall for entertainment and so there can be no breach of contract until a concrete case of refusal by Colenbrander to let occurs.

Mr. Searle in reply.

*Cur ad cult.*

*Postea* (August 10th).

De Villiers, C.J., said: This is an appeal against a judgment of the High Court of Southern Rhodesia in an action for damages for an alleged breach of contract. The contract is contained in a letter addressed by the defendant company to the plaintiff and in his reply thereto. The company, having agreed to let their Market-hall to Searle, after erecting a stage and proscenium therein, wrote as follows to the plaintiff: "Bulawayo, September 9, 1898.—Dear Sir,—Adverting to our conversation, we herewith accept your offer to erect proscenium and drop curtain to fit the Market-hall stage now in course of erection, it being understood that same shall be erected and ready for use by the 26th inst., in exchange for which we give you the use of the drop curtain for advertising purposes for two years from the 26th inst." The plaintiff, in his answer, dated the 12th of September, confirmed the terms of the contract. He accordingly erected the proscenium and drop curtain, and procured advertisements from several customers, which were painted on the curtain. After Searle left, the company insured the buildings, and had to pay an extra premium of £125 a month while the hall was used for theatrical performances. The consequence was that they were unable to let the hall for such purposes, but they leased it to one Colenbrander for a period of three years to be used as an auction mart with liberty to him to use it for concerts or balls or theatrical performances, he paying to the lessors one-half of the fees, not being less than the extra premium payable to the insurance company. The lease further provided that "the lessee shall permit the lessors to retain the curtain

or drop scene, which is now upon the stage, in its present position at the back of the stage, and to use or permit the same to be used at all times for the purpose of advertising, and the lessee shall not interfere with any person who may be engaged in painting such curtain." The plaintiff thereupon brought an action for damages for breach of contract, the breach, according to the amended declaration, consisting in this, that the defendants had "put it out of their power to hold, or allow to be held, any public entertainments by reason of their having parted with all control of the said hall." The learned judge of the High Court held that the defendant company had undertaken to do no more than allow the drop curtain to be exhibited at any entertainments on the stage which the company might think it advisable to allow, and that the plaintiff took his chance that the company would do so frequently enough to make his advertising pay. Judgment was accordingly given for the defendant with costs. The correspondence does not expressly state that the defendant company would be bound during two years to take advantage of every opportunity that might offer itself of letting the hall for public entertainments, but the absence of such a term in the contract would not be conclusive if it must be necessarily implied from the contract as a whole and from the circumstances under which it was entered into. I quite adopt the view of the Court of Appeal in *Hamlyn v. Wood* (Q.B.D. for 1891, vol. 2, p. 488) that "such an implication of a term in a contract ought to be made only where it is necessary in order to give the transaction such efficacy as both parties must have intended it to have, and to prevent such failure of consideration as cannot have been within the contemplation of either party." It is clear that both parties must have intended that the drop curtain, with the advertisements thereon, should be exposed to full public view whenever entertainments were given on the stage. I consider also that they must have intended that the defendant company should during the period agreed upon give reasonable facilities for the holding of public entertainments in the hall. The plaintiff on his part had forthwith to give valuable consideration by erecting the proscenium and drop curtain, at a cost to him of £15, and I cannot conceive that either he or the company contemplated that the company should thereafter be at liberty without just

or reasonable cause to put it out of its own power to allow the use of the hall in such a manner as to exhibit the plaintiff's advertisements. On the other hand it is not necessary, in order to give efficacy to the transaction, to hold that the company should let the hall at a loss or forego the privilege of having the property insured. The contract, in my opinion, was that the company would, with due regard to their own continuing interests as the owners of the property, give reasonable facilities for the holding of appropriate public entertainments in the hall. The question then is, whether there has been any breach of this contract. It is not alleged that any theatrical or other public entertainment has been prevented from being given in consequence of what the company has done. The breach relied upon is that, by reason of the leave to Colenbrander, the company has placed it out of its power to allow such entertainments. But Colenbrander himself is prepared at any time to let the hall for such purposes. The lease does not compel him to do so, but it clearly contemplates that he will and imposes on him the duty of exhibiting the drop curtain. Until he refuses a reasonable offer to hire the hall for theatrical performances the plaintiff has no reason to complain. The amount of the rent which Colenbrander must charge to recompense himself is very high, indeed almost prohibitive, but the high rent is caused by the high premium charged by the insurance company. The defendant company must give reasonable facilities for the giving of entertainments, but it would be an unreasonable requirement, and one, as I have already remarked, not contemplated by the parties to the contract, that he should either let the hall at a loss or else lose the benefit of insurance, in order to enable the plaintiff to exhibit the drop curtain. There is no evidence of any failure on the part of the company to afford such reasonable facilities as I have mentioned, and the appeal must therefore be dismissed with costs.

Buchanan, J. concurred, and said: The express contract between the parties, so far as it is evidenced by the writing, is simple. In consideration of the plaintiff erecting a proscenium and drop curtain to fit the stage in the defendant company's Market-hall, the plaintiff was to have the use of the drop curtain for advertising purposes for the period of two years. No breach of any of these terms is alleged. But plaintiff

pleads that it was an implied condition that the defendant company was in duty bound to keep the hall open and prepared for all such entertainments as might reasonably be held there, and the breach of this implied condition complained of is, that the company has removed the proscenium and curtain, rendered the hall unfit for holding public entertainments, and put it out of their power to hold, or allow to be held, any such entertainments. Now when parties have reduced their contract to writing, the law hesitates to go outside the writing. The utmost the authorities seem to allow as to implied condition, irrespective of custom of trade, which does not apply here, is that a term may be implied when from the language used or the circumstances under which the contract was entered into necessarily show that both parties intended it, so as to give effect to their contract. In the language of the Master of the Rolls (*Hamblyn & Co. v. Wood & Co.*, 2 Q.B., 1891, p. 491), "I have for a long time understood the rule to be, that the Court has no right to imply in written contract any such stipulation unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication." In the Court below a question was raised as to the admissibility of evidence as to the circumstances under which the contract was made. This evidence was essential to the case set up by plaintiff. At any rate the defendants are entitled to take the benefit of it in so far as it shows that the plaintiff took the risk of a speculative agreement. As he said himself: "I took my chance of entertainments. I got no guarantee of permanency." As one of his witnesses who negotiated the contract said: "I told plaintiff that the company could not give a guarantee. I said I guarantee nothing. I could not guarantee that the proscenium was to be a fixture." Now it is the temporary removal of this proscenium that is one cause of complaint. The other is that the defendants have let the hall to an auctioneer. Considering the purposes for which the hall was used, there is nothing to imply that the parties agreed that defendant should not let it for such a purpose. The hall, by the erection of a stage and accessories, was also rendered available for use for theatrical purposes, but neither of the parties could

have contemplated that to be the only manner in which it was to be used. On the contrary, theatrical performances were evidently considered the exception, and depended on casual visits to the town of any travelling company. The evidence shows that no application has been made for the use of the hall for such a purpose. The defendants have safeguarded the plaintiff by stipulating in their lease to Colenbrander that he may lease the hall for performances and entertainments, and that whenever the hall is so used the drop curtain shall be retained in position, and the plaintiff be allowed reasonable access to paint any advertisements he may desire on the curtain. The lessee is ready and willing to let the hall if desired, and even if a condition that reasonable facilities for theatrical performances is to be implied as a term of the contract, yet the evidence shows that no case for damages has yet arisen. For these reasons, in my opinion, this appeal should be dismissed with costs, and the judgment of the learned judge in the Court below affirmed.

Maasdorp, J., I concur: I only wish to add that as far as an implied condition is contained in this contract, I rather agree with the view taken by the Chief Justice, that there is an implied condition that reasonable facilities were to be given for holding theatrical performances when opportunity arose. But the occasion has not arisen yet in which an offer has been made for holding such theatrical performances, and therefore such offer has not yet been refused. Under these circumstances there has not been a breach of contract.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1899.  
{ Aug 10th.

The following gentlemen were admitted to practise as attorneys and notaries: Mr. Malcolm G. D. Pearson, Mr. A. J. Lewis,



and Mr. P. J. Theron; as attorney, notary, and conveyancer, Mr. Allan Reid; and as attorney, Mr. Reginald Metcalfe.

Mr. McGregor and Mr. Buchanan moved.

ZOE V. BOSMAN.

Mr. Buchanan applied for a writ of civil imprisonment on an unsatisfied judgment. Order granted.

ASSIGNEE OF ESTATE OF LATE } 1899.  
J. WATKINS V. PAULINE } Aug 10th.  
KROMM.

Mr. P. Jones applied for provisional sentence for £500 on a signed acknowledgment of debt, the validity of which was not denied.

Defendant filed an affidavit, in which she alleged that it would be more convenient if the principal case should be gone into, as she had a claim against the plaintiff founded on the breach of certain conditions in a lease drawn up between the late J. Watkins and herself, and that the document which she had signed was never intended to be sued on.

No replying affidavit was filed owing to the impossibility of communication with the plaintiff at Beaufort West before the case came on.

Mr. Innes for the defendant submitted that under the circumstances detailed in defendant's affidavit it would be better for both parties that the principal case should be gone into.

Mr. P. Jones submitted that the plaintiff was clearly entitled to judgment on the liquid document, the validity of which was not denied.

De Villiers, C.J., in giving judgment said: No hard-and-fast rule can be laid down in cases of this description, but the Court has a very wide discretion in such matters. The lessee has violated the Licensing Act, and by reason of this the tap licence in connection with the hotel leased has been suspended. Provision was made in the lease that if the licences in connection with the hotel were lost through the misconduct or negligence of the lessee, Watkins, the defendant could claim that the lessee or his sureties should take over the hotel at a fixed price (£1,800). The defendant had called on the plaintiff and the sureties to do so, but they had refused. Taking all the circumstances of the case into consideration, the Court is of opinion that the principal case should be gone into. Provisional sentence will be refused; costs to be costs in the cause.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

LEDEBOER V. BUREBOUGHS, BENNET AND CO.

Mr. Molteno applied for and obtained provisional sentence upon an acknowledgment of debt for £240.

ESTATE OF DUGGAN V. DU TOIT.

Mr. P. Jones moved for provisional sentence on a mortgage bond.

Granted.

ESTATE OF JANTJES V. THEUNISSEN AND OTHERS.

Mr. Searle, Q.C., applied under Rule 319 for an order declaring a certain agreement of sale cancelled, the property in question being an erf of ground situated in Mossel Bay. The defendants had not entered appearance.

Mr. Searle said that although not absolutely necessary, it had been thought better to file a declaration in order to put all the facts before the Court. This course had been followed in *Barrow v. Le Brun* (5 Juta, 368), a similar case.

Judgment under Rule 329 was granted, but no order was made as to costs of the declaration which had been filed.

BOSMAN, POWIS AND CO. V. HALPERAN AND OTHERS.

Mr. Miller moved for judgment for £53 4s. 1d. under Rules 319 and 329.

Granted.

VAN RYN COMPANY V. CORLETT.

Mr. Uppington applied for judgment under Rule 329 for £163 14s. 7d., goods sold and delivered.

Granted.

LYONS V. GANIE AND KASSIM.

Mr. Maskew moved for judgment under Rule 329 for interest and costs in connection with the purchase price of a house.

Granted.

JUTA AND CO. V. LEAR AND CO.

Mr. Miller applied for judgment under Rule 329, for £55, rent

Granted.

## LANGERMAN V. BERRY.

Mr. Currey applied for the appointment of the Magistrate of Salisbury, Northern Rhodesia, as commissioner to take the evidence of Mr. John W. S. Langerman, a material witness for plaintiff in the action. Ordered.

## INSOLVENT ESTATE OF PRINCE.

Mr. Buchanan applied for the appointment of the Acting Resident Magistrate of Port Elizabeth as a commissioner to take the evidence of witnesses in the above estate.

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

*Ex parte* PETERS. { 1899,  
Aug. 11th.

Post-nuptial Contract — Registration.

*Leave to execute after marriage a contract, excluding community of property between husband and wife, refused where it did not appear that at the date of the marriage they had any intention of executing such a contract.*

Mr. Close applied, on behalf of Mr. Ernest Ewald Peters and his wife, for leave to enter into a post-nuptial contract excluding community of property, and to have it registered. The husband had only resided in the Colony for three years. They alleged that they were not aware of the true effect of marriage in community in this country. It was their intention that after marriage they should each keep and have their own separate property and estates, but had now been advised of the true effect of the marriage. The marriage took place in June last in community of property, and both parties were of full age.

Buchanan, J., said he regretted the Court could not grant permission in this application. Persons in this colony married accord-

ing to the laws of the Colony. When there was no ante-nuptial contract, but it was shown to the Court that the parties had intended to enter into one, the matter being neglected through some oversight or other reasonable cause, the Court allowed a contract to be made and filed subsequently. But in this case there was nothing to show that the parties had any intention on the date of their marriage of executing such a contract, and therefore the application must be refused.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

## BERMAN V. BINDER.

Mr. Benjamin, for the defendant, asked for the appointment of a commissioner to take the evidence of a witness who was too ill to travel to give evidence in the Supreme Court.—The application was granted and the Resident Magistrate of the Paarl was appointed commissioner.

## TABORSKYI V. HENCKELS AND CO.

Sir Henry Juta, Q.C., for the applicants, applied for leave to attach certain property to found jurisdiction, and to sue by edictal citation. The petitioners intended to institute an action against the defendants for damages. The defendants were domiciled at Hamburg, Germany, and certain goods belonging to them were expected soon to arrive by steamer. The amount in issue was £378 18s. The invoices of the goods expected per steamer were in the hands of the Cape Town branch of the National Bank, who held a bill of sale for the value.

The Court granted an order for the attachment of the bills of lading with reference to the goods arriving by the steamer, in order to found jurisdiction, saving all just rights which the National Bank may have, leave to sue by edictal citation being granted; *per se* al service.

## RILEY V. RILEY.

Mr. Buchanan applied for leave on behalf of the applicant to sue his wife, the respondent by edictal citation in an action for divorce. His affidavit set forth the various movements of the parties since their marriage in December, 1891, at Mossel Bay, in community of property. The husband, in order to obtain employment, had to take up his abode in various parts of South Africa his wife at first either being with him or

visiting her friends in the Moesel Bay district, and he had always shown his willingness to support her adequately. After becoming connected with one "Professor" Boscombe, she disappeared, and the applicant had reason to believe that she was going under the name of Madame Cohen. While residing at Johannesburg the respondent had taken a situation at a restaurant, for the duties of which appointment she seemed to have a special liking, and her husband had to remonstrate frequently with her on account of late hours.

Leave to sue by edictal citation was granted, personal service if possible, and publication in the "Cape Times," "George and Knysna Herald," and "Government Gazette."

SEA POINT MUNICIPALITY V. ESTATE SOLOMON.

Mr. Close applied for an interdict restraining respondent from proceeding with certain building operations until proper plans have been passed by the Municipality.

A consent paper was put in, and the interdict granted.

Re MINOR DE VILLIERS.

Mr. De Waal applied for an order authorising the Master to make certain payments towards the education and maintenance at the Good Hope Seminary of the minor Isidora Adriana de Villiers.

Granted.

STRAUSS' EXECUTOR DATIVE } 1899.  
V. STRAUSS. } Aug. 11th.

Legacy—Condition—Election.

*Where property was bequeathed to the testator's grandson on payment of £300 into the testator's estate, but the bequest was subject to a life-interest in favour of testator's son, The Court, the testator having died but his son being still alive, ordered a rule to issue calling on the legatee to elect whether or not he would accept the bequest.*

Mr. Innes Q.C., applied on behalf of the executor dative in the estate of the deceased, S. A. Strauss, for an order compelling the respondent, the grandson of the testator, to pay £300 into the estate or repudiate his

bequest. Under the will of the deceased S. A. Strauss and his spouse the said respondent was bequeathed a half-share in certain farms, Calvinia district, on payment of £300, his father being empowered by the testament to enjoy full rights to the said property during his lifetime. The testator died in April, 1890, and the testatrix was also dead. The executor was anxious to liquidate the estate, but could not do so until this provision in the will was carried out. The respondent had been called upon to pay in the £300 but refused to do so, and also refused to repudiate the bequest and alleged that the applicant had no right to make the demand.

Mr. Innes: The property is bequeathed to the respondent, subject to the condition that the testator's son, respondent's father, shall have a life interest. It is a usufructuary bequest, not a *fidei-commissum*. The will does not say that the amount is to be paid on the father's death. The dominium is in the respondent and the moment he adiates he becomes liable to pay the £300. There is sufficient in the estate to pay the special bequests but not the residuary heirs.

[Buchanan, J.: What will be the result if the respondent repudiates the bequest or does not pay the money?]

The bequest will fail and the father's life-interest with it.

The Court granted a rule *nisi* calling on the respondent to show cause why he should not elect whether or not he would accept the bequest: returnable on September 12, and to be served on the respondent and on his father also. Costs to come out of the estate.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn.]

Re CROUSE'S ESTATE. } 1899.  
} Aug. 11th.

This was an application by the widow, who was also executrix, and the children of the late Gabriel Jacobus Crouse, for leave to mortgage the shares of the property bequeathed to the children in order to release the estate from its liabilities. Petition had been made to the Court on August 1, 1898, for leave to pass a mortgage bond of £150 on the share of each, upon their taking transfer from the widow (8 *Sheil*, p. 249). The Court then refused the application, but authorised the executrix to raise a loan and pass a bond on the estate for £250, in order to pay the arrears of interest on the existing bond on the estate. The widow now stated that this money had been so expended, but that the

property was so unproductive of rent that she had been unable to pay the interest on the two bonds each year, and had had to borrow the money. She had consequently again asked the legatees, the children, to take transfer and release her and the estate from further liability, and they had agreed to do so, provided the sanction of the Court could be obtained to the passing of bonds by them to the extent of £175 on each of their shares.

Mr. Benjamin appeared for the petitioners.

The Court granted leave to raise an amount on mortgage of the property sufficient to meet the liabilities of the estate which were stated to be about £1,400.

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## SUPREME COURT

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[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAARDORP].

J. P. LOUW AND CO. V. VAN 1899.  
NIEKERK. (Aug. 14th.

This was an action upon a disputed account.

Mr. Brown for the plaintiff.

Mr. Miller, for the defendant, consented to judgment.

### LOUW'S ESTATE V. VAN NIEKERK.

This was an action upon a disputed account.

Mr. Brown for the plaintiff.

Mr. Miller, for the defendant, consented to judgment.

### Re PRINCE'S INSOLVENT ESTATE.

Mr. McGregor made an application for the appointment of a provisional trustee in the insolvent estate of Wm. Prince in room of Mr. T. W. Clark, deceased. Mr. Max Gumpert was provisionally appointed, and the Court ordered the convening of a special meeting of creditors at Port Elizabeth, where the estate is being administered, to appoint a permanent trustee.

### Re SLAGTER'S INSOLVENT ESTATE.

Mr. McGregor applied for authority to call a special meeting of creditors for the purpose of electing a trustee in the estate of Adolph Slagter in place of T. W. Clark, deceased.

The application was granted.

### Re MARSHALL'S INSOLVENT ESTATE.

Mr. Uppington applied on behalf of certain creditors in the insolvent estate of William Marshall, who represented £306 15s. 7d. of the debts proved, but were the majority of proved creditors, for the appointment of P. W. Fitzgerald as provisional trustee. There had been no election of trustee at the second meeting of creditors.

Mr. Innes, Q.C., on behalf of creditors representing £348 12s. of the proved debts, applied for the appointment of D. Stroyan. It appeared that the proofs of certain of the creditors who supported the appointment of Fitzgerald had been objected to by Stroyan, but they had not been set aside. It was also alleged that fresh creditors had proved since the second meeting.

De Villiers, C.J., said that the Court was not in the habit of appointing a trustee to finally administer an estate if there was any chance of an election. There appeared to be a probability of an election if the matter were referred back. It would save expense if the two applicants for the appointment could arrange to act jointly but as that did not seem to be practicable the matter would be remitted to the Magistrate for further proof of debt and for the election of a trustee.

### DRAPER V. DRAPER.

This was an application by Mrs. Draper (born O'Connor) for an order on her husband to pay over to her the sum of £20 to enable her to defend an action for divorce instituted against her.

Mr. Miller for applicant; Mr. Close for respondent, the husband and plaintiff in the divorce action.

According to the petition of the applicant, she was married to Joseph Draper in July, 1895, at S. Mary's Church, Woodstock, in community of property. She affirmed that her husband subjected her to ill-treatment, especially when he was in liquor, and that he had left his home and refused to pay for her maintenance. During last month she caused a summons to be

issued against him in the Magistrate's Court, and in consequence was granted an order upon her husband for payment to her of £2 10s. per month, which, however, he refused to pay. Her husband was in receipt of £10 per month.

The respondent filed an affidavit in which he denied the paternity of the second child to which his wife had given birth since their marriage, and intimated that he was proceeding in an action for divorce against her on the ground of adultery. He alleged that his wife had used violence towards him, having on one occasion attacked him with a razor and grazed his throat, and she had frequently used threatening language. The plaintiff (and respondent) stated that he was in receipt of £10 a month as signalman, and in proof of his denial of the allegation of insobriety, mentioned that he had occupied his present responsible position at No. 5 Crossing for two years, which would not have been possible if he had not been a steady man. After paying the £2 10s. per month to his wife, as ordered by the Resident Magistrate of Cape Town, he had only £7 10s. with which to pay his own maintenance and that of the elder child, whose paternity he accepted.

Mr. Miller having signified his willingness to act as counsel,

The Court granted leave to the applicant to defend the action *in forma pauperis*.

#### WHITE, RYAN AND CO. V. COOLEY.

This was an application by the defendant for an order to set aside the judgment obtained against her for £97, or for leave to file her pleas.

Mr. Benjamin for applicant.

Mr. Buchanan for respondent.

The application was refused, the Court being of opinion that ample time had been ven to defendant to meet the obligation.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

BERMAN V. BINDER. { 1899.  
Aug. 16th.

Broker's note—Sale and purchase —  
Commission—Brokerage.

*The plaintiff purporting to act as a broker handed to the defendant a broker's note stating the terms upon which the defendant had sold certain property and the brokerage payable to the plaintiff, but the defendant without returning the note wrote immediately to the plaintiff repudiating the terms of the contract of sale, which was never carried out.*

*Held, that the defendant did not, by retaining the note, render himself liable for the brokerage.*

This was an action in which the plaintiff claimed £62 10s. as brokerage at the rate of 2½ per cent. on the sale of a certain piece of ground and buildings at the Paarl, belonging to the defendant. The sale was alleged to have been arranged by plaintiff, one Joseph Chamblin being the purchaser, and the purchase price being £2,500.

The defendant pleaded that on or about March 3, 1899, he sold the property to Joseph Chamblin for the sum of £2,500, £500 to be paid in cash, £1,700 to remain on mortgage, and £300 to be paid by promissory notes signed by Chamblin, payable in instalments of £150 a year.

The plain'tiff was present, in company with Chamblin, when the said agreement of sale and purchase was concluded as aforesaid. The defendant understood from Chamblin that plaintiff was interested in the said purchase, and plaintiff offered to obtain someone to endorse the two promissory notes above referred to, whereupon defendant promised plaintiff that if he obtained a satisfactory endorsement he would pay him at the rate of 1½ per cent. on the purchase price of £2,500 upon the passing of transfer in accordance with the aforesaid agreement.

Defendant specially denied that the plaintiff acted as broker in the said transaction or that he (the defendant) agreed to pay him a commission of 2½ per cent. or any commission as broker. He said that the plaintiff was not a licensed broker at the said date.

Thereafter Chambin was unable to carry out the contract of sale and purchase. The plaintiff did not obtain any endorsement of the said promissory notes, and the agreement of sale fell through, and subsequently thereto the defendant sold the property to another purchaser.

Mr. Upington appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Benjamin for the defendant.

Abraham Berman, the plaintiff, residing at Wynberg, deposed that he and Chambin went to see Binder, the defendant, at the Paarl in February, and an agreement was drawn up for the sale of the property to Chambin for £250. He told Binder that the usual brokerage was 2½ per cent., but he would take £50 cash, as he was a beginner in the broking line, and wanted money. Binder said it would be all right. Plaintiff had no licence at the time, but he sent two broker's notes, one to the seller, and one to the prospective purchaser. These were not returned.

By the Court: He expected payment whether the sale went through or not. Even supposing Chambin could not pay, he considered himself entitled to his brokerage.

Cross-examined: He had been in Namaqualand, where he was a minister. He denied that an arrangement was entered into that he was to marry Chambin's sister-in-law, and live on the property which was to be purchased from Binder. When he sent the broker's notes he had not taken out a broker's licence. He could not read, and could only write his name.

De Villiers, C.J.: Where did you get your licence?

Plaintiff: Here in Cape Town. He did not tell the gentleman he could not write, and he was not asked anything. He just paid him £5, and got his licence. The broker's notes were written out by another broker.

Moritz Stone, a Wynberg furniture-dealer, stated that in the course of a conversation between plaintiff and Chambin, the latter said that if Berman refused to pay any brokerage, he would be prepared to take the responsibility.

Max Binder, the defendant, said he had known Berman in Namaqualand as a school-

master. The sale with Chambin did not go through, but if transfer had been effected he promised to pay Berman £25 or £30 for his trouble. Berman told him he was going to marry Chambin's sister-in-law. When the plaintiff came to see him at the Paarl he brought a Malay man with him, who, he understood, was engaged to write out a testimonial in his (plaintiff's) favour as to his character, the document also to state that witness's property had been sold through his agency as broker. Berman wanted him to give this character, but witness refused to do so. After that witness received a broker's note, but Chambin was unable to complete the purchase, and witness subsequently sold the property for £2475. He never agreed to give Berman 2 or 2½ per cent.

The correspondence put in showed that after the receipt by the defendant of the broker's note his attorney wrote to the plaintiff repudiating the terms of the contract contained therein.

Joseph Chambin, a licensed broker, said plaintiff introduced him to Binder at the Paarl. Berman was courting his (Chambin's) sister-in-law, and if the property had been bought and the marriage of these two had taken place, it was probable witness would have put them in as tenants. The courtship, however, was broken off. When Berman sent him a broker's note through the post in a registered letter he refused to accept it. The conversations among the parties in connection with the transaction were carried on in Yiddish. The evidence of Leah Binder, the defendant's wife, taken on commission was put in.

After argument by Mr. Upington,

De Villiers, C.J.: Stress has been laid on the fact that the broker's note which had been sent to the defendant was not returned to the plaintiff. But the defendant's attorney immediately wrote to the plaintiff repudiating the terms of the contract as embodied in the note. The retention of the note cannot therefore be regarded as an acknowledgment on the defendant's part of the plaintiff's right to the commission now claimed. The question has been incidentally touched upon whether the plaintiff, not having been a licensed broker at the date of the transaction, can recover any commission at all. The 4th section of Act 20 of 1884 imposes a penalty on persons carrying on any unlicensed business, and the tariff (numbered 15) to the Act requires an annual licence of £5 for carrying on the business of a broker. There is nothing

however in that or any other Act which tends to show that the Legislature had in view any other object than the security of the revenue. A hawker is not entitled to a licence without a certificate as to his good character, and a dealer in liquors requires the approval of the Licensing Board, and in regard to the dealings, therefore, of hawkers, liquor dealers and others in a similar position the benefit and security of the public may be fairly regarded as one of the objects which the Legislature had in view in requiring the licence. In regard to brokers the penalty is for carrying on an unlicensed business and therefore unless the single transaction now in question amounts to carrying on an unlicensed business it would be impossible to hold that the contract itself is illegal and that the plaintiff is not entitled to recover such sum as the defendant may have agreed to pay him as commission. Assuming then that the plaintiff was not doing an act prohibited by law the question is whether he has proved an agreement to pay him the commission claimed. In my opinion he has wholly failed in proving such an agreement and the defendant's evidence has distinctly disproved it. The defendant's promise to pay a commission was conditional upon the correct terms of the sale being carried into effect, one of these terms being that the purchaser should, in addition to giving a mortgage for £1,700 on the property, either pay £300 in cash, or else pay £500 in cash and five properly secured bills, for the balance of £300. The purchaser failed to comply with this term of the contract and the plaintiff's right to commission never accrued. Judgment must therefore be given for the defendant with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorneys, Messrs. Scamlen & Syfret; Defendant's Attorneys, Messrs. Van Zyl & Buissinac.]

## SUPREME COURT

[before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

MARAIIS V. MULLER. { 1899.  
{ Aug. 17th.

Mr. Benjamin applied for the compulsory sequestration of the defendant's estate.  
Granted.

NIAY V. DIETERLE.

Mr. Gardiner applied for provisional sentence on two promissory notes for £50 each, less £65 paid on account.  
Granted.

SCOTT V. RACE.

Mr. P. Jones applied for decree of civil imprisonment on an unsatisfied judgment for £19 7s. 8d. for goods sold and delivered.

The defendant in person offered £2 per month.

A decree was granted, but execution suspended upon payment of £2 per month.

S.A. SUPPLY CO. V. HEYNS.

Mr. Buchanan applied for provisional sentence upon a contract of guarantee of payment of a debt incurred by H. C. Roberts & Co.

The defendant appeared in person and objected to judgment on the ground that the principal debtor had not been excused.

Provisional sentence was refused.

EQUITABLE FIRE ASSURANCE CO. V. STEYN.

Mr. Howel Jones applied for provisional sentence upon three mortgage bonds for £400, £150, and £500 respectively.

Granted, and the property declared executable.

## VAN DER BYL AND CO. V. FOUCHÉ.

Mr. Molteno asked for the final adjudication of the defendant's estate.

The defendant appeared in person.  
Order granted.

## WOODHEAD, PLANT AND CO. V. DEAN.

Mr. Close applied for judgment under Rule 329 for £45 2s. 3d., for goods sold and delivered.

Order granted.

## TREDGOLD, MCINTYRE AND BISSET V. RUCK.

Mr. Bisset applied for judgment under Rule 329 for £34.

Granted.

## ESTATE MAURICE DAVIS.

Mr. Gardiner applied for an order convening a special meeting of creditors in the above estate for the election of a trustee in room of Mr. T. W. Clarke, deceased.

Granted.

## STEYN V. MULLER.

Mr. Benjamin applied for leave to sue by edictal citation, the defendant being domiciled in Kroonstad, Orange Free State. The amount claimed was £133 10s. The application was granted, and leave given to attach certain property belonging to defendant situated in Swellendam *ad fundandam jurisdictionem*.

*Ex parte* LANGENHOVEN. { 1899.  
Aug. 17th.

Attorney—Admission—Bachelor of Laws—Act 4 of 1858—Act 12 of 1858, section 3—Act 16 of 1873—Act 27 of 1883.

*A person who has received the degree of Bachelor of Laws of the University of the Cape of Good Hope is entitled to admission as an Attorney of the Supreme Court, provided that he has been articled for the requisite time to an attorney and has passed the necessary practical examinations.*

This was an application for the admission of Cornelis Jakob Langenhoven as an attorney and notary of the Court. The petition set forth that the petitioner had passed the final examination for the degree of Bachelor of Laws of the University of the Cape of Good Hope, and affidavits annexed showed that he had duly served an attorney under articles for three years and had passed the practical examinations required by law.

Sir H. Juta, Q.C., for the applicant: The question raised in this application is whether a person who has served the ordinary time in the office of a qualified attorney and has qualified for the degree of LL.B., but has not passed the examination for a certificate in law and jurisprudence, can not be practically examined and thereafter admitted. The 14th section of Act 27 of 1883 deals with the subject of examinations, and provides that no person shall be admitted to practise as an attorney or notary except on the production of and registration with the University Council and Registrar of the Court to which application for admission shall be made of a certificate of having passed one of the examinations in law and jurisprudence referred to in Act 12 of 1858, section 3. The examinations therein referred to were the examinations provided by section 16 of Act 4 of 1853, under which the old Board of Examiners held their appointment. Section 3 of Act 12 of 1858 set forth that in order to be admitted as an advocate, it was necessary to pass the Higher Law Examination, and in order to be admitted as an attorney or notary, the candidate could pass either of the examinations. By Act 16 of 1873, however, the Act incorporating the University, Act 4 of 1853, was repealed, and consequently the examinations therein stipulated are repealed. Therefore, to carry out literally the terms of the 14th section of Act 27 of 1883 is a practical impossibility. Under those circumstances one has to see what the Legislature intended when it incorporated the University and passed Act 16 of 1873. In this latter Act, the sections which deal with examinations are 20 and 21. By section 20, persons who have obtained, or have been admitted to, the degree of Bachelor of Laws in the University of the Cape of Good Hope, are for the purposes of Act 12 of 1858 entitled to be enrolled as barristers or advocates of the Supreme Court, in like manner precisely as if such persons had obtained the certificates mentioned in section 2 of Act 12 of 1858. So that the degree of Bachelor of Laws was



put on the same footing as the higher law examination. Section 21 provides that persons obtaining a certificate of proficiency in law and jurisprudence shall for the purposes of the 3rd and 5th sections of Act 12 of 1858, be deemed to be in all respects in the same plight and condition as if they had obtained one or other of the certificates in law or jurisprudence mentioned in those sections. The position therefore is this: The Legislature, in 1858, ten years after the passing of the University Incorporation Act, said a person could be admitted if he had passed *one* of the law examinations provided by Act 4 of 1858; their intention being to keep it on the same footing as it was, but to substitute the Bachelor of Law degree for the higher law examination and the certificate in law and jurisprudence for the lower examination. The Legislature intended that for the purpose of passing as an attorney or notary the candidate must pass one or other of these examinations, and I submit that for all practical purposes there was as much notarial practice in the L.L.B. as in the old examination.

Mr. Searle, Q.C., for the Law Society: I do not oppose the application, but the Law Society has thought it necessary to bring the existing anomalies to the notice of the Court. The difference between the two examinations formerly constituted and the two now held is this: under the old Board of Examiners Act the attainments demanded for the higher of these certificates included all the acquirements demanded for the lower one, with such additions as the Board might seem fit to introduce. This was done away with by Act 16 of 1873, and section 19 seems to have an important bearing upon this matter. That section provides that, besides being empowered to grant, after examination, degrees in law, the Council of the University may also grant, after examination, certificates of proficiency in law and jurisprudence. It was clearly intended that there should be a specialising of the subjects and a parting of the ways, and that has been done since. The intention of Act 27 of 1883 was, that no one should be admitted as an attorney and notary until he had passed the law certificate examination. Section 14 mentions "one" of the examinations. That must be the one referred to in Act 16 of 1873, section 19. I admit that Act 30 of 1892, section 7, is rather in favour of the applicant.

De Villiers, C.J., said: The intention clearly was in Act 16 of 1873, to make it a

condition that any one who did not serve five years should get the certificate referred to in section 19 of that Act. There is no doubt whatever that the examination which the applicant has passed is very much severer than the one which he has not passed. He has also passed a practical examination in notarial practice which would be a sufficient test of knowledge, and the very general subjects in the L.L.B. examination also embrace subjects which would be included in the notarial practice examination. But that, of course, would not be sufficient if there were any law prohibiting a person who has passed the L.L.B. examination from being admitted as an attorney without also passing the lower examination; and the Court would have to give in to that law. The section relied upon on behalf of the Law Society is the 14th section of Act 27 of 1883, which enacts that no person shall be admitted to practise as an attorney except upon the production of a certificate of having passed one of the examinations in law and jurisprudence, referred to in the 3rd section of Act 12 of 1858. Now, that is really unintelligible on the face of it, and unless one gives it a very wide and broad construction there would really be no examination at all for attorneys to pass. We must therefore give it as liberal a construction as possible. On referring to Act 12 of 1858 we find that, if read in connection with Act 4 of 1858, there were two law examinations, a higher and a lower, and a higher and lower certificate. Subsequent legislation transformed the higher certificate into the L.L.B. degree, and the lower certificate into the ordinary certificate of proficiency. Then the question is—what examinations are referred to in the 14th section of Act 27 of 1883? Clearly they can not be either of the examinations referred to in Act 12 of 1858, because these examinations were conducted by the old Board of Examiners, and were not University examinations at all; the certificates were known by different names. The only possible construction that can be given is that the examinations referred to are the equivalent examinations conducted by the University, and the equivalent examinations are the L.L.B., and the certificate of proficiency in law and jurisprudence. That being so, I think it is clear that the applicant, having passed the higher L.L.B. examination, is entitled to the same privileges which he would have possessed if he had taken the higher certificate under the Act.

The LL.B. examination is as a matter of fact a severer one than was that for the old first-class certificate, and the subjects are of a wider range. It would be the height of absurdity if a person who had taken a first-class certificate could be entitled to be admitted as an attorney, and yet a person who has taken the LL.B. degree could not be so admitted. The Court must take a very wide construction of this section, and is of opinion that the applicant must be admitted.

Buchanan, J., in concurring, said this was a very proper subject for the Law Society to bring before the Court.

Maasdorp, J., also concurred.

[Applicant's Attorney, C. W. Herold; Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

*Ex parte* S. JACOBS.

Mr. Buchanan applied for the rehabilitation of the insolvent.

Ordered.

FRESH FISH AND FRUIT SUPPLY COMPANY,  
IN LIQUIDATION.

This was an application for confirmation of liquidators' report.

Mr. De Waal applied.

Report confirmed.

HOBBS V. ESTATE HOBBS.

Mr. Innes, Q.C., applied on behalf of the defendant in the action, for the removal of the trial to the Circuit Court at Cathcart.

Sir Henry Juta, for the plaintiff, consented.

The case was ordered to be removed.

GULDEN V. GULDEN.

Mr. Gardiner applied for the removal of the trial of this case to the Circuit Court at Prince Albert.

The Court ordered notice to be served on the defendant.

PORT ELIZABETH ASSURANCE } 1899.  
AND TRUST COMPANY, (LIMITED) } Aug. 17th.  
AND REDUCED).

Company—Reduction of capital.

This was an application which was before the Court on the 3rd instant, and ordered to stand over for further affidavits. The petitioning company asked the Court to sanction the reduction of its capital. The present capital was £250,000 in £1 shares, 190,000 of which were issued at 1s. paid up, and the paid-up capital was therefore £95,000. It was proposed that the

capital should be reduced to 190,000 ten shilling shares, 2s. 6d. paid up, so that the reduced capital would be £23,750. The reduction was to be effected by cancelling the 60,000 unissued shares, returning to the holders of the 190,000 shares paid-up capital to the extent of 7s. 6d. per share, and reducing the nominal amount of the 19,000 shares to 10s. per share, leaving 2s. 6d. paid up on each share. This course was deemed necessary, as the company had parted with certain branches of its business, the fire and marine insurance departments, and now confined its attention to trust business. The whole of the creditors were consenting parties to the reduction.

The petition included a prayer for a day to be fixed by the Court on and after which the company should be at liberty to discontinue the addition to its name of the words "and reduced."

Mr. Rose-Innes, Q.C., moved.

The Court granted a rule *nisi*, returnable on August 31st, calling on all persons concerned to show cause why the order prayed for should not be granted.

*Postea* (August 31st.)

The rule was made absolute and September 30th fixed as the date upon which the company might discontinue the addition to its name of the words "and reduced."

[Applicant's Attorneys, Messrs. Scanlan & Syfret.]

REGINA V. GILMORE. } 1899.  
} Aug. 17th.

Evidence — Accomplice — Cross-examination of accused person tendering his own evidence.

*The appellant was indicted in the High Court of Rhodesia together with one K. for theft. Evidence was given for the prosecution which would justify the conviction of the appellant who did not tender his own evidence. K., however, gave evidence on his own behalf and in cross-examination gave evidence supporting the case against the appellant.*

*Held, on a case reserved, that the admission of the evidence on cross-examination did not invalidate the verdict.*

This was an appeal from the conviction of the appellant by Court of Southern Rhodesia, Mr. Justice Vincent presiding, assisted by four assessors. Gilmore was charged, jointly with one Ally Kahn, with the theft of thirty bags of mealies from the British South Africa Company on the 21st February last.

From the evidence of record it appeared that the British South Africa Company stored certain of their mealies on a wagon standing in the vicinity of a mill where the said mealies were to be subsequently ground. The chief witness for the Crown, Mr. Howe, swore to all the mealies on the wagon in question were the property of the British South Africa Company, but at the same time stated that mealies, the private property of the employees of the company, as much as a bag at a time, were stored in the transport yard of the company, and also on the wagon referred to. On the 10th February ten bags, and on the 21st February thirty more bags, were taken from the wagon, and sold to Kahn, and sent by mule wagon to Kahn's place of business in Salisbury. Witnesses for the Crown proved the taking of the mealies and delivery to Kahn by Gilmore. Kahn gave evidence as to the delivery of the mealies to him by Gilmore at £1 per bag, and that they were not yet paid for. Except for the evidence of Howe, who swore that all the mealies on the wagon were the property of the company, there was nothing to show that the mealies actually belonged to the British South Africa Company. The mealies were delivered to Kahn in bags which did not bear the mark of the company, and were not proved to be of the same kind or quality as those remaining in the wagon from which the mealies had been removed by Gilmore. It moreover appeared from the books of the company—requisition books and issue books—which the witnesses for the Crown swore to being correct—that the company had not only sustained no loss of thirty bags of grain on the 21st February, but actually had a surplus of 744 lb. mealies in stock on that date.

Kahn was acquitted and the appellant Gilmore convicted and sentenced to one year's imprisonment with hard labour.

Gilmore appealed.

The following special entry was made upon the record for the purpose of the appeal, on the application of the appellant.

1. That the evidence adduced by the Crown did not constitute evidence of theft by the prisoner Gilmore on the following grounds:

(a) No evidence was adduced to prove the existence of the British South Africa Company in which company the property of goods alleged to have been stolen was laid.

(b) No evidence was adduced to prove that the prisoner Gilmore was not legally entitled to deliver the said property to the prisoner Khan; and that the prisoner Khan was not entitled to have issued to him or his servants mealies the property of the company.

(c) That the mealies alleged to have been stolen were not proved by the best evidence available to be the property of the company.

2. That the Crown was not entitled to cross-examine the prisoner Khan in order to elicit evidence against the prisoner Gilmore, the prisoner Kahn not having been first acquitted or convicted and sentenced.

3. That the evidence of the prisoner Khan who in the indictment was joined as co-defendant with the appellant Gilmore was illegally admitted and used and elicited against the appellant.

4. That the best evidence of ownership of the said goods consisted of the documents put in by the prosecution, and that they proved that the said goods were not the property of the British South Africa Company.

5. That the Crown witnesses and more especially the witness Edward Duffus Smith, proved that all mealies received by virtue of requisitions made were duly accounted for by the appellant.

6. That the onus was not on the appellant being charged with theft to prove his ownership in or legal possession of the property alleged to have been stolen.

7. That the witnesses for the Crown proved that the prisoner had alleged that he had purchased the mealies from one Hopley and the onus was on the Crown of proving that this purchase did not take place. The witness referred to above is one Mitchell.

8. That the witnesses for the Crown, more especially Howe, proved that mealies, other than those of the Company, were in the camp at the time, and in the store, and that mealies belonging to the said Howe and another witness, Robbie, were claimed as the property of the said Company.

9. That the witnesses for the Crown proved the appellant was not precluded by his contract of service from trading in mealies and storing the same at the camp.

Mr. Justice Vincent in his reasons said that he considered it impossible under the circumstances of the case for the prosecution

tion to cross-examine Kahn as to his case without reference being made to Gilmore. On perusing the cross-examination of Kahn he did not find any evidence which could be said to have prejudiced Gilmore and he submitted that even if there was such evidence and it should be held to have been wrongly admitted, there was ample legal evidence in the record to justify the conviction.

Mr. Brown for the appellant: There are two points in favour of the appellant. (1) There is no proof of the ownership of the mealies. The books of the Company clearly show that it suffered no loss. Upon the question of ownership *Regina v. Rooy* (4 H.C.R. p.p. 233, 234) Howe's evidence is contradictory. As to the evidence of Kahn, *Magistrates Cases Reviewed* (6 Shiel p. 234) and (Buch. 1873 p. 111).

[De Villiers, C.J.: In the first case cited the witness was called by the Crown.]

Mr. Graham, Q.C., for the Crown.

De Villiers, C.J.: Several questions were reserved by the High Court of Southern Rhodesia for the Supreme Court but only two of them were seriously argued. As to the first question whether there is sufficient evidence to prove that the mealies were the property of the British South African Company I am of opinion that it must be answered in the affirmative. The second question is whether the admission of the evidence of Kahn, the appellant's fellow prisoner, on cross-examination was such an irregularity as to invalidate the verdict. The statutes bearing on the point are Ordinance No. 72 and Act No. 13 of 1886. The 9th section of the Ordinance enacts that no person shall in any criminal case be incompetent to give evidence by reason of his being an accomplice in the commission of the offence charged in the indictment. The 10th Section frees such accomplice from liability to prosecution where he has been produced as a witness on behalf of the prosecution. The 6th section of the Act enacts that in any proceeding against any person

any offence he may, if he thinks fit, be

sworn examined and cross-examined as

in the case. The appellant and Kahn

ed with theft in the same indictment.

Appellant did not offer to give any

fellow prisoner Kahn volun-

ce, and was then cross-

ed for the prosecution.

on in cross-examina-

ing been inadmis-

judicial to the

is impossible

to exclude the evidence but the further question has been raised, whether the evidence ought to have been allowed in any way to prejudice the appellant. There is no statutory enactment on the point, but it has certainly been ruled that before one of two prisoners, who have been indicted together, is called as a witness for the Crown against his fellow prisoner, a verdict should first be found against him and sentence passed in case he is found guilty. The object of this rule is to remove every possible inducement for the witness to shield himself at the expense of his fellow prisoner. The temptation would equally exist where the prisoner tenders his own evidence and yet the Court could hardly have been asked to give a verdict against him before he was allowed to give evidence, because the very object of his going into the box was to clear himself from the charge. In the present case the evidence for the prosecution was quite sufficient to justify the Court below in convicting the appellant. This Court ought not, in my opinion, to disturb the verdict against him, even although the evidence of his guilt was supported by the evidence given by Kahn. That evidence could not be legally excluded, and it would be absurd to hold that because the admissible evidence of his fellow prisoner strengthened the case against the appellant, the conviction should be set aside. Different considerations would arise where the prosecution has failed altogether to prove the prisoner's guilt, but that is not the case with which the Court has now to deal, and a decision upon the point would really be an *obiter dictum*. The questions reserved must be decided in favour of the prosecution.

[Appellant's Attorney, Gue. Trollip; Attorneys for the Crown, Messrs. Scanlen & Syfret.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice B. CHANAN, and the Hon. Mr. Justice MAANDORP.]

MACKIE, DUNN AND CO. V. J. 1899.  
WARD AND VIMPANY. { Aug. 18th.

This was an application for an order for compulsory sequestration of the defendants

partnership and private estates. Provisional judgment had been obtained on July 31 for £4,180., and the debt was still unsatisfied.

The affidavits showed that the plaintiffs were a Port Elizabeth firm, the defendants being John Ward and Harold R Vimpany, of Steytleville. The whereabouts of Vimpany was unknown. For Ward it was contended that it would be detrimental to the interests of all concerned if his landed property were attached at the present time, a part of such property being a block of shops at the corner of Marshall-street, Johannesburg, from which he drew a rental of £32 per month, and for which he had been offered £3,250, but had declined, as he had been persuaded that as soon as affairs in the Transvaal were settled, the property would be worth very much more. He denied that the estate was insolvent, and resisted the application. In an answering affidavit the applicants stated that they had refused an offer of 10s. in cash and the other 10s. in half-yearly payments extending over two years, and had also refused to separate the partnership estate and Ward's private estate. They also stated that Ward's valuations of his property were excessive, besides which it was mortgaged.

Mr. Searle, Q.C., appeared for the applicants.

Mr. Benjamin appeared for the respondent Ward.

After argument,

De Villiers, C.J., said there was no doubt as to the insolvency of Ward's private estate, which would be unable to pay for the debts of the private estate and of the partnership estate. Under these circumstances, the Court was bound to sequester the private, as well as the partnership estates.

DOUGLAS V. BUTLER.

1899.  
Aug. 18th.

Receipt — Payment — Onus — Character of witnesses — Credibility.

This was an appeal from the judgment of Mr. Justice Watermeyer in the High Court of Southern Rhodesia in an action in which the appellant, Richard Douglas, was sued by Herbert Murray Butler in an action for a debt of £183 11s. 6d., being balance of account. The plea admitted the correctness of the account, but said that on April 1 last the defendant paid the full sum of £183 11s. 6d.,

and annexed to the plea was a receipt signed by the plaintiff Butler. The replication admitted that this receipt had been signed by the plaintiff, but said that the defendant fraudulently and by means of a trick induced the plaintiff to sign the said receipt, and wrongfully obtained possession of the same, but the defendant did not then or at any other time pay the said sum of £183 11s. 6d., or any part thereof. It was alleged that the trick consisted in the defendant obtaining the receipt from the plaintiff by making pretence that he was then and there about to pay the plaintiff the money due to him by first drawing a cheque for the amount, handing same to plaintiff, and subsequently obtaining such cheque from the plaintiff under promise of giving him cash for the same.

The plaintiff's evidence was to the effect that he met the defendant in the office of the latter. The account having been agreed to, the defendant took out his cheque book and wrote a cheque for the full amount. Plaintiff then endorsed the cheque and then receipted the account. No one else was present. He left the receipt on the table. Douglas, the defendant, picked up the receipt and the cheque, and said, "Don't be in a hurry." He went out and shortly after came back. He asked the plaintiff if he was going to buy his business. Plaintiff said not at the price he required. Defendant said "If you are not going to buy, I will not pay you the money." Not being able to get the money from him, plaintiff went to the police-station and complained. The defendant's case was that at the time the account was receipted he paid the plaintiff in notes and gold. In this he was corroborated by the evidence of two witnesses, Alexander Casuaris and John Rogers, whose names appeared in writing on the receipt as witnesses. The plaintiff, however, denied that those two then were present and said that he had not seen them that day. Judgment was given for the plaintiff, as claimed, together with costs of suit. In his reasons for his judgment, Mr. Justice Watermeyer, after referring to the manner in which the different witnesses had given their evidence, said: "I was further of opinion that the onus of proving the payment was on the defendant. The question at issue was the payment of the money—£183 11s. 6d. I was of opinion that it was incumbent on defendant to prove this payment, and that the mere production of the receipt was not sufficient to shift the onus. If the onus had been on plaintiff it is possible that I might,

in view of the evidence of Canaris and Rogers, have granted absolution. But being of opinion that the onus of proof was on defendant, and that, to my mind, he had not satisfactorily proved the payment, I did not think it necessary to consider the matter further."

The defendant appealed.

Mr. Innes, Q.C. (with whom was Mr. Benjamin), appeared for the appellant.

Mr. Searle, Q.C. (with whom was Mr. MacGregor), appeared for the respondent, Butler.

Mr. Innes: The receipt was *prima facie* evidence and the onus of going behind that and proving the fraud is on the plaintiff. *Bowes v. Foster* (2 H. and N., 779); *Lee v. Lancashire and Yorkshire Railway Co.* (6 Ch. App., 627). A strong presumption shifts the onus. *Best on Evidence* (pp. 297, 299); *Matthæus De Prob. Huber Prælectiones* 22, 3, 15 and 16). The case should be referred back to the Court below.

Mr. Searle was not called upon.

De Villiers, C.J., said: The tale told by the defendant seems to me a most extraordinary one. That the plaintiff should, after giving this receipt in the presence of two witnesses, and after he had received the £183 odd in bank notes and gold, have at once gone to the police office and laid information of the defendant having committed fraud, and then a few days afterwards should have instructed his legal advisers to take proceedings against the defendant, seems incredible. The plaintiff must have known at the time if the defendant's version was correct, that two witnesses had seen him receiving the money and signing the receipt. Another point that raises a very strong suspicion against the defendant is that the two witnesses appear to have witnessed the whole of this unusual proceeding, but that becomes quite intelligible if the defendant's version is wholly wrong, and if he introduced these witnesses merely for the purpose of supporting him in his statement that he had paid over the money. In that case the presence of the two witnesses at the time when the receipt was given would be fully explained, as they would be called for the purpose of proving that the money was paid. Then it is very important to know what the learned judge who heard the case thought of the manner in which the witnesses gave their evidence, for the credibility of the witnesses is always im-

portant where a question of fact is concerned. With regard to the plaintiff, Mr. Justice Watermeyer said: "The plaintiff gave his evidence in a simple, straightforward manner, which impressed me favourably; and further, it seemed incredible, if he had already obtained the money, that he should so promptly have given information at the police-office, and applied at once to his attorney. The defendant on the other hand was anything but a candid witness, and did not impress me favourably, whilst the evidence of his financial position showed that it would have been at least very inconvenient to have paid the money at the time. As between the parties themselves, I should unhesitatingly have accepted the plaintiff's story in preference to that of defendant." As to the two witnesses Rogers and Canaris, he said: "I do not know why they should have sworn falsely, except that Canaris is to some extent a dependant on Douglas, and Rogers is a man of low character. I concluded not to accept their evidence as against that of the plaintiff." Now even taking the learned judge to be wrong in regard to the onus of proof, it does not carry the case much further, for he pointed out that even if the onus had been on the plaintiff, it was possible that he might, in view of the evidence of Canaris and Rogers, have granted absolution. Taking the whole of the evidence, I am quite satisfied that if Mr. Justice Watermeyer had dismissed from his mind the question of onus altogether the judgment would have been the same. For these reasons I am of opinion that the appeal should be dismissed with costs.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

BEGINA V. PARROTT. { 1899.  
Aug. 18th.

Licence—Conditions—*Ultra vires*—  
Total prohibition—Certificate of  
Justice of the Peace—Native—  
Reputation.

*A condition imposed by a Licensing Court on the holder of a liquor licence that "no native man not being a servant shall obtain liquor except under a certificate of a Justice of the Peace" does not amount to total prohibition in*

*terms of the 2nd section of Act 28 of 1898, and is not ultra vires.*

*Evidence of reputation that a person to whom liquor has been sold is the illegitimate son of a European is not sufficient to prove that such person is not a native if his mother was a native and he himself has the features and appearance of a native.*

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Piquetberg.

The appellant was charged with contravening section 75 of Act 28 of 1883 as amended by sections 1 and 2 of Act 28 of 1898, in that upon or about the 8th day of July, 1899, and at or near Piquetberg, the said Adriana Catharina Parrott did wrongfully and unlawfully through her barmaid, Anna Adonis, sell liquor from her canteen situated on Erf No. 5, Piquetberg, to Jan Damon and David van Rooi, being natives under the said Act to whom the sale of liquor is prohibited, failing the production of the necessary permit as imposed by the 4th restriction of the Licensing Court held at Piquetberg on the 1st March, 1899.

The following restrictions were imposed by the Licensing Court:

1. No native man to obtain a drink unless he has a pass from his master, also that no female obtain drink under any circumstances for her own consumption.

2. The definition of a drink to be of the value supplied for 8d.

3. All passes to be kept for three months for inspection.

4. No native man not being a servant shall obtain liquor except under a certificate from a Justice of the Peace.

There was no denial of liquor having been sold to the persons in question by the appellant's barmaid. It appeared from the evidence moreover that they had both been discharged from the Piquetberg gaol between 9 and 10 a.m. on the 8th July, and were then in good health; they obtained liquor that day at the appellant's canteen and went out of the village. There was a hailstorm in the afternoon, and the next morning they were both found dead in the veld. The District Surgeon deposed that they had died from exposure.

Considerable evidence was given as to the nationality or race of these persons. The

gaoler of Piquetberg, the lock-up keeper of Porterville, and the Chief Constable of Piquetberg gave as their opinion that they were Hottentots.

G. H. Parrott, the appellant's husband, who managed her hotel, said that from the information before him and from his personal knowledge of the men, he would serve them if they came to him for liquor. Van Rooi was related to witness's barmaid, and Damon must have had a white parent. Damon had himself told him he was of white parents. This witness also stated that he and another person had gone to the Magistrate to ask him to interpret the Act in consequence of difficulty as to who should be looked upon as a native, but the Magistrate referred them to the Act and told them to judge for themselves. Witness decided that the man could be supplied. He did not authorise the barmaid to sell to them, but explained to her the sort of man who should be supplied.

Anna Adonis, the barmaid said she was a bastard, and was from white descent. Her father had two wives. She was from the Westhuisens' descent; they were farmers. She had been told that Van Rooi's father and hers were the same man. Damon was also a bastard.

Paul Adonis, husband of Anna Adonis, said he was a bastard, and Damon was his wife's brother. Damon was also a bastard and not a Hottentot; his father was a bastard.

Elizabeth van Rooi said that Damon's father was a brown man with long hair. She would not take Damon to be a Hottentot.

Albert Damon, son of the Damon whose race was in question, said: I remember my grandfather; he was a bastard. My mother is dead, her name was Engelbrecht. She was married in church. My grandfather was of French descent. I also knew David van Rooi. I knew his mother. I do not know if she is a Hottentot. She is white. I call her a bastard. I knew David van Rooi's father; he was a bastard. I mean that a bastard is the result of illegitimate intercourse between a white man and a bastard woman. I call a bastard a person with short hair, hair shorter than mine. I have woolly hair. I saw a brother of Van Rooi with hair a little shorter than his. David's hair was like mine, wool. Van Rooi's brothers were all white; he was the only yellow one. I consider these people were bastard Hottentots. I think them white people. If I did not know better I would call

them white. My father was married to my mother. My father was not a Hottentot: he was a bastard.

T. H. Dickson, an enrolled agent, said that the father of the deceased Jan Damon was a white man. He considered that there was no Hottentot blood in either Van Rooi or Jan Damon.

Griet van Rooi, said that she was the mother of David van Rooi. Witness was a Hottentot and David's father was a bastard. He came from some bastards in the Zeederberg.

The appellant was found guilty and sentenced to a fine of £10, or one month's hard labour within the precincts of the gaol.

The Magistrate, in his reasons, stated that no exception had been taken to the summons on the ground of the illegality of the restriction, and the case was therefore tried on its merits. Referring to the defence that the persons to whom the liquor was supplied were not natives under Act 28 of 1898, he said that he was well acquainted with them. There was nothing in the evidence to show, as was attempted, that they were the result of the illicit intercourse of white men with Hottentots. Anna Adonis, herself almost a Hottentot, claimed to be sister to van Rooi and stated on oath that his mother was dead, whereas the Magistrate said "she has for years been living in Porterville, and was the last witness to give evidence. She is a Bushman Hottentot of a distinct type rarely seen in these parts, and fast becoming extinct in others. Her relationship to Van Rooi as mother could not be denied, her husband is dead, and was she said a bastard Hottentot, a term amongst these natives which means they are not exactly Bushman Hottentots, but which since the passing of the last Act seems to have acquired a different significance. With the exception of the two law agents who appeared for the defence, one being the actual manager of the licensed place, and husband of accused, all the witnesses for the defence were coloured people, with most vague ideas as to what they were themselves, as they had always been Hottentots in their own opinion and that of others, and now it was suddenly sprung upon them that they were something else, so as to exempt them from the conditions of the Act. They were consequently puzzled. Jan Damon I have known for three years, as he spent most of his time in gaol. He was an old man of sixty-six, an unmistakable Kat River Hottentot; he had served in the old Cape Hottentot Corps on the

frontier. He has never to my knowledge, until this case, been regarded as anything but a Hottentot, and nothing in his appearance would denote otherwise. I have no hesitation in saying he was a Hottentot and did not come under Act 39 of 1897 which would exempt him from the restrictions. The word "native" in the restrictions must of course be read in conjunction with Act 28 of 1898. David van Rooi I also knew: he called himself a Hottentot in an affidavit made before his death in connection with another case, and undoubtedly he was a Hottentot. After seeing his mother I have no hesitation in saying so, and not being exempt under any Act, he was entitled to the protection of the Innes Liquor Act and was subject to the restrictions imposed under its provisions. The sale of liquor in my opinion was conclusively proved, the evidence of Zyster was well given, clear and concise and not shaken. It was the same as that given at the inquest the day after he was picked up half dead and he had nothing to gain or lose by giving false evidence and I believe him. The word "bastard" frequently occurs in this case. The bastard as known in Namaqualand for instance would be exempt under the Act, but a bastard Hottentot is really a Hottentot. A bastard is a slightly coloured man in the usual acceptance of the term."

Sir H. Juta, Q.C., for the appellant: The evidence is very conflicting, and it is very hard that a publican should be convicted upon it. The evidence given by the Magistrate is not the evidence given by the prosecution. But the Magistrate himself says that a bastard in Namaqualand would be exempt under the Act. The condition imposed by the Licensing Court substantially amounts to total prohibition and is therefore *ultra vires*. Act 28 of 1898, section 2. A Justice of the Peace is not bound to give a permit. The conditions which may be imposed are such as the man himself can fulfil or such as another person may be bound to fulfil.

[De Villiers, C.J.: Total prohibition is a general prohibition; it refers to the community generally and not to the individual.]

There was a case before the High Court very recently, *Regina v. Schmidt* ("D.F. Advertiser," August 1, 1899) in which a very similar clause was held to be *ultra vires*. Where Justices of the Peace are few and far between it practically amounts to prohibition. The evidence is anything but con-



clusive to show that the people to whom liquor was sold were Hottentots. It was not intended that the term Hottentot should include people of mixed race. The Act is a penal statute and therefore the case should be conclusively proved. The appellant tried to do what was right by applying to the Magistrate for his interpretation of the Act, but the Magistrate told him to do what he thought right himself.

Mr. Ward, for the Crown, was not called upon.

De Villiers, C.J.: The whole scope of the Act is to restrain the misuse of liquor more especially by natives. Licensing Courts are authorised to impose every restriction or condition on the sale of liquor to natives, short of total prohibition. The condition imposed and objected to in the present case is that "no native man not being a servant shall obtain liquor except under a certificate from a Justice of the Peace." I quite agree that if a certificate from the Archbishop of Canterbury or even of Cape Town had been required, the condition would have virtually amounted to total prohibition. No Piquetberg native could have access for such a purpose to either prelate. But Justices of the Peace are distributed over every district of the Colony. The Magistrate is a Justice of the Peace, and there is no proof that there are not available Justices of the Peace in Piquetberg who would be willing to give the necessary certificate to deserving natives. It could hardly be contended that a restriction which prevents certificates being given to any but deserving natives is illegal. The Act contemplates that among the classes of natives enumerated therein, there may be many who should not be allowed to buy or receive liquor but that some of them may be trusted not to abuse the privilege. The difficulty always is to ascertain who may be so trusted, and to solve the difficulty, the Licensing Court of Piquetberg required a certificate from a Justice of the Peace. The requirement does not, in my opinion, amount to a total prohibition. Another objection raised to the conviction is that the two persons to whom liquor was sold were not proved to have been natives in terms of the Act. I fear the time will come when it will be almost impossible to decide whether particular persons are natives in terms of the Act in question, and a great many other Acts on the Statute-book. Natives to whom the definition applies are continually marrying or cohabiting with other natives, and even

with Europeans, and in many cases it is difficult to decide whether the progeny falls under the one class or the other. Where a European is married to a native woman their children would probably not be treated as natives, but the illegitimate children of a native woman by a European, if retaining the features and characteristics of the mother, would be natives. Even if it were otherwise the Court would not be bound to accept the bare statement of the mother that her illegitimate children are the offspring of a European father. Nor can reliance be placed upon the fact that a person, to all appearance a native, bears a European name. Nothing is more common in this country than for natives to assume the names of Europeans whom they have served or who are well known to them. In the present case the respective mothers of the two persons to whom liquor was sold by the appellant appear to have been Hottentots, but there is some evidence that the respective fathers were Europeans. It is not alleged that they were legitimate children. They seem to have been a cross between a Bushman and a Hottentot but as both these tribes are natives the mixture would not affect the question at issue. The Magistrate had seen both the men during their lifetime and he was satisfied from their appearance that they were natives. In the absence of other evidence the appearance of the person furnishes the best criterion of descent. Each tribe has its features and characteristics which it is difficult to mistake. I am of opinion that in the present case the evidence is sufficient to prove that the men were natives and the appeal must therefore be dismissed.

[Appellant's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

## SUPREME COURT

[Before the Chief Justice (Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

SIGIDI'S EXECUTORS V. MATUMBU. { 1899.  
Aug. 21st.

Mr. McGregor for the appellant (defendant).

Sir Henry Juta, Q.C., and Mr. Buchanan for respondent (plaintiff).

This was an application for leave to take the evidence of four natives on commission *de bene esse* at Idutywa, Transkei, the said witnesses being too old and infirm to undertake such a long journey to Cape Town; also for the postponement of the trial until the November term.

Sir Henry Juta, for the respondent, objected on the ground that there had been no unnecessary or undue delay in bringing on the trial, and that the application was made merely for the purpose of gaining time.

The application for a commission was granted, and the date of trial postponed until the 4th September.

ADAMS V. DE KLERK. { 1899.  
Aug. 21st.

Trespass—Pounds Act—Fencing Act.

*It is no defence to an action under the Pounds Act, 1892, for damages for trespass on cultivated lands that the cattle came upon the plaintiff's land by reason of his not repairing or assisting to keep in repair a fence between the respective properties of the parties unless there is a legal obligation on the plaintiff to keep the fence in repair. The 13th and 14th sections of the Fencing Act, 1883, impose no such legal obligation.*

This was an appeal from a decision of the Resident Magistrate of Molteno. The respondent sued the appellant for £2 12s. 6d on a summons which alleged that during the month of April last, while the respondent was occupier of a portion of the farm Stafelberg Kraal, he found thirty-one head of appellant's cattle trespassing on his culti-

vated and enclosed land on which there was a crop of mealies, and he sent them away by one of his servants with instructions to take them to the pound. On the way thither the appellant met the respondent, and said he was willing to pay for the trespass if he were bound to do so, but had no change. By agreement the parties proceeded to Molteno to get change, but on arriving there the appellant, acting under advice, refused to pay.

The appellant pleaded the general issue.

In his evidence he said that there was a dividing fence between his property and that of W. A. de Klerk, the father of the respondent, who was the owner of the portion of the farm occupied by the respondent; that this fence had to be kept in repair by both of them; that the portion kept by De Klerk was not in good order, and that De Klerk agreed to put it in good order, and the cattle which trespassed walked over it. He put in a letter which he had had written to W. A. de Klerk, calling upon him in terms of section 14 of Act 30 of 1883 to repair the fence within seven days, and saying that if he did not do so the respondent would have it done at De Klerk's expense, and that the latter would be held responsible for all damages sustained by the appellant. The Magistrate found that the crops were not enclosed with a sufficient fence, but he awarded the respondent £1 9s. 3d., at 9d. per head of cattle, as there had been a trespass.

Sir Henry Juta, Q.C., for the appellant (the defendant in the original action): The appeal is based on these grounds: A joint fence was put by the parties, each to keep his portion in good repair. The respondent's half was in a very dilapidated condition, in consequence of which the appellant's cattle strayed over the fence, and the question is whether the respondent is entitled to claim money for trespass upon ground when he had neglected to keep his part of the fence in a proper state of repair. The essence of trespass is being wrongfully and unlawfully in a place.

Can it be said under the circumstances that the cattle, having been invited on to the ground by the dilapidated condition of the fence are there wrongfully and unlawfully? If the act is not unlawful it is not a trespass.

[De Villiers, C.J.: Can a breach of a duty to repair the fence be a defence to an action for trespass in any case and a right to the defendant to bring an action for breach of the contract to fence?]

Sections 22 and 23 of Act 15 of 1892 and Schedule C. speak of land being enclosed with a sufficient fence or not being enclosed at all. It does not deal with the case where a duty is cast upon a person to keep the fence in repair. If the plaintiff does not do his duty he is the *causa causans* of the injury to himself. Damage must be the result of an unlawful action on the part of the defendant. *Child v. Hearn* (L.R., 9 Ex., 176).

[De Villiers, C.J., referred to *Metro-politan and Suburban Railway Co. v. De Villiers* (10 Juta, p. 211).]

If cattle go along a high way and without any negligence stray into a shop no action lies for trespass. Further, the plaintiff is not the proper person to sue. The action should have been brought by his father.

Mr. McGregor for the respondent: The point that the plaintiff was bound to keep the fence in order, and having failed to do so cannot claim damages, was not raised in the Court below. There is no specific agreement proved to that effect. Under section 14 of Act 30 of 1893, there is provision for one party to have a fence repaired at the expense of another, but there is no evidence that that Act has been proclaimed in the district in which this property in question is situated. *De Villiers's* case, which was referred to, and also *Liquidator of The Cape Central Railways v. Nothling* (8 Juta, p. 25) depend upon the Railway Act (Act 19 of 1861). But cases of this nature are based upon the *Lex Aquilia*; that law still applies except so far as modified by the Act of 1861, and that law is that if your cattle do damage to another you are liable.

[De Villiers, C.J.: In *Rolle's Abridgment*, under the word "Trespass" it is laid down generally that if by Act or contract there is a duty upon anyone to keep a fence and he does not, he cannot claim damages for trespass.]

Then the English law differs from Roman-Dutch law, which is founded on the *Lex Aquilia*. Schedule C of Act 15 of 1892 contemplates the payment of damages on a smaller scale when the fence is not sufficient, and so even if a duty to fence or to repair is not carried out, damages are claimable.

Sir H. Juta in reply.

De Villiers, C.J.: It is not seriously denied that the defendant's cattle came upon the plaintiff's land and injured his crops. The defence is that the dividing fence between the properties had not been kept in order by the plaintiff in terms of a contract entered into by him with the plaintiff, and that, as

the cattle had thus been enabled to come upon the plaintiff's property, he could not sue for trespass. I am inclined to concur in the view that if such a contract had been proved, the plaintiff would not have been entitled to recover. But there is really no proof of such a contract beyond the vague statements of the parties that each "had to keep a portion of the fence in good repair." It does not appear how, when or where, the alleged contract was made, and the defendant himself in a letter written to the plaintiff before the date of the alleged trespass does not mention such a contract at all, but appears to rely upon the provisions of the 13th and 14th sections of Act 30 of 1893 as establishing the plaintiff's liability to repair the fence. The Act only applies to those districts in which it has been proclaimed. Assuming it to have been proclaimed in Moltene then the plaintiff was under no legal obligation to repair the fence himself, although he was liable to the cost of repairing the fence in equal proportions with the defendant. If he refused to assist in repairing the fence the defendant could repair the fence himself and recover from the plaintiff his portion of the cost. As the defendant's proper remedy was to repair the fence himself he could not rely upon the condition of the fence as a defence to the plaintiff's claim for damages for trespass. The appeal must therefore be dismissed with costs.

[Appellant's Attorney, P. M. Brink; Respondent's Attorneys, Messrs. Treckgoid, McIntyre & Biset.]

NQAMBANA AND OTHERS V. { 1899.  
BULUBULU AND OTHERS. { Aug 21st.  
Native territories—Chief Magistrate  
—Appeal in Civil Suits—Act 26  
of 1894.

*Under Act 26 of 1894, there is no appeal to the Supreme Court from any Court of Resident Magistrate in the native territories in any civil suit in which natives alone are the parties even although no question of native law or custom is involved.*

This was an appeal from a decision of the Resident Magistrate of Matatiele, East Griqualand, in an action in which the respondents were the plaintiffs and claimed transfer of certain land belonging to the

defendants and the present appellants, and sold to the plaintiffs through the agency of one Le Fleur, to whom the defendants had given a written power of attorney. The purchase price was £700, but the defendants refused to give transfer on the ground that Le Fleur had no authority to sell for less than £1,200. Judgment was given for the plaintiffs. The defendants now appealed.

Mr. Searle, Q.C., appeared for the appellants.

Mr. Howel Jones, for the respondents, objected to the appeal being heard on the ground that all the parties in the suit were natives, and were therefore barred by Act 26 of 1894 from appealing elsewhere than to the Native Court of Appeal. He referred to *Lusuti v. Ben* (7 Sheil, p. 226).

Mr. Searle: The intention of the Legislature was that appeals of this nature should go to the Chief Magistrate for hearing only where questions of native law and custom were involved. See Proclamation . . . That is implied from the appointment of assessors of native law and custom. This is no question of native law and custom, but purely one of Roman-Dutch law.

De Villiers, C.J.: The language of the Act is as clear as words can be. In civil suits "in which natives alone are parties" there is no appeal except to the Chief Magistrate's Court. The Court is asked to read the section as if it contained the words "and in which native law or custom is involved," but such an addition must be made by the Legislature and not by the Court. It is to be regretted that the expense of appealing to this Court was incurred. Both the parties to this suit are natives, and accordingly neither can appeal to this Court. The objection must be allowed with costs.

[Appellants' Attorney, ;  
Respondents' Attorneys, Messrs. Findlay & Tait.]

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## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

LOGAN V. BARNATO'S EXECU- { 1899.  
TORS. Aug. 22nd.  
" 23rd.

This was an action in which the plaintiff, J. D. Logan, claimed from the defendant,

the executors testamentary of the late B. I. Barnato, the sum of £4,330 with interest at 6 per cent. from June 1, 1896.

The declaration stated that about June, 1896, the plaintiff and Barnato entered into a verbal agreement, under which the plaintiff was to purchase on their joint account such number of shares up to and not exceeding 5,000 in a company styled the "Barnato Bank" as to the plaintiff should seem fit, Barnato undertaking to be responsible equally with the plaintiff in the joint venture.

That thereafter the plaintiff purchased 3,893 shares in the company, and paid £8,161 18s. 6d. on behalf of himself and Barnato.

That after the purchase the company was merged into and amalgamated with another company styled the "Consolidated Investment Company," and the plaintiff had received 2,433 shares in the "Johannesburg Consolidated Investment Company (Limited)," as representing the 3,893 purchased as aforesaid.

That the plaintiff had, about May, 1897, rendered an account to Barnato showing his indebtedness to the plaintiff in the sum of £4,330 19s. 3d. with interest, and tendered the number of shares in the "Johannesburg Consolidated Investment Company" representing half of the Barnato Bank shares purchased as aforesaid, but Barnato refused to pay, and repudiated the agreement. The plaintiff now claimed the same amount, and tendered 1,216½ Johannesburg Consolidated Investment Company shares.

The defendant denied the agreement, and admitted the refusal to pay. He said specially that no such shares as were mentioned in the declaration were purchased by the plaintiff under any agreement with Barnato, nor did he at any time before May, 1897, give notice to Barnato of the supposed purchase.

Sir Henry Juta, Q.C. (with Mr. Searle, Q.C.), appeared for the plaintiff; and Mr. Innes, Q.C. (with him Mr. McGregor), was for the defendant.

Sir Henry Juta, in the course of his opening statement, mentioned that since the issue of summons, Mr. Woolf Joel, one of the executors, had died, and the parties were quite willing that Mr. E. P. Solomon, who was an executor, should be substituted as a defendant.

James Douglas Logan, the plaintiff, deposed that he resided at Matjesfontein,

and was a member of the Legislative Council. In June, 1896, he was a member of the House of Assembly. He remembered one evening, after the House rose, walking from Parliament Buildings with Mr. Palmer, another member, who was going to dine with him at the Royal Hotel. They met the late Mr. Barnato on the steps of the House, and they all three went to the Royal Hotel, where they dined. In the course of dinner Mr. Barnato asked him, as they were both going to England, if he (plaintiff) wished to pay his expenses and his reply was, "Certainly I do." Barnato then said, "Well, go and buy Barnato Banks, there's bound to be a rise." Witness said it was not good enough, and refused. Deceased again asked him to buy, and said, "To show you it is a *bona fide* transaction I will go shares with you in any profits or losses upon purchases up to 5,000 shares." Witness, after again demurring, eventually agreed to purchase on those terms, namely, for his and Barnato's joint account. Mr. Palmer was present at the time. He bought the first lot on 9th June, through Simkins & Adams. He sailed for England on 15th July, and Mr. Barnato was a passenger by the same steamer. Witness on the voyage informed him of the purchase of 700 shares, and they discussed the matter frequently. While in England he bought more shares. He spent about two and a half months in Scotland, but occasionally went up to London, and while in the City called several times at Barnato's office in Draper's Gardens for the purpose of seeing him, but did not succeed. On one occasion he was accompanied by the Hon. Mr. Ross. He believed Barnato was frequently in the City, but rumour had it that he did not care much about going near the Stock Exchange. Witness wrote two letters to him, but did not keep copies, as he was travelling on a holiday, and he also wired to him. He had information that Barnato at that time was on the Continent. The Barnato Bank shares which he bought in London were also for the joint account. On the voyage home he had asked Barnato when he would see him, as he intended to buy more shares, and it was arranged that plaintiff should call at the office in Draper's Gardens. Barnato also asked him if he wanted any money for the purpose of buying shares, and he said no; he had plenty of money to buy all that would be required. Barnato further said they could have a settlement either in London or when he

returned to South Africa at the end of the year. When Barnato came out to the Colony again witness saw him at Matjesfontein and discussed the matter of a settlement with him. Barnato told him the amalgamation of Banks and Consolidateds had gone through satisfactorily, and there was going to be a big boom. Barnato was on his way to Kimberley or Johannesburg, and said he expected to return to Cape Town in about two months, when they could have a settlement. When Parliament next met, in the month of May, witness saw Barnato, and spoke to him in the bar of the House about this transaction, but their conversation was interrupted, and he therefore wrote him a letter enclosing an account and urging a squaring up. That account showed a purchase of 3,893 shares at an average of 44s. 6d., which with interest at 6 per cent. per annum made a total of £29,095 18s. 1d. He received a reply on May 14 from Barnato, in which he said he treated witness's letter as a joke, and denied all knowledge of the transaction. In reply, witness wrote that he was not in the habit of joking about business matters, and he then instructed his attorneys to proceed. On June 1 he received a telegram from Mr. Solly Joel saying, "Thanks for letter, impossible discuss matter with Barnato in his present condition; matter must wait my return." At that time Mr. Barnato's mental condition was not the ordinary one. Witness saw him a few days afterwards coming down to the House from the Commissioner's Office without his coat and hat. He had engaged in other transactions with the firm of Barnato Bros., and with Barnato himself. In 1899 he bought Kimberley Rodepoorts on the same terms of joint account with Barnato, about £10,000 worth. That was at the beginning of the year, and they did not have a final settlement until either August or September. There was a very serious loss of something like £3,000 each, and Barnato paid up. He was also in partnership with Barnato in connection with the present Kimberley Stock Exchange. The account put in showed as correctly as possible all the particulars of the various purchases, brokers' notes, &c., but there were 723 Barnato Bank shares which he could not trace; he could not find the broker's notes, but he had Johannesburg Consolidated scrip for them. He bought Banks between June and November, and the average price was

44s. 6d. A number of documents could not be traced, in consequence of changes of book-keepers in his office. The Consolidated Investment shares he sold numbered 2433, and they were realised to good advantage, as he got the top market price, 41s. 3d. The boom which Barnato spoke of never came off. Witness understood Barnato's visit to England was for the purpose of making a market, but he did not succeed.

Cross-examined: Barnato did not repudiate his former joint transactions with witness, although he denied all knowledge of the arrangement for the joint purchase of Barnato Banks. In these previous deals there were also heavy losses. Barnato sent him the letter denying that he was bound by these bank share transactions, and witness did not write to him reminding him that he had spoken several times about a settlement, because he thought it would be better done through his solicitors. It might be the case that the amalgamation with the Consolidated Company took place on the 28th September previous to the conversation at Matjesfontein.

Do you seriously mean to tell the Court that Barnato wanted you to buy more Barnato Bank shares when the bank was in liquidation?—To my knowledge Barnato Bank shares were dealt in up to September 24, 1896.

But the bank went into liquidation on September 24, and you tell us that in December he urged you to buy more bank shares?—I meant Consolidated Investment shares.

But you had no mandate to buy Consolidated Investment shares?—Banks were merged in Consolidateds. The amalgamation, so far as I know, did not take place until after Barnato went back to England.

Did you think you had a right to buy Barnato Bank shares for an indefinite time?—No limit as to time was fixed.

Witness said he was positive that when the agreement was entered into between him and Barnato the latter did not regard the thing as a joke. He did not give any reason why he wanted witness to buy Barnato Banks. The impression witness had was, Barnato wanted as many shares as possible taken up without his name appearing in the transactions, so as to make a market.

Mr. Innes: The capital of the company was £2,500,000, and he was to make a market with your 5,100 shares?

Very likely he had similar transactions with other people.

These transactions were not entered in witness's books, and he had no counterfoils of cheques. His agents in London paid for the shares purchased in London, and Mr. Simkins could prove payment for those bought here. He could not trace any cheques. He had furnished all the documentary and other information in his possession.

De Villiers, C.J.: Do you not keep an account of your transactions?

Witness: Yes, but I cannot lay my hands on it. I cannot trace the payments in my bank-books. There are no names in the bank-book, only amounts. I did not think it was necessary to keep a detailed account.

You say this contract was entered into about the beginning of June, 1896. Are you aware of the fact that Mr. Barnato only arrived in Cape Town from Johannesburg on June 24, so that you must have bought those 700 shares before you saw him?—I am under the impression that it was the beginning of June.

Does it not show that you have been putting in shares in what you call Barnato's deal which ought not to figure there?—Certainly not; I don't want to do anything crooked. In the course of further evidence, witness stated that he charged 6 per cent. interest, amounting to £149 for three years, from June, 1896.

Surely you could have given Mr. Barnato an account, to show him what was the result of the deal in June, 1896?—Very likely I would have done so, if I could have found him. I did not buy to the full extent of 5,000 shares, because the market was going to pieces.

Re-examined: In his Kimberley-Rodeoport transaction with Mr. Barnato no books or documents were kept. They simply had a settlement, and paid their proportion of the losses.

George Morrison Palmer deposed that he resided in Somerset East, and in 1896 he was a member of the House of Assembly. He knew Mr. Barnato and Mr. Logan. Witness corroborated the plaintiff's statements concerning the dinner at the Royal Hotel, at which Barnato said to Logan something to the effect that he would go halves with Logan in a Barnato Bank deal up to several thousand shares; he did not remember the number. Logan finally agreed to those terms. It was clearly the witness's impression that Barnato intended a serious transaction and not a joke. He believed Barnato was perfectly honest in his belief

that the market would go up for these shares, and it was not merely a question of giving Logan advice. Barnato said they would reach 8½. before very long, as he was going Home to make a market. Witness saw Barnato during the following session of Parliament shortly before he went to England. They had a conversation in the smoking-room of the House. Barnato told him he had received a demand from Logan for a lot of Barnato Bank shares, and asked witness's opinion about what had taken place, remarking, "If I had wanted to buy scrip it wasn't necessary to get Logan to finance it for me." Witness replied that that was not the point; what he understood was that he (Barnato) wanted to show his confidence in the bank shares by going in for a joint agreement with Logan, and he ought to pay. Barnato was in a very excited state, and witness did not think he was quite responsible for his actions, or for what he said at that time.

Cross-examined: Do you think Barnato gave Logan a roving commission to go and buy these shares?—So far as I recollect, there was only a limit as to the number, which I think was 5,000.

Re-examined: I certainly think Mr. Barnato's mind was unhinged at that time, and he became gradually worse until the steamer sailed.

Wm. B. Simkins, of the firm of Simkins & Adams, sharebrokers, deposed to the purchase of two separate parcels of Barnato Bank shares on the 9th and 10th June, 1896, for Mr. Logan, 200 at 6½s. 3d. and 500 at 5½s. Witness gave the average highest and lowest quotations of the stock on the Johannesburg Exchange, for the months of June, July, August, September, and October of that year.

For the defendants.

John Munro stated that he was one of the representatives of Barnato Bros., in Johannesburg, and was a director of the old Barnato Bank, which went into liquidation, and was amalgamated with the Consolidated Company on 28th September, 1896. Nothing was known about the amalgamation until Mr. Barnato went home. Witness and Mr. Harold Strange were appointed liquidators, and he personally checked all shares sent in to be exchanged for Consolidateds until the close of the liquidation, except during one month, when he was absent on holiday. Witness went into minute explanations of

various exchanges of bank shares for Consolidateds, and said he had no doubt in his mind that certain parcels of Barnato Banks referred to by plaintiff in his declaration could not have been exchanged for Consolidated shares. So far as he knew, Mr. Barnato had no banking account in 1896. All his transactions passed through the firm's books, and witness had no knowledge of any share transactions of this kind. Barnato got all his cash from the firm, and all his accounts were paid by the firm. Any speculations made by him were for the firm. Barnato was in Johannesburg or Pretoria from 15th March until 15th June, 1896, when he left for Kimberley.

Cross-examined: Any transactions between Logan and Barnato must have passed through the firm's books. He had heard Logan speak about a Kimberley-Rodepoort transaction, but witness understood that was effected in Kimberley, and it would therefore appear in the Kimberley books of the firm. Three separate sets of books were kept—at Johannesburg, Kimberley, and London.

John Alexander, proprietor of the Queen's Hotel, Sea Point, deposed to the late Mr. Barnato coming from Johannesburg to stay at his establishment in June, 1896, arriving here on the 24th. He came down along with a number of the Reform Committee who had been released from Pretoria gaol. The train was run right through on the Sea Point railway, but Mr. Barnato alighted at Cape Town Station and came out to the hotel in the evening. Witness was on the platform at Cape Town when Mr. Barnato arrived.

Edward Philip Solomon, of Solomon & Thompson, attorneys, Johannesburg, said he was a member of the Johannesburg Reform Committee. Barnato was in Johannesburg on the day the four principal prisoners were released, and he left on the 24th of June. Barnato stated to witness that as it had been said he would only remain until his nephew "Solly" Joel was liberated, he was determined to stay in the Transvaal until all the prisoners were released, and he did so.

James Paul O'Reilly, secretary to the Johannesburg Waterworks, Donald McDonald, transfer secretary of the Johannesburg Consolidated Investment Company, and other witnesses gave evidence as to transfer of Barnato Bank shares on the plaintiff's behalf previous to June, 1896,

De Villiers, C.J., said: It is not necessary to hear Mr. Innes. The plaintiff relies upon a verbal agreement which he alleges he made with the late Mr. Barnato for purposes of a joint account in the purchase of Barnato Bank shares, the amount not to exceed 5,000 of these shares. Barnato, it is alleged, undertook to be responsible for the profit or loss equally with the plaintiff in the joint venture. In order to prove this contract the plaintiff himself has given his evidence, and had also called Mr. Palmer. I am inclined to attach weight to the evidence given by Mr. Palmer, which seems upon the whole to have been given with perfect fairness. His statement is that sometime in June he is unable to give the exact date—he left the House of Assembly with Logan to dine at the Royal Hotel, and Barnato joined them on the way. This occurred during the Parliamentary session of 1896, and was the only occasion on which Mr. Palmer had dined with Logan and Barnato. Mr. Palmer said, referring to Barnato: "He met us as we left the House of Assembly, and we went to the Royal Hotel." During the dinner they were discussing about going Home together. Barnato asked if he (Logan) would like to pay his expenses, and Logan said "Yes." Barnato then said, "Buy Barnato Bank shares." Logan replied that they were not good enough, and then Barnato said he would go halves up to 5,000 shares." "Before we rose," Mr. Palmer said, "Logan stated that he would go in for them. It was clear that it was an agreement to buy shares on joint account. It was not merely giving advice to Logan. Barnato said the shares would rise in six weeks, as he was going Home to make a market." Now, if it had been proved in this case that the plaintiff did, as he alleged, buy 700 shares in the Barnato Bank on the 9th or 10th of June, 1896, and if Logan did within a reasonable time afterwards inform Barnato of the purchase, I am of opinion that under the agreement sworn to by Mr. Palmer, Mr. Barnato would have been liable for any loss incurred in respect of these shares. Unfortunately, however, the evidence shows that Mr. Logan was entirely mistaken in stating that the agreement was made before the 9th or 10th of June, 1896. It is now proved that Mr. Barnato was in Johannesburg at that time; that he was there in connection with the Reform prisoners, awaiting their release; and

that he did not leave Johannesburg until June 15, and did not arrive in Cape Town until June 24, a good many days after the alleged transactions upon which this action was founded. It is clear, therefore, that in regard to those shares purchased by Logan on June 9 and 10, they could not possibly be charged for by the plaintiff. That very serious mistake made by Mr. Logan tends, in my opinion, to throw a grave doubt on all the rest of the accounts which the plaintiff has furnished in the present case. An agreement of this kind should be reasonably construed. I do not think it could ever have been intended that there should be no limit of time during which Barnato Bank shares were to be bought. It is well known, with regard to speculative transactions of this kind, that if a person gives another a commission to buy shares it means that it must be done within a short or reasonable time, and I do not think it could ever have been supposed that this commission to buy shares should last for a period of three months. The evidence given by Mr. Palmer throws an important light on the matter, where he said that Barnato remarked that the shares would rise in six weeks, as he was going Home to make a market. The object of purchasing would be with the prospect of a rise, and if they were likely to rise in six weeks, it was never contemplated by Mr. Barnato that three months afterwards, when Logan was in England, any further shares should be bought on this alleged joint account. All these subsequent items, therefore, could not be brought into the account. There is only one further item in July 16, which took place before the parties left for England. That transaction must be kept altogether distinct. If a profit had been made by Graaff and Logan, I am satisfied that Logan would not have been bound to account to Barnato for any such profits earned, as it was an entirely distinct transaction. Therefore, the item of July 16, 1896, can not be brought in. Inasmuch as all the other items are much later than September 24, which was more than three months after the alleged agreement between Logan and Barnato, the Court has sufficient reason for refusing the plaintiff the relief he asks for. It was a kind of joint venture, and the person who was to administer it was Logan alone. He was to be the agent for both parties. Now nothing



is more clearly established in the Supreme Court than that where an agent acts for a principal he should keep full and clear accounts of every single transaction undertaken on behalf of the other. The necessity of such a rule is obvious in transactions of this nature. Unless books had been clearly and systematically kept as to every transaction the plaintiff would have been in a position to buy shares indiscriminately. If he made a profit outside of any specific agreement he was entitled to keep that profit to himself, and had only to bring up those shares upon which a loss had been sustained. In the present case it is impossible, from the data supplied by the plaintiff, to ascertain what the actual transactions were, and to what extent the plaintiff has profited by the dealings in Barnato Bank shares. The rules as to the duty of agents to keep accounts are clearly established. (His lordship quoted *Norey on Agency*, p. 205 on the point.) In this case it is impossible to say that no accounts have been rendered, but those which have been rendered are so clearly wrong on the face of them, that it is impossible to accept them as giving an exact statement of the transactions between the parties. As an illustration of what I am saying, an account was rendered of Johannesburg Consolidated shares which were alleged to have been exchanged for Barnato Banks or sold at a loss. When, however, these accounts were closely scrutinised, it was found that some of these Johannesburg shares represented Barnato Bank shares which had been purchased as far back as December, 1895. Others again, with reference to exchanges for Consolidated shares, represented Waterworks scrip. It is impossible, therefore, to attach any weight to the accounts rendered, and the absence of proper accounts justifies the Court in granting absolution from the instance. It seems that Mr. Logan has had a great many transactions of this nature, but his chief business is that of commerce; this speculation in shares seems to be a kind of by-play on his part. Perhaps the plaintiff did not think it necessary to keep accurate accounts, which, in the opinion of the Court, ought to have been kept, but that did not dispense with the necessity of keeping careful statements of his dealings with Mr. Barnato. The wholly unsatisfactory nature of the accounts rendered by the plaintiff makes it

quite impossible for the Court to give judgment in his favour. It should not be forgotten that this case is not against Mr. Barnato himself, but against his executors. It was certainly the duty of these executors closely to scrutinise the accounts rendered, and to defend any action in case those accounts did not satisfy them that a claim was legally established. Inasmuch as it is not satisfied that the amount claimed has been properly proved by the plaintiff, the Court is of opinion that under all the circumstances there should be absolution from the instance. I do not contemplate asking Mr. Innes if he presses for judgment for the defendants.

Mr. Innes intimated that he did not desire to do so.

Buchanan, J., in concurring with his lordship's judgment, said the Court had to depend altogether on the plaintiff and his witnesses to establish the agreement. After hearing the plaintiff and Mr. Palmer, he had no doubt that an agreement was entered into, but its exact terms it was difficult to ascertain. It seemed to be that Barnato wished to create a market, and agreed with Logan that the latter should go into the market and buy up to 5,000 shares. The parties were going to England shortly afterwards, and Barnato's intention was to create a market. According to Mr. Palmer Barnato believed that he would be able to make a market within six weeks, and consequently the agreement was intended to be executed without any unreasonable delay. The agreement was a verbal one, and now, three years afterwards, it was obvious that there was a great deal of forgetfulness on the part of those interested in this case as to what took place.

Maasdorp, J., also concurred, and remarked that it was the duty of a partner in any agreement of this nature to substantially prove all the transactions engaged in. It could not be said that there was anything in the nature of satisfactory proof that the claims of the plaintiff could stand the test of the evidence adduced.

Absolution from the instance with costs was accordingly granted.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADOLPH AND CO. V. WARNER } 1899.  
AND CO. } Aug. 23rd  
" 24th.

Construction of contract—Sale—  
Cancellation—Re-sale.

This was an action for the recovery of £218 11s. 3d., and £10 18s. 6d. interest on that amount. The declaration stated that from November, 1894, until October, 1896, the plaintiffs, an English firm, at the special request of the defendants, shipped to the defendants in Cape Town certain goods, in payment for which the latter promised to pay by instalments. From time to time the defendants made payments on account, and there was now due to the plaintiffs the sum of £218 11s. 3d. which the defendants refused to pay.

The plea admitted part of the claim, but said that the plaintiffs wrongfully included in the account the sum of £62 2s. 6d., being for certain ten cases of cocoagene sold by plaintiffs to defendants, and which the plaintiffs about the 16th March, 1897, agreed to take back and requested the defendants to place the same in the custody of Messrs. R. Wilson & Co., trading in this city. The defendants tendered £151 6s. 6d. and costs to date of plea.

Mr. Searle, Q.C., and Mr. McGregor appeared for the plaintiffs.

Mr. Graham, Q.C., and Mr. Benjamin for the defendants.

Counsel stated that there was practically no oral evidence with regard to the dispute, and the merits of the case would have to rest upon the construction of the correspondence which had taken place between the parties.

Henry Edward Warner, a clerk in the employment of the defendant firm, deposed as follows:—The plaintiffs introduced themselves to Warner & Co., and induced them to undertake the sole agency of "cocoagene" in this colony. Messrs. Adolph & Co. suggested that the defendants should hand over ten cases of this article which they had in stock to Messrs. R. Wilson, Son & Co., who, they believed, would take over

the agency. Mr. Wilson, of the firm in question, refused to accept the goods on the ground that his firm had no sale for the article.

The more material part of the correspondence was the following:

17th February, 1897, defendants to plaintiffs: "We have still on hand some twelve cases cocoagene out of last shipment. This article is going slowly, but where it has taken, people will have none other. . . . It appears to us that Messrs. R. Wilson, Son & Co., are going to take over the agency for cocoagene; if this is the case we would ask you to make arrangements with them to take over the balance of our stock—say ten cases with which you could credit us."

16th March, 1897, plaintiffs to defendants: "Whatever remnant of cocoagene you have on hand at present, kindly try to place same, or if you think otherwise then hand same over to Messrs. R. Wilson Son & Co. and we will credit you accordingly."

14th April, 1897, defendants to plaintiffs: "We will act upon your suggestion and hand cocoagene, etc., over to Messrs. R. Wilson Son & Co."

26th May, 1897, defendants to plaintiffs: "We herewith beg to inform you that in consideration of your letter March 16th, we have been to see Messrs. R. Wilson Son & Co. re Cocoagene; the writer saw Mr. Wilson himself, who informed him that the firm had received no communication from you and that they are not willing to take the business up nor to take the cocoagene over. We shall therefore go on selling same until we hear further from you and shall remit you a further £100 about the tenth of next month."

2nd March, 1898, defendants to plaintiffs: "After reference to letters of 17th February and 26th May, 1897, "Since then we have not heard from you with regard to what we were to do with the same. We have ten cases still on hand and we must ask you to give us full particulars and instructions as to what we are to do with it and request you to carry out your promise made to us on the 16th March to credit our account with what we have still on hand, and if you will then draw on us for the balance at 14 days sight, same will be met, or after receiving your reply we will remit within fourteen days."

Mr. Searle: The question is whether there has been a cancellation of the original sale and a re-sale. There has been no novation. The correspondence shows that we had no intention of taking the cocoagene back.

The defendants could not have thought they were holding it on our account, because they rendered us no account. If they considered that there had been a re-sale to us, they should have rendered us an account. If the defendants had become insolvent the trustees could have claimed the goods.

[De Villiers, C.J.: It is not a question of ownership; the ownership is still in the defendants, the question is whether under the agreement, the plaintiffs are not bound to take the goods back.]

There is no consideration for such an agreement.

Mr. Graham: Up to the 22nd January, 1897, defendants were the sole agents of the plaintiffs in Cape Town; they had agreed to supply cocoagene to no one in Cape Town unless at defendant's special request. I admit that as regards the cases in question there was a sale, but the question of agency nevertheless is of importance. The letter of 18th March, meant that the defendants were released from their liability.

[De Villiers, C.J.: Was it not merely a suggestion as to what they should do?]

No.

[De Villiers, C.J.: To prove a re-sale you must first prove a cancellation of the old sale.]

This was an implied cancellation of the sale.

Mr. Searle: The onus is on the defendants of showing that there was a cancellation of the original sale. *Ewers v. Roberts Trustees* (F., p. 32).

[De Villiers, C.J.: Supposing that Wilson were the agent of the plaintiffs, and the defendants had sent goods to him, but he had refused to take them would there not have been a cancellation?]

I submit there would not. Wilson might take over the agency without taking over the goods.

[De Villiers, C.J.: Did not the letter of February imply that Wilson was plaintiff's agent?]

The defendants thought that Wilson might take over the agency, but in May they knew that he would not do so.

*Cur ad rult.*

*Postea* (August 24th).

Judgment was given for the plaintiff for the amount claimed with costs.

De Villiers, C.J.: This is an action for goods sold and delivered by the plaintiffs to the defendants. The dispute arises with regard to ten cases of cocoagene which are still in the hands of the defendants. The

defendants admit that it was purchased, and certainly the correspondence assumes that to be so, but in order to be relieved from the payment of these ten cases, it lies upon the defendants to prove that the sale was cancelled. I shall only refer to the letters of the 17th February and 16th March, 1897. (His lordship quoted those letters). Now at that time R. Wilson, Son & Co. were not the agents of the plaintiffs. So no agency had been created. The contention of the defendants is that this amounted to a cancellation of the sale. In order to see what was the intention of the parties, we must look to the correspondence again. The answer to the last letter was "we will act upon your suggestion." But what is more important is the letter of the 26th May. Now if the parties had intended that this should be a cancellation of the sale which had already taken place, I think the language would have been more clear. The plaintiffs allowed the cocoagene to be handed to Wilson, Son & Co. as a favour, but the latter did not take it over, and matters remained *in statu quo*. The onus of showing that there was a cancellation lies on the defendants. It is impossible to hold that a cancellation has been proved and the defendants are therefore liable for the whole amount claimed.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorney A. P. Kenealy.]

## SUPREME COURT

[Before the Chief Justice (Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSION.

{ 1899.  
Aug. 24th.

Mr. Buchanan applied that Mr. William Vervoort Moll be admitted to practise as an attorney-at-law and notary public.

Ordered.

WALKER V. KENNEDY AND HEIGHT.

Mr. Upington applied on behalf of plaintiff for judgment for £96 4s. 10d., in default of the appearance of Kennedy, and in default of plea by Height.

The order was granted.

**BAILEY V. JANUARY REBECCA AND THIRTY-ONE OTHERS**

Mr. Upington applied for judgment, under Rule 329, for £133 17s. 4d., rent and Divisional Council rates, decree of ejectment, and cancellation of a certain lease.

The order was granted.

**LA SOCIETE BRUSSEL ET CIE V. BURROUGHS, BENNETT AND CO.**

Mr. Gardiner applied on behalf of the plaintiffs for the discharge of the provisional order of sequestration of the defendants' estate, granted on 8th instant.

Order granted.

*Ex parte* **REICH.**

Mr. Gardiner applied for the rehabilitation of the insolvent. It appeared that the insolvent had granted undue preferences to Messrs. Fehr Bros. and Mr. Attorney van den Heever, to the amount of £25 in all.

The Chief Justice said the Court must mark its sense of the undue preferences granted by the insolvent.

The application was therefore refused, with leave to apply again in six months.

**SIMPSON V. DE WET.**

Mr. Benjamin for petitioner; Mr. Searle, Q.C., for respondent.

Application was made for the removal of the action, for payment of the price of an erf of land at Beaufort West (£175), to the Circuit Court at that town.

There was no objection, and the order was granted; costs of the application to be costs in the cause.

*Ex parte* **WILLIAMS.—In re JONES'S INSOLVENT ESTATE.**

Mr. Howel Jones applied for an order authorising the Master to call a meeting of creditors for the election of a trustee in the insolvent estate of Roger Jones, formerly of Cape Town. The applicant had purchased certain property from the insolvent before insolvency, but had not received transfer. The trustee originally appointed was now dead, and there was no one representing the estate.

The order was granted.

**POWL V. VAN DE SANDT DE VILLIERS AND CO.** { 1898.  
Aug. 24th.

Practice—Rule of Court 329D—

Failure to plead—Bar.

This was an application by the defendants in an action for damages for libel for the removal of bar and leave to plead.

The affidavit of the defendants' attorneys (dated August 23), set out that the plaintiff's summons was served upon the defendants upon the 9th August, and it commanded them to enter appearance within two days after service. That according to practice from time immemorial, as they had ascertained from the Registrar of the Court, a defendant in such a matter was always allowed a period of four days after the expiry of the days mentioned wherein to enter appearance. The defendants therefore respectfully contended that they were not bound to enter appearance until the 15th instant, upon which date they did enter appearance in due form.

That the defendants further contended that in terms of Rule of Court 330, subsection (b), they are not obliged to file their plea until eight days after the last day for entering appearance, viz., the 15th instant, and that therefore they had until the 23rd instant to do so. That on the 21st instant the plaintiffs served upon deponents a notice demanding plea on pain of bar: to that a reply was sent to the effect that the demand was premature. Plaintiff's attorneys replied that the summons was served on the 9th instant together with the declaration, and a notice calling on defendants to plead within eight days after the last day for entering appearance, and that the plea should consequently have been filed on the 19th instant.

That on the 22nd instant the plaintiff barred the defendants from pleading.

They submitted that the defendants were not bound to file their plea until the 23rd, and that they could not be barred save on twenty-four hours' notice duly and regularly given.

That the plea had been prepared, and that the reason why it was not filed was that the defendants did not write to have the case set down for a day at the end of the term seeing that the roll was full. A postponement after that might involve a material loss in costs.

Mr. Innes, Q.C., for the applicants referred to Rule 330B, which requires the plea to be filed within eight days after the last day for entering appearance. The applicants rely

upon Rule 829D, which has the effect in practice of giving four days more for entering appearance.

[De Villiers, C.J.: This is not a liquidated demand.]

The effect of the rule nevertheless has been as stated, and the defendants acted in a *bona fide* manner. *London and South African Exploration Co. v. De Beers* (3 Sheil, 287).

Mr. Searle, Q.C., for the respondent: We do not object to the defendants pleading, but the plaintiff stands on his strict legal rights, as he is anxious to go to trial this term.

De Villiers, C.J., said the Court would adhere to its decision in *London and South African Exploration Co. v. De Beers*.

The Court ordered the bar to be removed, the defendants to plead forthwith and costs to be costs in the cause.

Mr. Searle applied for a day to be fixed for a trial by jury.

The Court fixed November 3.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

HIND AND ANOTHER V. WALL- { 1899.  
SEND COLLIERY COMPANY. { Aug. 24th.

Practice—Discovery—Delay—Costs.

This was an application that defendants be compelled to comply with an order of discovery granted by Mr. Justice Buchanan on the 7th inst. It appeared that the order had now been complied with and the question was one of costs only.

Mr. Searle, Q.C., for applicants, plaintiffs in the action; Mr. Innes, Q.C., for respondents, the defendants.

The Court expressed the opinion that there had been unreasonable delay on the part of the defendant company's Board of Directors at Kimberley in obeying the order of discovery. As the necessary documents had now arrived in Cape Town, there would be no order, but the respondents would have to pay the costs.

Mr. Innes then applied for an order postponing the trial until next term, and for the appointment of a commission to take the evidence of one Jobling, a principal witness for the company now resident in London.

The order of the Court was that the applicants, the defendants in the case, pay £100 into Court within twenty-four hours to meet the costs of the action the trial to be postponed until next term, and permission

given upon payment as aforesaid to take the evidence of the witness Jobling on commission in London.

In re MCMURRAY. { 1899.  
{ Aug. 24th.

Mr. Close applied, on behalf of Mrs. Elizabeth McMurray, at present residing at King William's Town, for leave to sue *in forma pauperis* in an action for divorce against her husband on account of malicious desertion. The parties had been married for ten years, and the applicant had been compelled to support herself and four children for four years by reason of her husband's desertion and refusal to afford maintenance. It was understood that he was now living at Winburg, Orange Free State.

The Chief Justice said he presumed that the sole object of the action would be that the wife might be at liberty to marry again.

Mr. Close said he was unaware of all the circumstances at this stage, but he supposed the applicant wished to compel her husband to come back and give maintenance to herself and children.

The Chief Justice said that more information was required as to whether any good purpose would be served by the Court granting leave to sue *in forma pauperis*, for instance as to the position of the husband and his ability to support his wife, and in the absence of that information, no order could be granted.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ZEEDERBERG AND DUNCAN { 1899.  
V. SMITH. { Aug. 25th.

Mr. Brown applied for an order superseding the provisional order of sequestration of the defendant's estate. The application for final judgment had been postponed until 31st, but in the intervening period the dispute had been satisfactorily settled.

Order granted accordingly.

COLONIAL GOVERNMENT } 1899.  
V. WHITE. } Aug. 25th.

This was an action for £50<sup>1</sup>, payment of licence money due by the defendants, under Act 43 of 1898, Schedule 2, Tariff No. 1, the local representatives of Mother Seigel's Syrup.

Mr. Searle, Q.C., and Mr. Ward for plaintiffs.

Judgment was granted for plaintiff in terms of the consent by the defendants to judgment in terms of the declaration.

KOTHE V. HERMAN. } 1899.  
} Aug. 25th.

This was an action in which the plaintiff claimed £33 for work and labour done in connection with the erection of a building, which the plaintiff had contracted to build for the defendant. The plaintiff annexed an account to the declaration. The plea tendered £6 15s., but the defendant objected to two items, viz.: £17 10s. "to laying 750 sq. feet concrete flooring" and £8 15s. "to plastering 750 feet flooring with cement." He said that during the course of construction of the said building, it was agreed between the parties that certain flooring and plastering or washing agreed and necessary to be done by the plaintiff, should be concrete flooring, and cement plastering or washing, in manner as then and there agreed upon, in lieu of the mode previously agreed on that the defendant should supply the materials. It was also agreed that the plaintiff should make no extra charge for such work in addition to the contract price originally agreed upon. The defendant accordingly provided the material, and the work was executed as agreed, and the defendant owed nothing to the plaintiff in respect of such work and labour.

The replication joined issue.

Mr. Benjamin appeared for the plaintiff,

Mr. McGregor for the defendant.

Evidence was led by both parties.

The Court gave judgment for the plaintiff.

[Plaintiff's Attorney, J. J. E. Bernard ; Defendant's Attorney, D. Tennant.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

JENNINGS V. JENNINGS. } 1899.  
} Aug. 28th.

Mr. Buchanan appeared for the plaintiff, the defendant being in default.

This was an action for divorce, brought by Emanuel Thomas Jennings against his wife Maria Jennings (born Esterhuyesen) on the ground of adultery. The parties were married at Concordia, Namaqualand, on 16th October, 1882, and there were three children of the marriage. The plaintiff was at present domiciled at Langlaagte, Johannesburg, and he alleged that his wife had been living with a Hottentot farm servant, named Nicholas Zwartbooi, by whom she had two children. Zwartbooi died on the 2nd inst.

Evidence taken on commission by the Resident Magistrate of Springbokfontein was read by counsel to prove adultery.

De Villiers, C.J., said it was rather unfortunate for the plaintiff, that he should not be present to give the Court an opportunity of interrogating him. He had left his wife for seven years, and it was no wonder she went to live with another man, although certainly that was no justification for her adultery, but the Court had a certain amount of discretion in such a case.

Decree of divorce was granted, also custody of the children, but without costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

DE KOCK V. EXECUTORS OF VAN } 1899.  
DE WALL. } Aug. 28th,  
} Aug. 29th.

Donation—Acceptance—Ratification  
—Registration—Death of donor  
before acceptance—Minors—Deposit of money in bank for minors.

*The mere deposit by a grandfather of a sum of money with a bank in trust for or in the name of his grandchildren who are still under the guardianship of their mother does not constitute a donation to*

*such grandchildren, and if he dies before acceptance of the gift the transaction does not become a completed donation by acceptance after his death.*

*The receipt by the bank of the deposit without any intention to accept it on behalf of the alleged donees as a donation to them does not amount to such an inchoate acceptance as would become complete upon it being ratified on their behalf after the death of the donor.*

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This was an action instituted by the plaintiffs, heirs of the late Rev. Gilles Van de Wall to have certain alleged gifts made by him during his lifetime declared invalid and set aside. The declaration alleged that one of the plaintiffs was married in community of property to a daughter of the Rev. Mr. Van de Wall; the defendant, Mrs. Gordon, was also a daughter of Mr. Van de Wall, and was sued in her capacity as natural guardian of her three minor children, Mary, Gilles and Nicolai, and also as one of the executors in the estate of Mr. Van de Wall, the other defendants being the Malmesbury Board of Executors, who were appointed trustees for the minors, and Mr. Marais, co-executor testamentary along with Mrs. Gordon. In 1895 Mr. Van de Wall deposited £700 with the Malmesbury Board of Executors as trustees for the minor Mary Gordon, and this deposit was renewed and was in existence at the time of his death, in January, 1896. In December, 1894, Mr. Van de Wall deposited £800 with the same Board as trustees for the minor Gilles Gordon, and in 1895 £1,000 was deposited by him in the African Banking Corporation on behalf of Nicolai and Gilles Gordon. These deposits were varied from time to time, and they were never registered as gifts; nor, according to the declaration, were they recognised as *bona-fide* gifts, and they had not been accepted by any person on behalf of the said minors. After the death of Mr. Van de Wall, in 1896, the Board of Executors were appointed trustees of the said sums for the minors. Mr. Van de Wall by his will, dated November 1, 1892, appointed as his heirs his three daughters, one of whom was married to the plaintiff.

The plaintiff contended that the said deposits did not belong to the minors and were invalid as gifts to them, and that the said sums belonged to the estate of the said Rev. Gilles Van de Wall and were bound to be administered by his executors, but that the latter refused to do so.

He claimed an order declaring that the said sums of £2,500 belonged to the said estate, and were subject to the terms of his will and must be distributed in terms thereof; also an order for the payment by the Board of Executors to the said executors.

The Malmesbury Board of Executors filed a plea alleging that prior to 1888 and until 1890, £700 had been deposited with them by Mr. Van de Wall in his own name. In 1890 this sum was transferred to the name of his son Dr. G. Van de Wall, in whose name it remained until 1892. In December, 1892, it was re-transferred to Mr. Van de Wall as trustee for Mary Gordon and remained so until 1895. That the £800 was deposited in December, 1892. They denied any variation either in the amounts of the deposits or the names of the minors. They admitted that the gifts were never registered and that the secretary of the Malmesbury Board of Executors for the time being was by orders of the Supreme Court of 31st August and 12th October, 1897, appointed trustee for the minors to administer the funds in question. They said that about June 13, 1898, the Court made an order authorising the secretary to pay certain amounts out of the capital standing to the credit of the minors to Mrs. Gordon for the maintenance and education of the minors.

They denied the plaintiff's contention and submitted to the judgment of the Court, and prayed that they might be held harmless in costs.

The plea of the other defendants, Mrs. Gordon and Marais, alleged that the £700 had been deposited with the Malmesbury Board of Executors by Mr. Van de Wall in his own name as trustee for Mary Gordon in December, 1892.

That the £800 had been deposited by him also in December, 1892, in trust for Gilles Gordon.

That the deposits in the Paarl Branch of the African Banking Corporation had been made as follows: For and on behalf of Nicolai Gordon, £300 in February, 1892, £100 in February, 1894, £200 on 9th May, 1892. On behalf of Gilles Gordon £400 on 28th October, 1893.

They admitted that the deposits had never been registered, denied the other allegations, and prayed that the plaintiff's claim might be dismissed with costs.

The replication was general.

Sir Henry Juta, Q.C., and Mr. Close for the plaintiff.

Mr. Starle, Q.C., and Mr. Buchanan for the Malmesbury Board of Executors as trustees for the minors Gordon.

Mr. Innes, Q.C., and Mr. Benjamin for the executors in the estate of the late Rev. Mr. Van de Wall.

Gysbert Wilhelm Kotze, secretary of the Malmesbury Board of Executors, deposed that his Board were appointed trustees for Mary, Nicolai, and Gillies Gordon so far as these moneys were concerned. The circumstances connected with the will of the late Mr. Van de Wall were brought before the Court in 1897, when there was an application made to appoint the Malmesbury Board of Executors the trustees, and subsequently application was made by Mrs. Gordon to allow some of the money to be paid out for the maintenance of her children. Mr. Van de Wall always personally drew the interest on the two sums deposited with the Board of Executors.

Cross-examined: In the ordinary course of business he might have returned the deposits to Mr. Van de Wall, just as he paid the interest to the depositor.

John Hendrik Louw, manager of the Paarl branch of the A.B.C. Bank, gave similar evidence with reference to the deposit of £1,000 in that institution by the testator.

Mrs. Johanna Hendrika Gordon, one of the defendants, deposed that she was the daughter of the late Rev. Mr. Van de Wall, and the mother of the minor children concerned. Her husband died in 1887. She was not aware of the deposits referred to in this action during the lifetime of her father, nor did she know anything of the interest drawn upon them by her father. She was one of the executors of her father's estate along with Mr. Marais, and as executors they did not deal with these moneys. Witness always had the impression that her father would do something for her children from his attitude towards her and conversations she had with him. When these deposit receipts were found, however, they seemed to represent such a large sum for her father to will to her children that it shook her belief that they would be entirely for them. When she considered her position as sister, daughter,

and executrix, she regarded it as an extremely delicate one. She thought the co-heirs looked upon her with distrust and suspicion, as if she might have connived at getting these gifts, and had used undue influence. After consulting her friends, she decided that, for the sake of shielding her father's name and the family reputation, she should be perfectly prepared to give up this money so that all should share equally, and family dissension would be obviated.

Cross-examined: At the death of her husband she went back to live with her father, who provided a home for herself and little ones, allowing her £10 a month for household expenses, &c., in addition to which she earned £10 per annum as teacher of Dutch in the Ladies' Seminary at the Paarl. Her father gave her distinctly to understand that as her children grew up and their requirements increased, he would render her assistance.

Re-examined: The grandchildren of the testator were about seventeen in number.

De Villiers, C.J.: When you discovered about these deposits were you prepared then to accept them?

Witness: I could not realise that they ought to come to us, although I was fully convinced that my father would do something for my children.

De Villiers, C.J.: Would you have ultimately accepted the amounts on behalf of your children?

Witness: I cannot answer that, but I applied for assistance towards the maintenance of my children, and it was paid to me out of these deposits.

This closed the plaintiff's case.

For the defendants,

Johannes Stephanus Marais, one of the executors of the will of Mr. Van de Wall, deposed that the intention of the testator was that the estate was to be divided among the three daughters, Mrs. Gordon and two others. One of the codicils to the will stated that if the individual shares of the daughters came to more than £900, a fourth heir—a son—was to share in the proceeds *pro rata*. On the first liquidation the balance for distribution was £5,437 17s. 3d., the second liquidation amounting to a small sum, only £15 each, being Malmesbury Board of Executors' dividends. Each heir therefore got £1,768 odd. The codicil was challenged and set aside by the Court, so that the fourth heir did not come in. Mrs. Gordon gave up the *pro rata* amount her brother Henry



would thus have received out of the estate if the codicil had been confirmed; but as far as he knew the other heirs did not do so.

Cross-examined: The executors did not deal with these gifts at all. Witness considered that he was not legally entitled to do so, but he represented to Mrs. Gordon that this money was in the hands of the Malmesbury Board of Executors and at the bank lying idle, and his impression was that, if she could have legally done so, Mrs. Gordon was not averse to deal with the various deposits on behalf of her children.

Sir H. Juta: Whatever the intention of the depositor may have been there has been no acceptance on behalf of anyone. The interest on the deposits with the Board of Executors was drawn by Mr. van de Wall himself. The deposits in the bank were not in trust, and the depositor received the interest. There must be clear proof of the depositor's intention. Both the bank and the Board dealt only with him, and he could do what he liked with the money, and that is important in the consideration of what his intention was. As to acceptance. *Van Heenen's Trustee v. Versveld and others* (9 Juta, p. 161); *Slabber's Trustee v. Nezer's Executors* (12 S.C.R., 163). The donor here could revoke at any time. The father is the proper person to accept, as being natural guardian. The grandfather is not the guardian, he is a stranger, and as a stranger he had no right to accept. The mother was the natural guardian, and she was the only person who could accept. The conduct of Mrs. Gordon was not that of one who thought the gifts *bona fide*. Acceptance should take place before the death of the donor in order to have any effect. In any case the deposits are invalid as gifts to the extent to which they are in excess of £500.

Mr. Innes: The heirs stand in the same position as Mr. van de Wall himself, and he could not now revoke these gifts.

[De Villiers, C.J.: Supposing that Van de Wall had become insolvent, but at the time the gifts were made had been solvent, could the trustee have taken the gifts? Would not the same test apply in this case?]

The same test would apply.

[De Villiers, C.J.: Is there proof of such an irrevocable gift that Van de Wall would be bound?]

The facts show his intention to make provision for the minors. As to the acceptance it cannot be maintained that he could accept on behalf of the minors. As grandfather,

he could not accept and there was a guardian living. But the gifts were made to the Board of Executors and the bank, institutions authorised to accept them. They did accept them and though at the time of acceptance, they were not authorised to accept, the acceptance was subsequently ratified by the natural guardian.

[De Villiers, C.J.: That raises the important question whether a *donatio inter vivos* can be accepted after the death of the donor.]

Not accepted, but ratified. The ratification after the death of the donor makes good the acceptance from the date of the acceptance. These institutions can receive money on behalf of minors, if there is no ratification the gift falls to the ground, but if there is ratification the ratification dates back to the time of the originally unauthorised acceptance. As between the donor and the Board or the bank the transaction was complete before his death. As to acceptance by an unauthorised agent *Voet* (39, 5, 12).

[De Villiers, C.J.: I should have no doubt if Mrs. Gordon had during Van de Wall's lifetime intimate an acceptance.]

*Groenewegen, De Leg. Abrog.* (39, 5, 10) and *Vinnius Inst.* (3, 20, 4, 4), both say that there may be an acceptance on behalf of a person who is ignorant of the donation. In *Bolton Partners v. Lambert* (41 Ch.D., 295), the doctrine that ratification relates back to the original acceptance was carried so far as to prevent the effectual withdrawal of the principal. (See judgment of Cotton, L.J., at p. 346). See also *In re Portuguese Copper Mining Company* (45 Ch. Div. 16). As to registration; I do not think it has ever been held that registration is necessary where there has been delivery. The question was discussed in *Van As v. Nt's Executors* (13 S.C.R., 427) but was left open. (See judgment of De Villiers, C.J., at p. 43); *Burge on Colonial Law* (vol. 2, page 849), says that in France registration was required for moveables unless there was delivery. *Van Leeuwen*, (*Censura Forensis* I, 2, 8, section 5) is against my contention. Registration however is intended to prevent fraud and here there has been no fraud and there has been delivery. If registration however, is necessary, the question arises whether £500 should be deducted from the whole amount or whether each donation should be separately considered, and £500 taken from each. *Voet* (39, 5, 16) says that each should be taken separately. Therefore where the

donations are all separate and each below £500 there is no need for registration, provided there is no suspicion of fraud.

[Maasdorp, J.: Does not that apply only to a joint donation.]

That does not seem to be so. Therefore the donations of £70 and £800 should be reduced by £200 and £300 only. The donation of £1,000 was made up of different amounts under £500 each and so no registration of them is necessary.

[De Villiers, C.J.: That is reducing registration to an absurdity.]

Mr. Searle: The Board of Executors acted *bonâ fide* throughout as the correspondence shows. After the death of Mr. Van de Waal it acted under an order of Court. A donation can be accepted by a public person and the Board is a trust company incorporated by Act of Parliament.

Sir H. Juta in reply referred to *Thorpe's Executors v. Thorpe's Tutor* (J. 4, 488).

Mr. Innes referred to *Voet* (39, 5, 13) as to the death of the donor.

Mr. Searle referred to *Van de Kessel, Dictata ad Groet. section 12 de donat: Groenregen, De Leg. Abrog. ad Inst. section 2 de donat.*

*Postea* (29th August).

Judgment was delivered.

De Villiers, C.J.: The late Rev. Mr. Van de Wall deposited two sums of £700 and £800 respectively with the Malmesbury Board of Executors, in trust for two of the children of his daughter, Mrs. Gordon, whose husband was dead at the time. He also deposited with the African Banking Corporation various sums amounting in all to £1,000 in the name of another child of Mrs. Gordon. During his lifetime he received the interest on the deposits, but at the time of his death the deposits had not been withdrawn. He executed no deed of donation, nor did he cause the alleged gifts to his grandchildren to be registered in the Deeds Office. Mrs. Gordon, in her evidence, which was very frankly and fairly given, states that her father did not inform her of the gifts, although she had reason to believe that he would make some provision for her children. Not being aware of the gifts, she could not, of course, accept them on behalf of her minor children during her father's lifetime. There is no evidence that Mr. Van de Wall even informed the grandchildren of the gift, and consequently there could be no acceptance on their part. But after Mr. Van de Wall's death Mrs. Gordon applied to the Court for directions

as to the amounts deposited, with the result that the Board and the bank were appointed trustees of the moneys for the minors. The plaintiffs, who are two of the testamentary heirs of the deceased, were not parties to the application, and the order of the Court cannot therefore prejudice them, but the proceedings then taken are important to show that Mrs. Gordon did, after her father's death, virtually accept the gifts on behalf of her children. The question to be decided is whether such acceptance was sufficient to complete the donation and vest the right to the moneys deposited in her minor children. If during Mr. Van de Wall's lifetime Mrs. Gordon had been informed by him of the deposits, and had accepted the amounts on behalf of her children, there would have been no difficulty in deciding this case. One of the necessary ingredients of a valid donation is acceptance by the donee or some one duly authorised on his behalf. According to *Voet* (39, 5, 13 *in fine*) an unauthorised acceptance by a notary or other similar official would bind the donor upon such acceptance being subsequently ratified by the donee. It is not quite clear whether such ratification would, in *Voet's* opinion, be sufficient if effected after the death of the donor. In a previous passage of the same section he had explained that it was necessary that the acceptance should take place during the lifetime of the donor. This is clearly laid down in the *Digest* (39, 5, 2, section 6), where it is said that if a person, with the intention of making a donation to me, gives money to another to bring to me and dies before the messenger reaches me, the money does not become my property because the donation has not been completed. It is contended in the present case that the Board and the bank did during the lifetime of Mr. Van de Wall accept the money on behalf of the grandchildren, and that such acceptance was ratified after his death by their mother. It might with equal force have been contended in the case mentioned in the *Digest* that the messenger had accepted the money on behalf of the donee. In my opinion there is not even an inchoate acceptance of a donation by a third person on behalf of a donee, unless the person receiving the money knows that it is a donation and intends to accept it as such on behalf of the donee. The requirement mentioned by *Voet* that the acceptance should be by a notary or other similar official shows that there should be some kind of solemnity indicating to all concerned the

exact nature of the transaction. There is nothing in the correspondence or in the oral evidence given in the present case to show that either the Board or the bank knew that the deposits were intended as donations. The deposit receipts do not show that they were donations. For aught the Board and the bank knew, the money might have belonged to the minors and been deposited by their grandfather on their behalf without any thought of a donation. Their receipt of the money in the ordinary course of their business was not, in my opinion, such an inchoate acceptance of a donation on behalf of the minors as to become complete upon being ratified after the donor's death by the mother and natural guardian of the minors. In this view of the case it is unnecessary to inquire into the motives which induced Mr. Van de Wall to make some deposits in trust for, and other deposits in the name of, his grandchildren. I am satisfied that the transactions were perfectly honest, and that he had no sinister object in using the name of his children as the depositors instead of his own name alone. It would not necessarily have been proof of dishonesty if he placed the money in his children's name without really intending to make an irrevocable gift to them. The fact that he did not inform the Board and the bank and even his daughter of the alleged donation goes far to show that he did not intend it to operate as such. But whatever his intention may have been the transaction was not complete as a donation before his death, and, as he clearly did not intend it to take effect only after his death, the non-acceptance of the gift on behalf of the donees before his death prevents them from claiming the money as a donation. In regard to the sum already paid to the minors under order of the Court, the plaintiffs do not insist upon its repayment into the estate. The balance in the hands of the Board and the bank must be paid into the estate, but all costs of this action may fairly be borne by the estate.

Buchanan, J., in concurring, said: There is no doubt the judgment of the Court now given will act against the testator's own intention, and will cause a distribution of the estate in a manner which he himself did not desire. But whatever the intention of the testator might have been, under all the circumstances which have been brought before the Court, it is impossible to hold that he gave legal effect to that intention. If this donation had been perfected as a

donation, and given and accepted as such by the person properly qualified to accept it, the question of registration might have come into the discussion, but it is not necessary to follow that up. If this donation had been given irrevocably to a third person and accepted by that third person, it would be quite possible, on the authority of the passages in *Voet* quoted, to hold that ratification might have taken place subsequently to the death of Mr. Van de Wall. But the difficulty in this case is to find that there was any acceptance of the donation. The test which should be applied in all these cases is the question of irrevocability. Did the testator so part with this money as to put it out of his power to take it back? It is proved that he kept control of these sums in his own hands; he himself deposited the money with the Board and in the bank; received it back, redeposited it, and drew the interest upon it. If he had been the father of the children he could have acted in the two separate capacities, the one as donor, and the other as accepting the gifts on behalf of the donees. The money must be considered as part of the general estate, and must be administered by the executors.

Maasdorp, J., said: It seems to me pretty clear that Mr. Van de Wall intended at some time or other to make a gift of certain sums of money to these children, and that he actually set apart these sums for that purpose. But I am not quite clear that the testator ever intended to divest himself of the control of the money up to the time of his death. It is contended by the defendants that the transaction went somewhat further, and that Mr. Van de Wall actually handed these moneys over to the bank and the Board to be received on behalf of the children and to be held in trust for them. There is no proof, however, that such was the case. Both the bank and the Board seem merely to have taken these deposits in the ordinary course of business, and never to have become parties to the donation or to have accepted it on behalf of the minors. It is also contended that there was some sort of acceptance by the minors themselves, but there is no evidence of that either, or that the minors knew their grandfather intended to make a gift to them. It is necessary to have a concurrence of intention on the part of the donor and donee, and certainly after the death of the donor there was no longer an opportunity of such consensus of acceptance.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Attorney for the Malmesbury Board of Executors, P. M. Brink; Attorneys for the other defendants, Messrs. Van Zyl & Buissinné.]

#### KIRSTEN V. KIRSTEN.

This was an action for restriction of conjugal rights.

Mr. Graham, Q.C., appeared for the plaintiff.

The defendant was in default.

Hermanus Dempers Kir-ten, the plaintiff, stated that the parties were married in June, 1889, and lived happily until 1897, when a man named Etheridge came to live with them as a boarder. Etheridge was the cause of a disagreement in consequence of which a deed of separation was entered into. This was subsequently cancelled, and the defendant again lived with plaintiff happily for about a month. She left on several occasions after that, and he took her back, but she finally went away in February last and now declined to return. In 1898 the defendant started a boarding-house at Three Anchor Bay, and she was now living in Woodstock. She refused to live with him as she said she did not love him. He had no proof of infidelity, but Etheridge was distinctly the cause of the disagreement.

An order was granted for the defendant to return on or before 12th October, or to show cause, on November 1, why a decree of divorce should not be granted, plaintiff to have custody of the three children of the marriage.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

VAN DE VEN V. VAN DE VEN. { 1899.  
Aug 29th.

This was an action for restitution of conjugal rights.

Mr. Buchanan appeared for the plaintiff.

The defendant was in default.

The plaintiff, the husband, stated that the marriage took place on 8th December,

1892, and there were three children of the marriage. The parties lived happily for some years, but about a year ago certain differences arose, and the defendant left him and refused to return. On the 12th August he had an interview with the defendant, and asked her to return, but she refused, and his attorneys had received a letter from her saying: "What is the use of summoning me to return to my husband? I won't go back, and he knows it. It is useless summoning me, for I shall never live with him again." The petitioner desired to have the custody of the two eldest children.

An order was granted for the defendant to return on or before 12th October, or to show cause on 1st November why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. C. J. Berangé & Son.]

HALL V. CLAREMONT MUNICIPALITY. { 1899.  
Aug. 29th.  
Sept. 1st.  
" 4th.

Municipality—Diversion of water—  
Flood.

This was an action for damages against the Municipality of Claremont, by reason of injury to plaintiff's property on account of the negligence of defendants in constructing certain defective drainage works, namely, a culvert, contiguous to plaintiff's property, which overflowed in August last year, and depreciated the value of his property.

The declaration was as follows:

1. The plaintiff is an architect and surveyor residing at Claremont; the defendant is the Claremont Municipal Council, a body established under the Municipal Act, 1882.

2. The plaintiff is an owner of certain house and land within the Municipality abutting upon a road or thoroughfare called Livingstone-road.

3. In or about the commencement of the year 1898, the defendant Council constructed certain culverts, pipes, and drains in a road called Harfield-road, within the said Municipality, in order to drain the said road and area abutting thereon, and by the said culverts, pipes, and drains brought a large quantity of water across and underneath the railway line down into certain roads on the lower side of the said line, and thence to the said Livingstone-road; a considerable amount of water collected from the area on the lower side of the said line was brought

down to the said Livingstone-road by drains constructed by the defendant Council as aforesaid for that purpose.

4. The water collected as aforesaid was conducted by the said Council from the said Livingstone-road by main pipes and drains into a road or thoroughfare called Stanley-road, and thence to the Black River, a stream flowing through the Municipality.

5. In or about April, 1898, the defendant Council caused to be constructed a certain culvert along the said Livingstone-road, and dug a sluic or watercourse from the said culvert along the said road, down to the point where the plaintiff's property abutted on the said road.

6. The effect of the operations above described was to cause the drainage water collected and flowing down to Livingstone-road as aforesaid to be diverted from its previous course, in paragraph 4 described, into the said culvert and the watercourse running down to plaintiff's property.

7. The said culvert and watercourse were improperly constructed, and in particular were wholly insufficient to carry off the water which the said Council had collected as aforesaid, and caused to be diverted thereinto.

8. In consequence of the said improper construction and insufficiency of the said culvert and watercourse, on or about July 13, 1898, the water collected and brought down as aforesaid, overflowed the said culvert and watercourse, and washed away the greater portion of the said Livingstone-road from the said culvert to a point about 200 feet beyond the plaintiff's property, and also washed away a portion of plaintiff's said property abutting on the said road, and destroyed the access to plaintiff's property.

9. By reason of the destruction of the road as aforesaid, plaintiff has sustained great loss and damage through being deprived of access to his said premises, and to the reasonable use and enjoyment thereof.

10. In consequence of the above the plaintiff's property has deteriorated in value; he was unable to let the said premises until February, 1899, on account of the above, and since the said date has been compelled to let his house at a lower rental than he could otherwise procure.

11. The plaintiff is entitled to demand from the defendant Council the sum of £500, being damages sustained by him by reason of the deterioration in value and loss of rent as aforesaid; and is also entitled to an order on the defendant Council to restore the said

road to the condition in which it was previous to the washing away thereof, or to pay him the sum of £250, the estimated cost of performing the said work; the defendant Council refuse to restore the said road or to pay any sum as damages.

12. Unless the said Council be interdicted from making use of the said culvert until proper arrangements have been made for carrying off the water flowing through the same the plaintiff will sustain further loss and damage to his premises.

The plaintiff claims: (a) The sum of £500 as damages; (b) an order on the defendant Council to restore the said road to its condition prior to July 13, 1898, or to pay him the sum of £250; (c) an order interdicting the defendant Council from continuing to allow water to flow through the said culvert on to the said road, or from utilising the said culvert until due provision has been made by it for carrying off the water passing through the said culvert; (d) alternative relief; (e) costs of suit.

The defendants in their plea admitted the first two paragraphs, and said that plaintiff was in their employ from May 1, 1898, to February 28, 1899, and it was his duty to advise them as to the design, construction, and location of water-sluts, culverts, inverts, and structures of a similar nature then existing or proposed, and that he had not at any time while in their employ advised against or taken exception to the culvert and works now complained of by him.

2. They denied paragraph 3. They said that in May they diverted a stream which used to flow under the railway at the junction of Harfield and Pine-roads, and then along the eastern side of the railway, but they took it along the western side and then into the same watercourse, the Black River, wherein it had flowed previously.

3. They denied paragraph 4.

4. They said they constructed a culvert across the end of a road intersecting the Livingstone-road for the purpose of carrying off water which ordinarily flowed over the road and in the same direction, but the culvert was properly and efficiently constructed and sufficient for carrying off the water which flowed into it. The plaintiff's property did not abut on the Livingstone-road, and the plaintiff had the same access to his property as he always had. They denied paragraphs 5, 6, 7, and 8, save as above, and said that if any portion of plaintiff's property was washed away it was through no fault of theirs.

5. They said the plaintiff's property was not ready for letting until the beginning of 1899. Save as above, they denied paragraphs 10, 11, and 12.

The replication admitted the employment by the defendants, but said that under the plaintiff's written agreement it was his duty to advise when required, but that he had not been requested or required to advise upon the works complained of.

As to paragraph 2 of the plea, he said that up till the month of November the water flowed in the manner set forth in the declaration, but thereafter the defendants diverted at the junction of Harfield and Pine-roads, as stated in the second paragraph.

As to paragraph 3, he said that if the defendants did not conduct the water by pipes and drains, the pipes were put in and the drains made with their consent. He said that if the culvert mentioned in paragraph 4 was now sufficient to carry off the water, the reason was that the defendants had since the washing away of the Livingstone-road made certain improvements in the drainage and otherwise which had the effect of relieving the culvert from portion of the water formerly flowing down to it.

Issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Close appeared for the plaintiff.

Sir H. Juta, Q.C., and Mr. Brown for the defendants.

Watson Hall, the plaintiff, stated that he was in the service of the Claremont Municipality from May, 1898, until February this year, as consulting architect and surveyor, but he had nothing to do with inspecting drains and culverts, except special works in connection with drainage. He gave evidence generally as to the damage done by the rainfall and storm-water on 13th July, 1898. Photographs and plans were put in showing the property and the present conditions of the roadway close to plaintiff's house. The property cost him £1,260, including the ground and building, and previous to the damage he was offered £1,400 for it. After the washaway, he could not get a purchaser. The property was mortgaged for £650, but the bond was called up in November last in consequence of the deterioration in value. He considered a fair rental for his house would be £7 10s., but he was obliged to let it for £5 a month. He spoke to several members of the Council about the damage while still in the employment of the Municipality, amongst

others to Mr. MacLean, Mr. Ingle, Mr. Robertson, and also Mr. Walker, the secretary. Their reply was that they could not do anything for him, as the exceptional rainfall was an act of God. Mr. Ingle said the Council was not responsible, and could not do anything for complaining property-owners. He did not think he would now get more than £800 or £900 for his property. It would cost £250 to repair the road.

Cross-examined: The part of Livingstone-road which was made by the Municipality ended at the culvert. His house was on what was called the Lansdowne Syndicate Estate, and what he called the road was simply the natural ground with the trees removed. The road in front of his house was formed, although not gravelled. The roads in that vicinity had not been taken over by the Municipality. He had heard it stated that the rainfall in July last year was unprecedented during many years. He made no complaint in writing to the Council about the damage, nor did he make any claim until he left the service of the Municipality. As he read his agreement with the Municipality, it was not his duty to report upon any culverts which were not acting properly or were doing damage. Mr. Walker and some of the Public Works Committee told him that an agreement would have to be drawn up specifying his duties with regard to reporting upon drains, culverts, stormwater, &c. The Council had an inspection of the damage a few days after, in consequence of which they refused to satisfy any claim on the part of Mr. Brooks and Mr. Fisher, and the latter repaired the damage done to his own property. Plaintiff did not ask the Council to inspect his property, but pointed out the damage to Mr. Walker, the secretary. The municipal valuation of his house was £650.

Evidence was given by Mr. W. T. Olive as to the alleged injudicious construction of drains adjacent to plaintiff's property, and by Mr. J. H. Commin with reference to frequent complaints by himself concerning overflows of water. The latter deposed to the damage done to Livingstone-road by the floods of July last year, and the consequent inaccessibility to plaintiff's property. He thought these circumstances affected the value of plaintiff's property to the extent of about a third.

Mr. Alfred Tier gave evidence of the large quantity of water which was swept down Livingstone-road in consequence of the culvert constructed by the Council. A cart could not be brought near plaintiff's house.

As a matter of fact, after the washaway he spoke to Mr. Hall about renting his house, as he thought he might get it cheap, but Mr. Hall wanted £7 a month, and he declined to pay that amount. It would be worth that rental if there was proper access.

Mr. A. P. de Villiers, auctioneer and sworn appraiser, said he was a member of the Lansdowne Syndicate, and Livingstone-road was one of the formed roads when they acquired the estate. It was simply a sand road, but was properly defined.

Mr. Chas. S. P. wrie, a landowner at Claremont, and a Municipal Councillor for about thirteen years, said he was acquainted with all the roads contiguous to Livingstone-road, where plaintiff's house is situated, and stated that the effect of making St. Matthew's-road was to bring down twenty times the previous quantity of water. The damage done to Livingstone-road was undoubtedly due to the divergence of the water by the culvert constructed by the Council. Plaintiff's property was very much depreciated in value by the washaway in July last year.

Mr. John S. Merrington, late Municipal Clerk, Claremont, stated that the low valuation of plaintiff's house—£150—was fixed in consequence of the washaway. But for that, the property would be fairly valued at £1,000 for municipal purposes.

The tenant of the house, Mr. Charles Edward Barnes, said he had frequently given notice to leave on account of there being no proper access. All articles for his household use had to be carried down from the corner of Cecil-road, there being no road for vehicular traffic.

Mr. Henry Dyson said before the washaway he was prepared to give plaintiff £1,400 for his house, but now he would not have it at any price.

This closed the case for the plaintiff.

Mr. Ernest Albert Ingle, a member of Claremont Council and chairman of the Public Works Committee said that during last year less water was brought down by the culvert into Livingstone-road than previously. The water could not possibly be carried from the culvert to that road without a pumping-station. After the flood in July last year he was one of the Councillors who inspected the whole neighbourhood, as Messrs. Brooks and Fisher had complained of the damage. The Council refused to do anything, because the damage was caused by the

negligence of the owners in not providing proper water channels to take the water from their roofs. He saw no damage whatever done to plaintiff's house. In witness's opinion, if the volume of water had run in the ordinary way, Hall's house would probably have been washed away, but the culvert prevented that. He was not aware that a slice of land had been carried off from plaintiff's land in consequence of the washaway. Mr. Fisher had deepened the road by carrying away sand from it. He did not know that plaintiff's house stood empty for any length of time. It was nothing for houses to stand empty for two or three months in Claremont. Witness had houses of his own, in a much better neighbourhood, standing empty for longer periods. He thought £5 a month was a very fair rental. These roads had not been taken over by the Municipality, and they were not made roads.

Cross-examined: The part of Livingstone-road at plaintiff's house was a sand track which had now been washed out. Just about the time this action was commenced the bulk of the water passing through the culvert had been diverted on to the Flats.

George Gardiner said he was inspector of works for the Claremont Municipality. Last year the culvert in the vicinity of Livingstone-road brought down a less quantity of water than before the floods of August last year. He had had some conversation about the culvert with the plaintiff, and he told witness that it was a good piece of work. Plaintiff made no complaint to him, but merely said it was a pity the road was washed away.

In cross-examination, witness said he was now proprietor of the Lansdowne Hotel, and had previously been engaged at the Salt River Works. He had had no special experience of roads out here, but he had been employed as road superintendent at Huddersfield and Crawford for two years. He left the service of the Council in November of last year.

Mr. L. MacLean, last year Mayor of Claremont, deposed that plaintiff had never spoken to him about a washaway, or complained of the damage to his house. He knew the culvert at Livingstone-road, and remembered the so-called washaway. Witness never informed the plaintiff that he had better not complain about it lest he should lose his situation as surveyor of works.

In cross-examination witness said he had no recollection of the plaintiff

being interested in the so-called washaway until a petition was received by the Council in September. He did not know until then that plaintiff had a house in Livingstone road. When the Council examined Livingstone-road they did not inspect plaintiff's house, as he had not complained.

By the Court: He had seen the washaway, and there was no doubt that the concentration of water at that spot had to some extent been caused by the culvert referred to.

Several other witnesses, including Mr. Bisset, Mayor of Claremont, gave evidence, the latter gentleman stating that no damage to plaintiff's property had been directly caused by any overflow of water due to any negligence on the part of the defendant municipality, although the culvert complained of might have contributed to the washaway. He also considered that plaintiff had sufficient access to his property, although he could not get to the front door of his house. He regarded £5 or £5 10s. as a fair monthly rent for the property.

In cross-examination, witness admitted that the culvert in quest on might have contributed to the washaway which caused the damage to Livingstone-road.

Mr. Walker, clerk to the Claremont Municipality, denied that plaintiff had ever complained to him of the damage to his property in an official capacity.

Gardiner (recalled) stated that to the best of his knowledge the effect of raising Cecil-road by about six inches would not be to divert the water from its proper course or direct it towards that part of Livingstone-road extension where plaintiff's house was situated.

Wm. Moore corroborated, and said that, from his knowledge of the various roads in the neighbourhood, he did not think that either the culvert or the construction of neighbouring streets would be liable for the damage caused to plaintiff's property.

De Villiers, C.J., in giving judgment, said: I am satisfied that the cause of the damage in Livingstone-road extension was an accumulation of water diverted into that road and the culvert across Cecil-street. The only difficulty in the case is as to the form of the pleadings, because the plaintiff alleges in his declaration that one of the causes of the damage was the insufficiency of the culvert. That, in my opinion, is an entire mistake, and if the declaration had

not contained other allegations which are consistent with the case proved, I should have been inclined to give absolution from the instance. On reading the declaration, however, as a whole, I think we may take it that the main allegation relied upon is that the effect of the operations was to cause a drainage of the water collected, and to make it flow down to Livingstone-road, thus being diverted from its previous course, and allowed to run down to the plaintiff's property. It was wholly wrong for the plaintiff to assert that the culvert was insufficient, because if that had been the case, the damage would have been less rather than greater. I do not think, however, that this incorrect allegation should debar the plaintiff from having some remedy. It is impossible to say that the defendants were unprepared to meet the case. It has not been alleged that witnesses could have been called on behalf of the defendants, who were not called in consequence of this erroneous statement. With reference to the claim for damages, the plaintiff has produced evidence to show that the value of his house has depreciated, and that he has been unable to rent it at the same rent which he would have received had the road been kept in a proper state of repair. The Court, at the same time, can not lose sight of the fact that the plaintiff himself, while this culvert was being constructed, was in the service of the Council, and although it might not be part of his duty to attend to drains, as a property owner having some skill in the matter, it might have been expected that he would call the attention of the Council, timeously, to the wrong manner in which the culvert was being constructed. On the whole the Court does not think that there should be any damages given to the plaintiff, and with regard to the further prayer of the plaintiff, the defendant Council will be ordered to restore the road within six months to the condition it was in prior to July 30, 1898, or to pay the plaintiff the sum of £250. The judgment to carry costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Gaa. Trollip.]



# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice LUCHANAN, and the Hon. Mr. Justice MAASDORP.]

BEESTON V. BEESTON. { 1899.  
 { Aug. 30th.

This was an action for divorce, brought by Mrs. Beeston against her husband on the ground of adultery.

The declaration set out that the plaintiff resided in Cape Town, and the defendant at Mowbray. The parties were married at Kidderminster, England, on 25th February, 1878, and there was one surviving son, issue of the marriage. It was alleged that the defendant had, during the last two years, committed adultery with a woman named Maggie Peak, by whom he was the father of a child. The defendant had filed a plea admitting the allegation contained in the declaration, and consenting to judgment.

Mr. Benjamin appeared for the plaintiff.

The defendant was in default.

Mrs. Beeston deposed that after the marriage, her husband took to drink, and all her attempts to reform him were unsuccessful. On several occasions he left her for a week at a time, and he enlisted twice, but was bought out of the army by witness's mother. He continued in his drunken habits, and about four years ago left England for the Cape. For three years he wrote to her in terms of affection, but in consequence of information received she came out here, and met her husband in a house living with the woman Maggie Peak, and nursing a child, which he afterwards acknowledged to be his.

Other evidence of the adultery was led, and a decree of divorce was granted.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

LANGERMAN V. BERRY. { 1900.  
 { Aug. 30th.

Negligence—Collision—Contributory negligence.

This was an action instituted by Mr. F. J. B. Langerman against Michael Berry, a baker carrying on business in Long-street, Cape Town, for £150 damages sustained through the alleged negligence of the defendant's servant when engaged in driving the defendant's cart. The declaration stated that on the 5th June last,

while the defendant's servant was driving the baker's cart belonging to him, he negligently and carelessly caused the cart to collide with a Cape cart belonging to the plaintiff, and driven by plaintiff's son, and the plaintiff thereby suffered loss and damage to his cart and horses to the above amount. The defendant's plea admitted that his cart did come into collision with plaintiff's Cape cart, but denied carelessness or want of due and proper caution on the part of his servant, and denied damage to the amount of £150, or at all. The replication was general.

Mr. Currey and Mr. Miller appeared for the plaintiff.

Mr. Upington for the defendant.

Mr. Currey asked the direction of the Court with regard to the postponement or otherwise of the case. On the 4th instant the Court granted an order for a commission to take the evidence of Mr. J. W. S. Langerman, at present in Salisbury. Last Friday, 25th instant, a telegram was received from Salisbury stating: "Commission papers leave by this evening's mail." These papers had not yet arrived, and would not be here before Saturday next. The witness in question happened to be one of the most important for the plaintiff's case.

The Court elected to take the evidence so far as it could go.

Frederick Botha, clerk in the office of the Colonial Secretary, said he remembered the early morning of Monday, June 5. On the previous night he had slept at Mr. F. J. B. Langerman's house at Sea Point, and rose about five o'clock. He and Willie Langerman in panned the horses into the plaintiff's Cape cart. It was a very dark morning, and both cart-lamps were lit. Willie Langerman drove carefully along the main road, Sea Point, towards Cape Town, and when near the Round Church the cart collided with Mr. Berry's baker's cart. Mr. Langerman's cart was on the left, the proper side, and there was ample room for any other vehicle to pass. Witness did not see the baker's cart before it crashed into the other cart. The baker's cart had no lights. They thought the best thing to do was to let the horses go, as they had swerved, and they were pulled back over the splashboard. Witness was thrown out, and when he got up he went to see what vehicle had collided with them, and on asking the driver of the baker's cart where his lights were, he simply replied, "What do you want lights for?" Mr. Langerman's horses bolted with the cart, but they were

stopped about half a mile further on. Willie Langerman was a most careful driver. Witness attributed the collision to the carelessness of the driver of the baker's cart, who was on the wrong side of the road. There were two guns in the cart, one of which was injured.

Cross-examined: Witness insisted that Willie Langerman was an experienced driver. The horses in Mr. Langerman's cart were spirited animals, but they did not bolt as soon as they left their stables. He did not look to see if the baker's cart was injured. When they left Mr. Langerman's house that morning they were going on a shooting expedition. He was quite sure the driver of the baker's cart did not call out.

By the Court: Witness had often been in the cart when these horses were driven by Willie Langerman.

David Sampson, a native boy, described the accident, confirming Mr. Botha's evidence, and added that Willie Langerman had frequently driven the same horses.

Mr. T. A. Darling, manager to Mr. Tregidga at Sea Point, said he went to business on the morning in question about five o'clock, and about six he heard a crash, and opened the shop door. It was so dark that he could not see across the road. He went over to the church fence, and saw a pair of horses galloping towards Cape Town, dragging a Cape cart with one red lamp. Subsequently he saw the cart being brought back from town by four boys, and could see that it was damaged.

John W. Fowler, police constable, deposed as to the morning of Monday, 5th June, being very dark. He was going on his beat at six o'clock, and found the cart about 500 yards from where the collision occurred and observed that the dieselboom was broken. It was dark enough to have lights in any vehicle.

Cross-examined: Witness said he saw young Mr. Langerman at the Cape cart, but that gentleman said nothing to him about a collision: all he said was that his horses had bolted. Mr. Langerman's horses were very spirited animals, and took a lot of driving. He could not say he had ever seen young Mr. Langerman driving them. The driver of the baker's cart always went slowly along the Sea Point road, and was in the habit of continually shouting to his horse to get it along.

The driver of a milk cart testified to the broken dieselboom and other damage done to Mr. Langerman's cart.

Mr. Langerman, the plaintiff, said his son was an experienced and careful driver. The two horses were pedigree animals, and he valued them at 200 guineas. One of them took a first prize last February at the Agricultural Show at Rosebank. They were thoroughbred' Clevelandas, four years old. The vehicle was one of Cooper's show carts. He estimated the damage to the horses at £50, and the Cape cart was now in the hands of the coachbuilder for repair. He had done everything to effect a compromise without litigation, but without avail. His son's clothes were destroyed and he had sustained injuries to the right knee. The gun that was injured was not his property, and the owner had not claimed damages. He claimed £50 damages for the injuries to the horses, and the same amount for the damage to his cart, and £30 for the loss and inconvenience caused by being deprived of the use of his property.

Mr. James Spreull, Government Veterinary Surgeon, described the injuries sustained by the horses, which he valued at about £200 before the accident; probably £50 would have to be knocked off the price in consequence of the injuries sustained by the accident.

Cross-examined: Witness did not think the injuries would interfere with their action as driving horses.

Mr. Archibald Gray, manager for Cooper's vehicle factory, said Mr. Langerman purchased the Cape cart for £80, and the repairs would cost about £20. After the repairs he would estimate the value of the cart at about £50.

Mr. Henry Cook testified to Mr. Willie Langerman's experience and carefulness as a driver of the two horses injured in the accident, and said Mr. Berry's driver was the laughing-stock of Sea Point on account of his bad driving.

This evidence was confirmed by a native in Mr. Cook's employment.

This closed the case for the plaintiff, with the exception of the evidence of Mr. Langerman, jun., taken on commission.

For the defence,

Johannes Frederick Mohl, the driver of the baker's cart, deposed that he had been driving for Mr. Berry since May last, and had experience as a driver for twenty-six years, and had had his own horses and

carriage. On the morning in question he shouted three times when he saw the Cape cart coming towards him at a rapid pace. The Cape cart came towards his side of the road. Witness drew up as close to the fence as possible, when the other vehicle tried to pass him, and the wheels caught each other, but there was no mark on the wheels of the baker's cart. Witness's horse was a very steady animal. He did not see Mr. Botha nor Mr. Langerman that morning; the only person he saw was the policeman, who said, "Are you the party who has had an accident?" He replied, "Yes, I am waiting to see about it." He waited for about five minutes, and then went on his rounds with bread for his customers, and when he returned to the spot he again saw no one. He could see the Cape cart coming thirty or forty yards away. It was not a particularly dark morning.

Cross-examined: Witness's impression was that there was nobody in plaintiff's cart. The horses were not under control. Witness had a light on his cart when he inspanned that morning, but the lamp had got smashed by jumping out of its socket when he was driving over a watercourse. He never had an accident before. He had been driving for Mr. Berry since May 1, and previously had never driven for anybody else. When he spoke about having driven his own horses and carriage he referred to a time when he was a private gentleman.

Frederick Henan, a little boy, employed as bread deliverer on the cart belonging to the defendant, said it was not a dark morning. The baker's cart was on the left-hand side of the road, and Mr. Langerman's cart came very fast from Sea Point, on the wrong side. He could see no one in the Cape cart. Both the driver (Mohl) and himself shouted three times, but no notice was taken, and the Cape cart just shot past. He was quite certain the wheels of the two vehicles did not lock. He saw no one jump or fall out of Mr. Langerman's cart. Mr. Berry's driver had never had an accident before or since this occurrence.

Mr. Berry, the defendant, gave his driver a good character for careful driving and steadiness, and he and another witness confirmed the statement that there was no mark on the wheel of the baker's cart to indicate that a violent collision had occurred.

The further hearing was postponed until the evidence taken on commission should arrive.

*Postea* (November 6.)

The evidence of J. W. S. Langerman, taken on commission at Salisbury, was read. He stated that he was a son of the plaintiff. In June last he was living at Sea Point. On June 5 last, at six in the morning, he left the house, and proceeded through Sea Point about 100 yards, when his cart collided with that of defendant. It was dark, and plaintiff's cart had lights. There was no light on defendant's cart. Plaintiff's one wheel was three feet clear of the tram line. His left wheel was nearly in the gutter. Both springs were broken by the accident. The axle was smashed, and the axle-tree broken. The horses were also injured. The cart had taken a prize at the Rosebank Agricultural Show. It was purchased for 60 guineas. The other cart was a baker's cart. Witness rushed up to the driver, who said, "What for do I want lights?" Witness had had twelve years' experience of driving.

Cross-examined: The horses were two bay Clevelandas, and quiet. They were not generally known as unruly horses. He did not speak to any ladies. He could see the name of Berry on the cart. He spoke to a constable, but did not tell him that the accident occurred through the horses bolting. The baker's cart was on the wrong side of the road. One of his lights must have gone out during the accident.

For the defence, Charles Jones produced a plan of the ground where the accident took place. On the right side of the road was a fence. On the other side was a row of houses. There was a long brick wall in front of them.

By Mr. Currey: The wall on the left side, looking towards Cape Town, was unusually high. There was a very large double-storied house there. He did not remember that at the far end of the house there was an unusually large gumtree. He took the line of the wall. He could not say if the house was a great deal nearer the scene of the accident than marked on the plan. He took the line of the wall on the road.

Police-Sergeant Harry Frank said he was sergeant in charge of the Three Anchor Bay Police-station. On June 5 last, a little before noon, young Langerman came into his office and asked if a man were not obliged to have lights on his cart at six o'clock in the morning. Witness replied that he was very doubtful on that point, on account of the way the Municipal regulations were worded. Langerman then described the collision, saying that the man who was driving the cart had no

lights. The witness described at length what took place between him and Langerman. Witness then went to see plaintiff, who said his two boys were in the carriage. Plaintiff said he would not hear of the prosecution, but would rather make old Berry pay for his horses. He saw young Louis Langerman, who took him to where the accident had occurred. Louis Langerman said he saw the accident. This took place beside the fence. The cart tracks led right into the fence.

By Mr. Currey: He received no subpoena before August 30. He never communicated with Berry, to whom he told absolutely nothing. He told Berry's attorney what he saw. Witness suggested a criminal prosecution. This was after hearing young Louis Langerman. He swore young Louis said, "I was there." Louis was standing in the road at six in the morning. He did not know that young Louis was stone deaf.

Michael Connock, a stable proprietor, stated that Mr. Berry's carts were kept in his stables. After the accident he examined the particular cart which had been in collision, but there were scarcely any traces of damage about it; the cart itself was very old and shaky, and witness had often been surprised that it had held together over the hard roads.

The plaintiff Langerman (recalled) said he had heard the evidence of Sergeant Frank. It was not true that his son Louis was at the scene of the accident on June 5. He always had the greatest trouble in getting Louis out of bed. That morning Louis rose at eight. He did not say that Botha was not in the cart, nor that Louis was present.

After argument,

De Villiers, C.J., said: The question to be determined in this case is entirely a question of fact, and upon this question it is, of course, possible to take different views according to one's views of the credibility and the trustworthiness of the witnesses examined on both sides. I am bound to say that the impression left on my mind by the evidence was that the defendant's driver was really at fault. In the first place he had no lights; that is common cause. At six o'clock in the morning in June it would be fairly dark still. The plaintiff's cart had a light. That is a circumstance quite independent of the municipal regulations, which ought to weigh with the Court in the present case. If the municipal regulations are brought into the case, then it would appear that

there is a regulation that after sunset there should be lights, but it does not appear whether those lights should be used until daylight. But, quite independently of the regulations, I think that where a collision occurs in the early morning, and one of the carts has a light and the other has no light, there is some ground for the presumption that the cart which had no lights was at fault when the collision occurred. Then, as to the side of the road on which the collision occurred, according to the evidence of Mr. Botha, who seemed to give his evidence very fairly, the plaintiff's cart was on his own right side, that is, on the left side going to Cape Town, and he is supported in that by the other witness, Langerman, and also by the coloured boy who was in the cart. Against that there is the evidence of the policeman, who went afterwards and had the spot pointed out to him where the collision occurred, but he admitted that the boy who pointed it out to him was very deaf, and it is quite clear that the boy could not have been there at the time of the accident. Then another policeman was on the scene of the accident shortly afterwards, and he saw some footmarks on the right side of the road going to Cape Town. We do not know what made those marks, and it is quite possible that the marks might have been made after the collision, when the horses swerved, and it may be in consequence of the sudden swerving to the right that the axle broke, which threw the occupants of the cart on to the road, and that would explain why young Langerman was really found on the right-hand side going to Cape Town. If the case depended entirely on me I should be inclined to give judgment for the plaintiff; it is unnecessary, however, to decide what the damages are, inasmuch as my brethren are inclined to think that the plaintiff's case has not been proved.

Buchanan, J., said: It appears from the case that Mr. Langerman had two fresh, well-bred young horses. His son, without his permission, took them out early on a June morning, the horses being very fresh and spirited, and requiring very careful driving. Shortly after the cart started, and within 150 yards of the start, the plaintiff's son says that the cart and horses collided with a baker's cart. It was an old rickety cart drawn by a white horse, and surely if anything could possibly have been

seen by the occupants of the plaintiff's cart it would have been a white horse; and again there was hardly a sign of a scratch on the baker's cart. On the evidence of the spurs and of the constable, I am not convinced that the baker's cart was on the wrong side of the road. There is no doubt that he was without lights, but if the plaintiff's horses had been driven at a slow pace and with due care the probability is that the accident would not have occurred. The majority of the Court, therefore, hold that the plaintiff must fail in his action.

Maasdorp, J., said: I have come to the same conclusion as my brother Buchanan. The burden of proof lies on the plaintiff to make out his case. If it is not proved, and if there is a doubt left with the Court, the plaintiff must fail. The necessity for a light is to warn people that something is in the way. If, however, the cart could have been seen without a light, there was no necessity for a light. The tram-rails were seen by plaintiff's son, and therefore he must have seen the baker's cart as well, if he had travelled carefully. He did not see it, and therefore there must have been negligent driving on the part of the plaintiff. There is some doubt as to what happened with regard to the pole. One witness said that the collision was very violent, and the pole broke. I am satisfied that the pole was not broken, for otherwise the horses could not have dragged the carriage the distance they did. The horses were fresh, and must have bolted. The damage must have been caused afterwards, but not by the collision with the baker's cart. The plaintiff has not proved that the damage was caused by the negligence of the defendant, and he must therefore fail in his action. Judgment will therefore be for defendant with costs.

Judgment accordingly for defendant with costs.

[Plaintiff's Attorneys, Messrs. Dempers & Van Ryneveld; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP].

### PROVISIONAL ROLL.

ELLIOTT BROS. V. LE GRANGE. { 1899.  
Aug. 31st.

Mr. Benjamin applied for provisional sentence on two promissory notes for £37 15s. and £52 7s. 6d., value received; also that a sum of £150 attached in the hands of one Wessels *ad fundandum jurisdictionem* be declared executable.

Judgment accordingly.

BARRY BROS. V. W. J. T. MILLER.

Mr. Buchanan asked for and obtained an order for the final adjudication of the defendant's estate as an insolvent.

FORREST V. DIETERLE.

Mr. Cloos applied for provisional judgment on a mortgage bond for £6,000, with interest at the rate of 7½ per cent., and costs.

Provisional sentence with costs.

ESTATE OF BATE V. MINTER.

Mr. M. Bisset applied for the final adjudication of the defendant's estate.

Order granted.

PAARL BOARD OF EXECUTORS V. JACOBSE AND ANOTHER.

Mr. P. Jones applied for provisional sentence, with costs, against the defendants on a mortgage bond for £60.

Granted.

SCOTT V. DYKMAN.

Mr. P. Jones obtained judgment under Rule 319 for £12 2s. 6d. against defendant.

DITTMER V. FRYER. { 1899.  
Aug. 31st.

Limitation of action—Revival—  
Acknowledgment of debt.

Mr. Molteno applied for provisional sentence upon a promissory note for £200 dated

January 1, 1888, signed by the defendant in favour of the plaintiff and payable on demand.

The defendant pleaded prescription.

The plaintiff in answer to the plea filed affidavits setting forth certain letters. One of these, dated July 26, 1893, from the plaintiff's attorneys to the defendant was as follows: "Dear Sir,—Mr. Adolph Dittmer has requested us to communicate with you regarding the amount of your indebtedness to him on your promissory note for £200, and to state that as he is leaving for Europe to-day, he has no time to reply to your letter of the 26th ultimo. Mr. Dittmer is very much in want of the money due by you, and has instructed us to say that in case you cannot raise the amount required without delay, that he wishes you to forward us your title deeds so that we may endeavour to raise the money here. We have therefore to request you to do so at once to avoid any further unpleasantness."

The defendant replied on the 7th August, 1893, in the following terms: "Dear Sir,—Yours of the 16th ultimo to hand, in which you request me to send you my title deeds that you may be able to raise the £200 due to Mr. Dittmer from me. As my grounds are all mortgaged, and I foresaw some difficulty in raising the money upon second mortgage, I have arranged to hold sale of live-stock not later than the 30th September proximo, out of the proceeds of which sale it was my intention to pay off my promissory note to Mr. Dittmer. Should this arrangement, which I consider to be best, not suit you, you can let me know, and I shall send you my title deeds upon which you can then try to raise a second mortgage. The present mortgage upon the ground is £150, and the Divisional Council valuation is £200."

On February 2, 1899, in answer to another letter from the plaintiff's attorneys stating that they had instructions to sue the defendant unless the amount of the promissory note and money advanced (£15) were paid before the end of the month, the defendant replied as follows: "Dear Sirs,—I am in receipt of your letter of 10th instant, re Mr. Dittmer's debt. I consider the time rather short, but am making arrangement so as to be able to pay the money by the time mentioned. At any rate I shall pay the money during next month."

Mr. McGregor for the defendant: This case is not covered by *Bell and Moore v. Swart* (supra p. 430). The question is

whether there was an acknowledgement or promise to pay, and if there was, whether it was an unconditional promise. *Chasemore v. Turner* (10 L.R., Q.B. 500). The letter of August, 1893, does not contain an unconditional promise, it simply indicates certain ways in which the money may be paid. Then a promise to pay creates a fresh cause of action, so that the plaintiff's cause of action now is the promise in the letter of February, 1899, and not the promissory note. *Quincey v. Sharp* (45 L.J., Ex. 317); *Skcat v. Lindsay* (46 L.J., Ex. 249, judgment of Cleasley B.); *Meyerhoff v. Everlich* (48 L.J., Q.B. 43; 4 C.P.D., 63); *In re Bethell* (34 Ch.D., 561); *Curwen v. Milburn* (42 Ch. 424); *Morrbray v. Appleton* (80 L.T.R., 805); *Roscoe's Nisi Prius* (13th ed., p. 649).

[De Villiers, C.J.: Is it necessary that where a debt is barred, and there is a subsequent promise to pay, that the subsequent promise must be sued upon? I think that can be raised in the replication.]

That appears to be so from *Chasemore v. Farmer* but it is not quite clear.

De Villiers, C.J., said: In my opinion, the defence has wholly failed. The promissory note was made on 1st January, 1888, and on 26th July, 1893, a letter was written by the plaintiff's attorneys to the defendant requesting the latter to forwards his title deeds, so that an attempt might be made to raise the amount for payment of the promissory note. On the 7th August, 1893, defendant wrote a letter to the plaintiff which amounted not only to an acknowledgment of indebtedness, but a promise to pay; at all events, from the acknowledgment which he therein made a promise to pay could clearly be inferred. In that letter the defendant stated that as his ground was mortgaged, and there would be difficulty in obtaining a second mortgage, he had arranged to hold a sale of live-stock not later than September 30, and out of the proceeds of that sale it was his intention to pay off his promissory note. The defendant added that should that arrangement not suit the plaintiff he could let defendant know, and he would send the title deeds, on which he (the plaintiff) could try to raise a second mortgage. The only question was the mode of payment; the acknowledgment or liability to pay was unqualified. In my opinion this letter of defendant placed the claim entirely out of the Prescription Act and judgment must be for plaintiff with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

MASTERTON V. VICTOR WOLFF.

Mr. Bisset applied under Rule 329 for judgment for £25, unpaid rent and for an order for the removal of certain furniture. This furniture belonging to the defendant was in the room, for the rent of which he was now sued, and a new tenant was going to take occupation next day.

Judgment for the amount claimed was entered, the Court intimating that it was within the power of the plaintiff to attach the furniture in question.

FISHER V. BIESEL.

Mr. Buchanan applied for judgment for £20, balance of account due.  
Granted.

PICKARD V. RUCK.

Mr. Currey applied for judgment for £9 16s. 7d., goods sold and delivered.  
Order granted.

*Ex parte* HOLTZHAUSEN AND } 1899.  
OTHERS. } Aug. 31st.

Rectification of transfer deed—Error.

This was an application for the amendment of certain transfer deeds.

The applicants were the joint holders of a certain piece of perpetual quitrent land called Brakkefontein alias Boschhoek. The original extent of the farm was 2,001 morgen 241 square roods. In 1842 the then proprietor Holtzhausen transferred a defined extent of 1,000 morgen 120 square roods 72 square feet to one Muller. Holtzhausen bequeathed the farm to his seven children, and the transfer purporting to convey it was executed in 1878. Instead, however, of one-seventh underdefined share in the remaining extent of 1,000 morgen 120 square roods 72 square feet, being transferred an undefined one-fourteenth share in the original extent was described as being conveyed, and this error had been repeated in all succeeding transfers. The Acting Registrar of Deeds reported that it was clear that the legatees were entitled to the whole of their father's interest in the farm, and that it was supposed at the time transfer was effected that his share was actually being transferred.

The applicants were the legal successors in title to the testator's share, and they prayed for an order declaring them to be the sole joint proprietors of the said remaining extent, authorising the Registrar of Deeds to make the necessary amendments to rectify the deeds of transfer and authorising the issue of amended title under Act 9 of 1879.

Mr. Buchanan appeared for the applicants. The order was granted.

ABT V. REGISTRAR OF SUPREME } 1899.  
COURT. } Aug. 31st.

Pleadings—Inspection—Registrar of Supreme Court.

*A stranger to a suit is not entitled, as of right, to inspect the pleadings in the Registrar's office before judgment has been pronounced thereon.*

This was an application by one Herman Abt of Vryburg, for an order of Court compelling the Registrar of the Court to permit him to inspect the pleadings which had been filed in an action pending between Sonnenberg and the executors of De Villiers. It appeared from the affidavits that the applicant was a resident burgher of Vryburg division, and took an active part in the Parliamentary election of 1898 at which time Sonnenberg and De Villiers were joint candidates for the constituency. He had been informed that an action was now pending between Sonnenberg and the executors of De Villiers, regarding the expenditure connected with the joint candidature, and pleadings had been filed. Applicant said he had been accused of expending large sums of money, in connection with the election, and was placed under arrest upon a charge of corrupt practices, but acquitted by the Magistrate. He was desirous of comparing his expenditure with the outlay of the candidates, and to do so he wished to have an opportunity of seeing the pleas filed in the action. He had heard, but could hardly credit it, that the figures disclosed a total of something like £3,000 expended on behalf of the joint candidature. He further submitted that he was indirectly interested in other payments relating to this election.

Sir H. Juta, Q.C., appeared for the applicant.

Mr. Innes, Q.C., and Mr. Graham, Q.C., for De Villiers' Executors, and Mr. Searle, Q.C., for Sonnenberg.

Sir Henry Juta: The simple point is whether pleadings once filed in the Supreme Court are public documents, which may be inspected upon the proper fees being tendered. By the Charter of Justice, section 2, this court is a Court of Record, and every document filed in it is a public document. There is no discretion allowed to the Registrar in charge of the records as to what documents can be exhibited, provided the application is made at a reasonable time. This action having been begun, the documents in that action were a public record, and were not simply private documents as between the parties to the suit.

See the *Encyclopædia of the Laws of England*, *sub voce*, "Record" and *Stephen's Commentaries Vol. III.*, as to Courts of Record.

[De Villiers, C.J., referred to the 5th Rule of Court.]

That means that the parties can inspect without payment of fees, Act 20 of 1884, (schedule 2, Fees of Office III), allows search for any record on payment of a fee.

[De Villiers, C.J.: Do you say that the Registrar is to be allowed to show all manner of documents which might be libellous or defamatory?]

There is no limitation as to what may be looked at.

[De Villiers, C.J.: If a matter is reported by the press, and a fair report is given of the proceedings, then it is privileged; but supposing a member of the press were to get hold of a record in the Registrar's office and publish it, would that be privileged?]

It would not, but that is no reason why it should not be inspected.

[De Villiers, C.J.: If it is defamation on the part of the press in publishing a document so obtained, it might also be defamation on the part of the Registrar.]

I submit that the Registrar has no discretion.

[De Villiers, C.J.: Is there any case in which a person—a stranger to the pleadings—has been shown pleadings which have not come into court?]

I cannot find any precedent for a person having asked the Registrar to be allowed to inspect documents while a case was pending. Therefore, one must go back to first principles, and simply decide what is the nature of

a public document. The Registrar's Office is a public department, and therefore every document filed in it is public.

[De Villiers, C.J.: That position cannot be maintained. People cannot look at anything they liked in the Master's Office. They can look at accounts, &c., but not every thing deposited there.]

It is in the public interest that there should be full publicity with regard to the documents in the Registrar's Office, which is part and parcel of the Government administration. In arbitrations inspections cannot be demanded, but with reference to actions in a public court, the position is different.

[De Villiers, C.J.: Many summonses are issued for provisional sentence which never come before the Court. Would it be right that any person should be allowed to search for such summonses?]

A summons, after all, is the beginning of the roll, and part and parcel of a judicial proceeding, and judicial proceedings are public proceedings. It cannot be a matter for discretion, because it would be so difficult to draw the line. Supposing a person were interested, and wanted to intervene in a case, should he have to wait until that case came into court? In this case the applicant swears that he is very much interested in it. Should he have to wait until it has been decided whether or not the case will go to trial.

Mr. Innes, Q.C.: The position is this, the defendants in the action pending received a letter from the applicant's attorneys on behalf of some client unnamed, wishing to come to the solicitors for the executors in order to make copies of the pleadings, or to be supplied with copies. All that the solicitors for the executors said was that they were not in a position to do so, and the applicant was referred to the Registrar. If the Court is of opinion that the law allows the applicant to take copies of the pleadings, we have no objection.

[De Villiers, C.J.: Do you admit they are entitled to inspect them as a right?]

No, there is no object in the 5th Rule of Court if the whole world can have access to the pleadings and take copies of them? There would then be no necessity to confine the right to "parties." By record is meant a complete record, *i.e.*, when the case is concluded, but while a case is still on foot the record is not complete. If a case does not come into court the documents filed in connection with it are destroyed. The immemorial practice of the Court is that no record is



considered complete until the case has been finally disposed of. *Encyclopædia of the Laws of England, sub voce* "Record Office." Rules framed by the Master of the Rolls.

Mr. Searle, Q.C.: The position which the plaintiff takes up is somewhat similar to that adopted by the defendant. The application is in the nature of a discovery order but that can only be made under the Rules of Court, and can only be made between parties to a suit. The applicant in this matter is not a party to the suit. His interest is of a most vague character, and he is not the agent of either of these two candidates, and it appears that the applicant is prompted by sheer curiosity. The documents in a case do not become a record until judgment has been delivered, and this action may never come to trial; it may be settled. It would be against public policy that the office of the Registrar should be liable to the inspection of every person who from mere curiosity or thinking he might discover a *cause célèbre*, might wish to copy certain documents and give them to the public. It is distinctly laid down in the Magistrates' Court Act that "all parties concerned" should have access to records, not the general public. The applicant has his remedy without this proceeding. He can sue for illegal arrest, but he has taken the peculiar course of coming to the parties to an action and asking them to show their pleadings, with regard to which it does not appear that he had the most remote concern.

Sir Henry Juta, in reply: Rule 5 becomes clear if Rule 243 is looked at. When it was framed, one party was not bound to serve a copy of his pleading upon the other party.

De Villiers, C.J.: This is a novel application and certainly no authorities in its support have been cited. The applicant's counsel mainly relies upon the Stamp Act of 1898, under which (Tariff No. 3) certain fees are payable for "searching for any entry record or document." The searching, however, must be confined to such entries, records and documents, as are open to inspection, and the Act does not assist the Court in the decision of the question whether the pleadings in the case of *Sonnenberg v. De Villiers* constituted such a document. No judgment of any kind has been pronounced on the case which has not gone beyond the initial stage of pleadings being filed. The 6th Rule of Court, promulgated so far back as 1828, permits either party to a cause at all reasonable times to search for and obtain copies of pleadings in the cause,

but no such permission is given to strangers to a cause. It may well be that when judgment has been given on pleadings they become a public record open to inspection, but I certainly am of opinion that, until such judgment has been given, the public cannot, as a matter of right, inspect the pleadings upon payment of a fee. Many a summons is filed without the case ever coming into Court, and there exists no ground of public policy why the public should have access to records showing against whom summonses for debt have been issued or defamatory charges made. Public interest requires that the proceedings of Courts of Justice should be public from which it follows that the publication of the reports of such proceedings should also be permissible. But cases which may never come into Court in no wise concern the public and, therefore, without some authority in support of the application, I am unable to accede to it. The application must be refused with costs.

Buchanan, J., said: I am inclined to say that Sir Henry Juta's argument is sound as regards any document, entry, or record of a completed case upon which judgment has been given. These are the only documents which are preserved, all others are destroyed. Once documents become of record, there is no doubt any person can go and search. But with regard to inchoate matters not yet adjudicated upon, which are liable to be utterly destroyed and not kept in perpetuity, I do not think any inspection should be given.

Maasdorp, J., also concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Attorneys for De Villiers Executors, Messrs. C. G. Berrangé & Son; Attorneys for Sonnenberg, Messrs. Sonnenberg & Minchin.]

DOWNEY V. DOWNEY. { 1899.  
{ Aug. 31st.

Service of summons — *Domicilium citandi* for indictment.

*The defendant having had a charge of bigamy preferred against him, gave a certain address as the place at which a notice to come up for further examination could be served upon him at any time during the subsequent six months. There was no proof that he had ever lived at that address.*

*His whereabouts being unknown summons in an action for divorce was served within six months at the address given.*

*Held, that under the circumstances the service was good.*

This was an action for divorce. The declaration set forth that the plaintiff, whose name was Eliza Downey (born Findlater), was married to the defendant George Richard Downey, at St. John's Church, Southall, England, on 30th December, 1889, and there was one child of the marriage. Subsequent to the marriage the defendant proceeded to Cape Town, and there was proof that he bigamously entered into a second marriage. Plaintiff applied for a divorce, the custody of the child, and for maintenance.

Mr. Gardiner for the plaintiff: The Sheriff has not been able to find the defendant. At the request of the plaintiff's attorneys the Sheriff has consequently served the summons by fixing it, together with a copy of plaintiff's declaration, on the door of a house, 7, Walmer-road, Woodstock. "That is the address which the defendant has given for service in another proceeding. A preliminary examination was taken upon a charge of bigamy against the defendant before the Magistrate of Cape Town, and he was bound over to come up before the Resident Magistrate of Wynberg at any time within six months. The recognisance gives this address for service. The six months have not elapsed, but the defendant can not be found, nor can it be ascertained that he has ever lived at that address. It can be proved, however, that it was his intention to live there with the woman whom he persuaded to enter into a form of marriage, his lawful wife being alive. Defendant was in Cape Town about a week ago, but has now gone. *Voet* (5, 1, 9, 3) shows that the Courts have gone very far in holding that a *domicilium citandi* once given can be used for service in other proceedings than the one for which it was chosen.

De Villiers, C.J.: Under the circumstances the Court thinks that the service is sufficient.

Mrs. Downey, the plaintiff, gave evidence of the marriage, her husband's departure for the Cape, and his neglect to maintain her. When she arrived here she saw her husband at the station, and ascertained that he could

not support her. He practically admitted that he had committed bigamy. She then went to reside at Bloemfontein.

Sophia Charley identified photographs as those of the man Downey, whom she married in October last year, believing that he was a single man. They lived together as man and wife after the marriage. Afterwards she discovered that he had been previously married, and left him.

Detective Walker testified to the arrest of the defendant on 13th May last, on a charge of bigamy. He had been working on the railway for some time, but when arrested, he said he expected it to happen, as he had met his first wife in Cape Town some months previously. Defendant also said he had "got on the spree and got the sack from the railway. It was all his second wife's fault, as he had borrowed money from her, and she had threatened to sue him unless he married her."

Decree of divorce was granted, plaintiff to have custody of the child, application for maintenance not being pressed.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

LAMB V. COLONIAL GOVERNMENT. { 1899.  
Aug. 31st.

This was an application for the removal of trial to the Circuit Court at Uitenhage, and for leave to try the case by a jury. The action was one for damages caused through sparks from a passing train.

Mr. Innes, Q.C., appeared for the applicant.

Mr. Ward appeared for the Government to oppose.

Mr. Innes said he could not ask that this order be granted, but would apply for the removal of the trial to the Eastern Districts Court, and for a jury. The fact that there was no provision for trial by jury at Uitenhage had been over-looked.

Mr. Ward: The Court cannot remove the case to be tried by a jury at Graham's Town. The Court can remove the case to the Eastern Districts Court, and leave it to that Court to fix a day for trial by jury. There can be no trial by jury in an action against the Government for a tort committed by its servant. Act 37 of 1888, section 4, lays down special procedure for such cases, the action must be brought in the Supreme

Court, and the Supreme Court can remove it. The Jury Act was only intended to apply to actions between private persons.

Mr. Innes: If case is removed it can be left to that Court to deal with the question of a jury.

An order was granted for the removal of the case to the Eastern Districts Court, Graham's Town.

[Applicant's Attorney, Gus. Trollip; Attorneys for the Government, Messrs. J. & H. Reid & Nephew.]

*In re* WALBRUGH, JUN.

On the motion of Mr. Gardiner, the Court made absolute a rule *nisi* under the Derelict Lands Act, 1881.

LEWIN BROS. V. FISCHER.

Mr. Graham, Q.C., applied for the removal of trial to the Circuit Court, Prince Albert.

Mr. Searle, Q.C., for respondent, opposed on the ground that the pleadings had not been closed.

The application was refused.

GULDEN V. GULDEN.

On the motion of Mr. Gardiner, this trial was removed to the Circuit Court at Prince Albert.

BRAUDE V. BRAUDE.

Mr. Searle, Q.C., applied on behalf of the plaintiff in an action for judicial separation for an order on the defendant to pay the sum of £50, to enable plaintiff to continue the proceedings instituted by her.

Mr. Graham, Q.C., opposed the application on the ground that the money already allowed for this purpose had been wasted in vexatious proceedings.

The Court granted an order for payment of twelve guineas.

*Ex parte* SPANGENBERG; *re* 1889.  
ESTATE OF ESTHER STEPHENS. ) Aug. 31st.

Marriage—Evidence—Heirs.

This was an application by Johannes Matheus Spangenberg for an order authorising the executor of Esther Martha Stephens or the Master of the Court to pay to him and his brothers and sisters the share of inheritance awarded to them as children or heirs of Petrus Johannes Mattheus Spangenberg out of the estate of the said Esther Martha Stephens.

It appeared from the report of the executor dative in the intestate estate of Esther Martha Stephens, that one-fourth share of her estate had been set aside for the unknown heirs of the said P. J. M. Spangenberg in case his marriage should be proved hereafter. P. J. M. Spangenberg was a deceased brother of the said E. M. Stephens; one of his alleged children had put in a claim for a share but no satisfactory proof of the marriage had been produced.

The applicant alleged now on affidavit that he was the son of P. J. M. Spangenberg and his lawful wife. He was unable to produce the marriage certificate of his parents but he produced the affidavits of three old residents of Malmesbury who stated that they were present when the marriage ceremony was performed. He also produced an affidavit from his father's only sister, who had received her share of the estate, to the effect that although she was not a witness to the marriage she was convinced that her brother was legally married.

Mr. Molteno appeared for the applicant. The application was granted.

JOPLING V. JOPLING.

1889.  
Aug. 31st.

Husband and wife—Funds to institute action—Divorce—Alimony.

*The Court, on the application of a woman married out of community of property and who was without means, ordered her husband to pay her the sum of £25 to enable her to bring an action against him for divorce on the grounds of adultery.*

*She further applied for alimony pendente lite but this application was refused as it appeared that she had been living for two years without assistance from her husband.*

This was an application by Aleida Maria Elizabeth Jopling for an order upon the respondent, her husband, for the payment to her of £50 to enable her to bring an action against him for divorce and pending such action £15 *per mensem* for the maintenance of herself and three children of the marriage. She alleged that she had been compelled to leave the respondent and that he was now

receiving a salary of £20 *per mensem* and was living in a well-furnished house with a woman named Taylor.

The respondent alleged an affidavit that he was married to the applicant out of community and had no funds of hers in his hands; that since she left him, two years previously, he had paid £70 of her debts and that at present his salary was £10 *per mensem*.

The applicant in reply stated that during the marriage the respondent had been insolvent and £200 of her own money had gone in the payment of his debts. She denied that he had paid £70 in settling her debts. She had no means to support herself and children.

Sir H. Juta, Q.C., for the applicant, referred to *Tyfield v. Tyfield* (3 Shiel, p. 393); *Muller v. Muller* (8 Shiel, p. 5)

Mr. Gardiner for the respondent: It has never been actually decided that a woman married out of community is entitled to alimony. In *Tyfield v. Tyfield* the parties were married in Australia, where there is no community. In *Muller v. Muller* the husband had property of the wife in his possession and moreover he was the plaintiff. *Stag v. Stag* (Juta, 2 p. 229); *Eaton v. Eaton* (6 E.D.C., 236); *Harper v. Harper* (4 H.C.R., p. 247).

Sir H. Juta: According to English law it is clear that if his wife has a separate estate she cannot get anything from her husband with which to institute an action. But here she has nothing: she had £200 and her husband has squandered it.

The Court ordered the respondent to pay his wife £20 within fourteen days to enable her to bring the action. Costs to stand over.

De Villiers, C.J., said the principle of the English law seemed to be a wise one, but in this case the applicant had nothing. As to alimony, inasmuch as she had left her husband two years previously, it did not appear to be a case for alimony.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

#### *In re* MULLER'S ESTATE.

Mr. Gardiner applied on behalf of the executrix in the estate of the late Abraham Johannes Muller for leave to mortgage certain landed property in the estate to take

the place of another mortgage which had been paid off. One of the heirs to the estate was a minor.

The application was granted.

#### PORT ELIZABETH ASSURANCE AND TRUST COMPANY.

On the application of Mr. Innes, Q.C., the Court made absolute the rule confirming the reduction of this company's capital.

#### QUEEN V. OLWAGE.

On Mr. Ward's application, this trial was removed to the Circuit Court at Victoria West.

#### QUEEN V. KRUMBIE.

On Mr. Ward's application, this trial was removed to the Circuit Court at Paarl.

#### STEYN V. MULLER.

On Mr. Benjamin's application, the Court granted an extension of the return day in this case.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

BURROWES V. BRITISH SOUTH AFRICA COMPANY. { 1899.  
{ Sept. 1st.

Interpretation of Statute.—Directory and imperative provisions—Southern Rhodesia Order in Council—Validity of Ordinance.

*The Southern Rhodesia Order in Council enacted that the Administrator shall submit to the Legislative Council, before the expiration of the month of December in each year, such estimate as he may think necessary of the whole expenditure, not fixed, which is intended to be incurred, together with an estimate of the revenue for the*

financial year then next ensuing. The Order in Council, which was promulgated in November, 1898, contained a provision that the Legislative Council should meet within six months after such proclamation. In consequence of the necessity to prepare for and carry on the elections the Council was unable to meet before May, 1899, as a further consequence the estimates could not be submitted to the Council before the 31st of December, 1898. During its first session the Council passed a Bill for the levying and collection of certain Customs dues, which was duly promulgated as an Ordinance in August, 1899.

Held, that such ordinance was not invalidated by reason of the estimates not having been submitted until May, 1899.

In the absence of a clear expression of its intention by the Legislature, the Court, in deciding whether any particular provisions are directory or imperative, must have due regard to the general scope of the Statute, as well as to considerations of convenience and justice.

This was a case stated for the opinion of the Supreme Court of this colony by the senior judge of the High Court of Southern Rhodesia, the Hon. Mr. Justice Vincent, under the provisions of sub-section 5 of section 53 of the Southern Rhodesia Order in Council. The original action which gave rise to the case stated was brought by Mr. William Henry Burrowes against the B.S.A. Company, and came before the learned judge in the form of a special case in the following terms:

1. The plaintiff resides in Bulawayo, and is the holder of a general dealer and importer's licence.

2. The defendant is a company incorporated by Royal Charter, and has and exercises the general administration of affairs within the territory known as Southern Rhodesia, under and by virtue of

the said Royal Charter and the Southern Rhodesia Order in Council, 1898, and other orders and proclamations previously promulgated and still unrepealed.

3. Under the said Order in Council a legislative body, styled the Legislative Council, was duly constituted and convoked in or about the month of May, 1899, and not before, with powers in the said order specifically set out.

4. Subsequent to the convocation of the said Council and not before, the Administrator submitted to the said Council an estimate of the expenditure intended to be incurred for services within Southern Rhodesia, together with an estimate of the revenue of the said territory for the financial year then current and ending on the 31st March, 1900.

5. Thereafter an Ordinance (being No. 11 of 1899) was passed by the said Council by which the public revenue of Southern Rhodesia was charged with the sum of £759,459 towards the service of the year ending 31st March, 1900. The said Ordinance was promulgated on the 7th August, 1899.

6. Subsequent to or at the time of the submission to the said Council of the said estimates and not before, the said Administrator proposed a draft Ordinance, purporting to be necessary for providing the part and portion of the ways and means by which the said expenditure was to be met.

7. The said draft Ordinance was subsequently passed by the said Council, and after being duly assented to by the High Commissioner, was duly promulgated as Ordinance No. 21 of 1899, on the 31st July, 1899.

8. The Ordinance No. 21 of 1899 provides for the levying and collection of certain Customs duties. The said duties were not leviable prior to the promulgation of the said Ordinance.

9. Certain other duties and taxes were levied and collected by the defendant prior to the promulgation of the said Ordinance which are in no way affected by the said Ordinance.

10. The defendant contends that under and by virtue of the said Ordinance, the plaintiff is liable to pay the duties on all goods, wares, and merchandise described and set forth in schedules A and B of the said Ordinance, and imported by him; and the value of the duty for which plaintiff is so held liable is more than £100.

11. The plaintiff on the other hand contends that the said Ordinance is *ultra vires* and of no force and effect in law on the

facts herein set out, and claims a declaration that he is not liable to pay the said duties, or any of them.

The question for the Court is whether the said Ordinance was lawfully passed and promulgated.

If the Court shall answer the said question in the affirmative, judgment shall be entered for the defendant with costs; and if the negative, judgment shall be entered for the plaintiff with costs.

The record was dated Bulawayo, August 9, 1899.

The case stated by the Hon. Mr. Justice Vincent was in the following terms:

As will be seen from annexure hereto (A), the above matter came before me by way of a special case.

The Southern Rhodesia Order in Council, 1898, was promulgated on the 25th day of November, 1898. Section 17 of this order makes provision for a Legislative Council. Section 18 provides for the creation of electoral districts, the declaration of what number of members shall be elected for each district, and the qualification of electors and elective members respectively. Section 20 enacts that the Legislative Council shall be convoked within six months after the publication of the Order, and afterwards once at least in every year. Section 35 empowers the Administrator, by and with the advice and consent of the Legislative Council, to make Ordinances for the peace, order, and good government of Southern Rhodesia.

Sections 41 and 44 are as follows:

41. The Administrator shall submit to the Legislative Council before the expiration of the month of December in each year such an estimate as he may think necessary of the whole expenditure, not fixed, which is intended to be incurred for services within Southern Rhodesia, together with an estimate of the revenue of Southern Rhodesia for the financial year then next ensuing, and shall transmit to the High Commissioner and to the company, at the earliest opportunity, an Ordinance providing for the service of that year.

44. The Administrator shall at the same time that he proposes to the Legislative Council the estimate of the ensuing year's expenditure submit to them the draft of any Ordinance which may be necessary to provide the ways and means by which the expenditure is to be met.

The Legislative Council was in consequence of the necessity of elections, &c., unable to meet before May, 1899.

The financial year of the British South Africa Company commences on April 1, and ends March 31 of the following year.

Subsequent to the convocation of the Council, the Administrator submitted an estimate of expenditure, together with an estimate of revenue for the financial year then current and ending on March 31, 1900. An Ordinance was duly passed by which the public revenue was charged with the sum of £759,459 towards the service of the year ending 31st March, 1900. This ordinance was promulgated on 7th August, 1899. When submitting to the Council the above estimate, the Administrator proposed a draft Ordinance for providing part of the ways and means by which the above expenditure was to be met. This Ordinance was passed by the Council, and after being assented to by the High Commissioner, was promulgated as Ordinance No. 21 of 1899, on July 31, 1899.

This Ordinance provides for the levying and collection of certain Customs duties. If this Ordinance be valid, plaintiff will be liable to pay duty on goods, wares, and merchandise to an amount exceeding £100.

The plaintiff contends that this Ordinance is *ultra vires*, seeing that the provisions of sections 41 and 44 of the above Order in Council were not complied with, and that it was not therefore competent for the Council to consider estimates for the present financial year, or to provide by taxing measures for meeting the expenditure of that year.

At the conclusion of argument, I decided to avail myself of the provisions of subsection 5 of section 58 of the Southern Rhodesia Order in Council, which enables me to state a case for the opinion of the Supreme Court.

The question for the opinion of the Supreme Court is whether Ordinance No 21 of 1899 was lawfully passed and promulgated.

Sir Henry Juta, Q.C., and Mr. McGregor for the plaintiff: The tenth section of the Company's Charter gives it power to make Ordinances. The Order in Council of 9th May, 1891, as amended by Order in Council of 30th July, 1891, gives the High Commissioner power to raise revenue by Proclamation, which Proclamation shall have effect as if contained in the order itself. (Sections 4, 5, 6.) The Matabele Order in Council, 1891, section 22, gave the company power to impose Customs duties by Ordinance. This was repealed by the Southern Rhodesia Order in Council, 1898 (section 91), which took its

place. Section 6 of the latter Order continued the powers and authorities conferred on the High Commissioner by the former order, concurrently with the powers conferred on the company. It also conferred powers on the company in augmentation of those conferred upon it by the Charter. (See sections 6 and 7.) A Legislative Council was created by section 17 consisting of the Administrator, the Resident Commissioner, and nine other members. This Legislative Council has power to raise money. Section 36 provides: "It shall be lawful for the Administrator by and with the advice and consent of the Legislative Council to make Ordinances for the peace, order, and good government of Southern Rhodesia." Section 40. "No fiscal vote or resolution shall be proposed in the said Council except by the Administrator, acting on the instructions of the company, or by his authority in writing previously obtained." (Sections 41 and 44 are set out in the case stated.) Section 43 provides that "The Administrator shall transmit with the annual estimates such full and sufficient information as to every expense of an unusual nature therein comprised as may be necessary to enable the High Commissioner and the company to judge of the propriety of the proposed expenditure, together with a table exhibiting the variations from the preceding year." The point of the case is that the Administrator did not prepare the estimates of revenue and expenditure before the end of December, and did not submit them to the High Commissioner for him to judge of the propriety of the proposed expenditure as provided by section 43. He did not submit estimates for the financial year next ensuing: they were estimates for the financial year then current. The issues are: (1) Whether the words of section 41 are directory or imperative, and (2) if either directory or imperative whether the estimates submitted were for the "financial year then next ensuing." A Colonial Legislature has no other powers than those contained in the statute which creates it; it has no inherent power such as the Parliament of Great Britain. It is a subordinate law-making body, which has only the powers granted to it by the superior authority which created it. *Kielly v. Carson* (4 Moore, P.C., p. 63); *Fenton v. Hampton* (11 Moore, P.C., p. 37); *Doyle v. Falconer* (1 P.C. App., 328). Now where a power or privilege is conferred upon a person all the incidents and formalities provided for in the conferring statute

are imperative, but where a public duty is cast upon a person the incidents and formalities are directory. *Marwell, Interpretation of Statutes* (3rd ed., p. 518).

[De Villiers, C.J.: Is it not a duty as well as a power of the Legislature that they should raise money to meet the expenditure?]

The tax-payer would not consider it a duty: the Administrator may keep the expenditure within such limits that it is not necessary to raise money. It is the right of the public not to be taxed; therefore the power conferred to raise money is a violation of the rights of the public.

[De Villiers, C.J.: The case states that the Legislative Council was in consequence of the necessity of elections, &c., unable to meet before May, 1899.]

With extraordinary efforts it might perhaps have been possible to call it together before December 31.

[De Villiers, C.J.: The necessary time for registration, nomination, &c., makes it impossible.]

If that is so it cannot have been intended that the Legislative Council should impose taxes for the year 1899. No inconvenience could arise because the High Commissioner has a concurrent power to do so under section 5. But if the words "Before the expiration of the month of December" are directory only the estimates might have been submitted any time before April. But section 43 gives the reasons why they should be submitted before December.

[De Villiers, C.J.: Ought you not to go so far as to say that if the information given by the estimates is not sufficient the Court ought to set the Ordinance aside. In *Rivers v. Cape Town Municipality* (1 Searle, 141), the standing rules and orders of the Colonial Legislative Council had not been complied with; the Court did not set aside a taxing vote on that account.]

Standing rules and orders are merely framed for convenience.

[De Villiers, C.J.: Are not the provisions in question rather in the nature of rules for the guidance of the Administrator?]

No. They are not framed by the Council itself, like standing rules and orders, but made by the Imperial Government, which says, you may impose taxes but you shall only do it in a certain way.

[Maasdorp, J.: How do you interpret "next ensuing" year?]

The financial year following 31st December, and commencing on the 1st April.

[Buchanan, J.: Who has to assent to the Ordinance?]

The High Commissioner assents, and the Secretary of State may disapprove of it within a year following. If the power is *ultra vires* the High Commissioner cannot ratify it. He can, however, tomorrow proclaim the Ordinance as a proclamation. Wherever the power of taxing is conferred it must be construed strictly. *Hillyard on Taxation* (p. 37).

Mr. Innes, Q.C., and Mr. Graham, Q.C., for the defendant company: This matter is still in the hands of the High Court of Rhodesia, which has to pronounce judgment. For the jurisdiction of that Court, we must look to the Order in Council. Section 12, sub-section 3, provides that the Resident Commissioner shall make a report to the High Commissioner upon every Ordinance submitted for his assent. Section 36, "All Ordinances shall be submitted to the High Commissioner for his assent, disallowance, or other direction thereon, together with a report thereon by the Resident Commissioner, and no Ordinance shall take effect until the High Commissioner shall have signified his assent thereto, and the Ordinance together with a notification of such assent shall have been published in the *Gazette*." This is a formal Ordinance reported upon by the Resident Commissioner, and assented to by the High Commissioner. Section 49, sub-section 3, provides that the High Court shall give effect to all Ordinances, &c., so far as they are not repugnant to the Order in Council. This Ordinance is not repugnant, the question is not one of repugnancy but of non compliance with machinery.

[De Villiers, C.J.: Section 41 requires an estimate for the financial year next ensuing.]

The estimates have been submitted for the financial year next ensuing: they were estimates for the year from April 1, 1899, to March 31, 1900. Although submitted after December instead of before they were nevertheless estimates for that year. Supposing the financial proposals are rejected after the 1st April, it does not follow that there can be no new financial legislation except through proclamation by the High Commissioner. The powers of the High Commissioner were only intended to be held in reserve for extraordinary emergency.

[De Villiers, C.J.: I don't think we can go into the question of jurisdiction; we have only to deal with the question submitted to us. You say that the Order in Council is in the nature of a *Grundwet*.]

Yes. A *Grundwet* which deals with the High Court and gives the Court its powers. This Ordinance on the face of it is not repugnant.

As to whether sections 41 and 41 are directory or repugnant, *Regina v. The Justices of the County of London and the London County Council* (1893, Q.B.D. 2, p. 476, judgment of Bowen, L.J.). It depends entirely upon the scope of the Act. The object of providing that the estimates, &c., should be put before the Council before a certain date was the protection and information of the Council itself and the High Commissioner, and to give them ample time to consider the question of taxation. Surely they can waive that right. If not great public inconvenience would arise. As to directory and imperative provisions *Regina v. Wells* (1 Buch., App. Cas., p. 1); *Marwell* (Libr. ed., pp. 528, 529).

Sir H. Juta: It is not a formality or a ceremony to submit the estimates for the financial year next ensuing; it is the substance of the matter. The Legislative Council is not a sovereign body.

De Villiers, C.J.: An interesting question has been raised by Mr. Innes as to whether the High Court of Southern Rhodesia had jurisdiction to inquire into the validity of an Ordinance which had been duly proclaimed. His argument was that the High Court does not possess what our Republican neighbours term a testing right as applied to a *Grundwet*, and that its powers are circumscribed by the terms of the Order in Council. There is some force in the argument, but at this stage this Court is not called upon to determine the question. The High Court has not decided that it has the jurisdiction, but has submitted for the opinion of this Court, the question whether Ordinance No. 21 of 1899 was lawfully passed and promulgated by the Legislative Council of Southern Rhodesia. The Ordinance provides for the levying and collection of certain Customs dues. Sir Henry Juta had urged upon the Court that no great inconvenience would be caused by a declaration that the Ordinance is invalid inasmuch as the High Commissioner retains concurrent power with the Legislative Council to make laws for the good government of the country. The Legislative Council is, in part at least, of a representative character, and if there is one subject of legislation more than any other which should be decided with the advice of such a semi-representative body rather than by the High Commissioner alone it is the taxation of the people of the coun-



try. Emergencies might of course arise in which it would become necessary for the High Commissioner to act on the powers said to have been reserved to him, but it was, in my opinion, clearly intended that laws relating to taxation should first be submitted to the Legislative Council. The objection raised to the validity of the Ordinance in question is that estimates of revenue and expenditure had not been submitted to the Legislative Council in terms of the 41st and 44th sections of the Order in Council. The plaintiff contends that these provisions are imperative; the defendant company contends that they are merely directory. I quite agree that it would be impossible to define the classes of cases in which the provisions of a statute should be held to be either directory or imperative. Where the Legislature has expressed no clear intention on the point the Court must have due regard to the general scope of the statute as well as to considerations of convenience and of justice. The Order in Council was not promulgated until the 25th of November, 1898. It provided that the Legislative Council should meet within six months after such promulgation. It could not well have met in a much shorter time because all the machinery of the elections had still to be got in order. The case, as submitted, in fact states that "in consequence of the necessity of elections, &c, the Legislative Council was unable to meet before May, 1899." And yet the Order in Council had directed that the estimates should be laid before the Council before the expiration of the month of December in each year. It cannot be supposed that the framers of the Order in Council intended such a direction to be imperative in the sense that the omission to comply with it should invalidate a taxation Bill subsequently passed in due form. As to convenience, there can be no doubt that it is wholly in favour of a construction making the provision directory. If it were imperative, the result would be that if a Bill providing for ways and means, duly laid before the Council, should be rejected after the 1st of January in any year it would be *ultra vires* of the Council to pass any other measure in lieu thereof during that year. The correct view appears to me to be that the provisions in question were enacted for the benefit of the Council itself. It was quite competent for the Council to waive the benefit in the same way as it might waive the enforcement of Standing Rules and Orders framed by itself.

In the case of *Rivers v. Cape Town Municipality* (1 Searle, 141) this Court summarily dismissed a plea that a resolution passed by the old Legislative Council was invalid by reason of certain Standing Rules and Orders in regard to the summoning of members not having been observed. For these reasons the Court will declare that the Ordinance No. 21 of 1899 has been lawfully passed and promulgated.

Buchanan, J.: I concur in the opinion that both the 41st and 44th sections of the Order in Council are directory only. The object of the direction was that the High Commissioner and the company should have due notice of the propositions to be submitted to the Council. Any order passed by the Legislative Council must be assented to by the High Commissioner. If the High Commissioner did not receive the notice which the section directed should be given to him, he might not assent to this Ordinance. But as it is competent to the Council to waive, so it is equally competent for the High Commissioner to do so, and to waive the provision inserted in the Order in Council for his direction. The High Commissioner has assented to the Ordinance, and has taken no objection to his not having received notice.

Maasodorp, J., said: I also concur. Looking at the whole Ordinance, I come to the conclusion that the provision as to time is merely a direction for the convenience of all parties concerned, and primarily for the convenience of the Legislative Council, so that they shall be timely in possession of the necessary information upon which subsequent legislation is to take place; there is no repugnance between the Ordinance and the Order in Council. With reference to the word "ensuing," it merely means the financial year after the 31st December, within which, for the convenience of parties, the Administrator is expected, but not exactly imperatively ordered, to place the necessary Estimates of Revenue and Expenditure before the Legislative Council.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SIGIDI'S EXECUTORS V. MATUMBU. { 1899.  
Sept. 4th.  
" 5th.  
" 6th.

Native law and cust m—Great wife—  
Will—Allocation of Property—  
Dominium.

*S., a Kaffir Chief, during his lifetime allocated certain cattle, &c., to the kraal of his wife N. He died leaving a will under which the plaintiffs were appointed executors. The defendant claimed and took possession of the allocated cattle on the ground that he was the eldest son of N. and that N. was the Great Wife of S., and that he was therefore entitled by Kafir law and custom. In an action for the recovery of the cattle instituted by the executors,*

*Held that the onus probandi lay upon the defendant and that he had not sufficiently established his defence.*

This was an action instituted by the executors of the late Chief Sigidi. The declaration alleged that Sigidi, the chief of the Gcalekas, having his kraal at Cizela in the Transkei, died, leaving a will valid according to the law of this Colony, by which the plaintiffs were appointed executors and that they had taken out letters of administration from the Master of the Supreme Court. The value of the stock thus left amounted to £1,099 18s. The chief died in August, 1897, and in September of that year it was alleged that the defendant by force took possession of his kraal and of the stock, and now refused to restore them and their progeny to the executors. The claim put in by the executors was for possession of the kraal and restoration of the stock and progeny or their value, viz.: £1,501.

The defendant in his plea admitted that Sigidi left what purported to be a will executed according to the laws of this Colony and that the plaintiffs when duly confirmed as executors would be entitled to administer the estate, but said that the letter of administration should have been signed by the Chief Magistrate and not by the Master. He did not admit the validity of all the provi-

sions of the will, but he denied that the property referred to in the declaration formed part of the estate.

He said that he was the eldest son of Nohakise who according to native law and custom was the great wife of Sigidi, duly appointed to and installed in that position by him with the consent of his councillors. That Sigidi during his life established a kraal at Cizela, where his wife the said Nohakise lived and during his lifetime he allotted and gave certain stock to be the stock allocated to the kraal.

According to Kafir law and custom all such stock ceased upon such allocation to be the property of the said Sigidi and became the property of the defendant as the eldest son of Nohakise—subject to the right of the said Sigidi to require the use and benefit of the said stock when from time to time he resided at the said kraal. That when he so allocated the stock Sigidi desired and intended that they should cease to belong to him and should subject as aforesaid become the property of the defendant.

That after the death of Sigidi the defendant went to the kraal and took possession of the stock which had been allocated to it, and which belonged to him as aforesaid. They amounted to 30 head of cattle, 2 horses and 19 goats, and their value was the sum of £170 or thereabouts. That the said animals formed no part of the estate of Sigidi at his death.

That the said kraal consisted of a number of huts upon land of which Sigidi was not the registered owner. According to Kafir custom the huts which existed at the death of Sigidi were destroyed and new huts built upon a new site at Cizela. The defendant was residing at the new kraal, which never was the property either of Sigidi or the plaintiff. The defendant was guilty of no violence either in taking possession of the stock, or in destroying the old kraal and building a new one.

The replication was general.

Sir H. Juta, Q.C., and Mr. Buchanan appeared for the plaintiffs.

Mr. McGregor and Mr. Upington for the defendant

John Tule, a native minister of the Baptist denomination, said he was born in Tembuland, and knew the late Chief Sigidi from his youth. Sigidi was a petty chief of the Gcalekas. Witness had lived near Umtata, Clarkebury, and in Cape Town and America, and was well acquainted with Kafir laws and customs. He had been formerly a

councillor of Dalindyabo, a Tembu chief, and had frequently been consulted in disputes about the apportionment of cattle in connection with marriage settlements. In 1893 there was a dispute between the Pondos and the Tembus about some cattle, arising out of native marriage customs. He was sent by Chief Dalindyabo to Mr. Stanford and Sir Harry Elliot to assist them in deciding the dispute. The Paramount Chief of Sigidi was Kreli, whose power was absolute and unlimited over the petty chiefs. The great wife of a petty chief was appointed by the Paramount Chief of the tribe, and even the Paramount Chief could not change that great wife. The power of a petty chief over his property was like that of a common native; he could do with it as he pleased, even when it was assigned to a kraal. A petty chief had usually two wives, a great wife and a right-hand wife, in addition to other women, who were *quadis* or concubines, who were attached both to the great house and the right-hand house. A petty chief's property was distributed amongst the different kraals. When the cattle were put at the various kraals, they did not become the property of the *quadis*, but of the husband, and he could deal with them as he chose. When a woman had been appointed the great wife, and the chief married the daughter of a superior chief, the latter did not take precedence over the first wife, and the former did not lose her rank. Witness quoted several instances, amongst others that of Kreli himself, who was the son of Hintsa, but by a wife who was not of the highest rank. Another case was that of Sigcau, Chief of the Gcalekas, who married a woman who was appointed the great wife, but who bore no children. Then Sigcau married another woman, who bore him children, and she was placed in the great wife's kraal, but held no rank, and the barren wife was not deposed. That was the recognised custom. When a petty chief died the son of the great wife distributed all the stock just as he pleased in the most arbitrary fashion, the only person having any authority over him being the Paramount Chief, who, in his turn, could take all the property of the petty chief. Dinizulu, one of the executors of Sigidi's estate, was the son of Sigidi's great wife. Matumbu, the defendant, was the son of another woman, a concubine or *quadi* of Sigidi, by name Nohakise, who ran away because Sigidi could not persuade

Kreli to make her the great wife. Nohakise fled to her brother Gangleesi, before the war of 1877, taking her son, the defendant Matumbu, with her, and the latter did not return to Sigidi's until four years ago. There were no ceremonies recognisable by native law and custom when Matumbu was circumcised, but all the usual formalities were observed at the circumcision of Dinizulu.

Cross-examined: Witness said he was a minister of the Baptist Church, and was educated at Clarkebury. His father was a councillor of Sigidi, and was one of the party which supported Dinizulu's claim. The split between Dinizulu and Matumbu occurred about three years ago, and was chiefly between the Christian natives and the raw Kafirs, although a number of the latter supported Dinizulu, who is the head of the Christian faction. It might be that of all the people of Sigidi about four-fifths were in favour of Matumbu. The chief could not act against the law. Custom and law amongst the Kafirs were very strong influences. Witness was a councillor of the petty chief Dalindyabo. The first wife was not necessarily the great wife of a chief. He had never heard of a case in which a chief consulted his tribe about the selection of a great wife, although all the members of a tribe pay the dowry. When the great wife was appointed she was put in the great house. There was a big dance when the great wife was chosen, and some arrangement was made for the allotment of the stock. Even if a great wife was barren, she could not be divorced or sent back to her people.

By the Chief Justice: Once a great wife, always a great wife. Sigidi wanted to make Nohakise, the mother of Matumbu, the great wife, over Dinizulu's mother Nowaka, but Kreli would not permit it, as being against Kafir law. Witness denied that Matumbu's mother ever occupied the Great Place before she went away from Sigidi's; she only occupied the huts set apart for the *quadis*, or concubines. When stock was given to a kraal by a chief they could not be sold or given away, but they could be used for ploughing, drawing wood, and for food supplies. The Government appointed Matumbu headman of Sigidi's people, but the headman was not of necessity the chief of the tribe.

Fonyelwa, brother of the late Chief Sigidi, said he was not a Christian native;

he was one of the chief's councillors. A separate kraal was not made for Nohakise, Matumbu's mother, when she came to Sigidi's, but she lived in the kraal of Nokweni, the mother of Sigidi. Nowaka was the great wife, but Sigidi wanted Nohakise to hold that position; the tribe objected to this because Krelil had spoken against it. When a great wife was appointed the chief could not alter the appointment. Nohakise ran away several times, because Krelil did not take her part. She left the last time before the war of 1877, and never returned to Sigidi, and lived for about eighteen years afterwards. In dealing with his property, a petty chief could do with the stock sent to the kraal of any of his wives as he liked. Krelil had complete control over Sigidi and all the other petty chiefs, and Krelil said, "I have already pronounced Nowaka, the mother of Dinizulu, great wife, and that ends the matter." The proper forms and ceremonies were gone through when Dinizulu was circumcised, and Krelil recognised the event by sending an ox, but there was no such observance when Matumbu was circumcised. The latter was appointed headman because the majority of the tribe were opposed to appointing a Christian, and Matumbu was a red Kafir. When Sigidi died witness and Dinizulu made an inventory of the chief's stock. There were forty head of cattle, including ten calves, horses, foals, sheep, lambs, goats, and kids. The value of an ox in Kafirland was £10; calves, £7 or £8; cows, £10; horses, £10; foals, £5 or £6; sheep, 10s.; lambs, 6s.; goats, 10s., and kids, 5s. He remembered Matumbu coming to the great kraal after Sigidi's death, with about forty or fifty men armed with assegais. Matumbu's message was that witness and his people were to take their things away, as the great place belonged to him. Witness did not go away, and in the morning a policeman came. Matumbu threatened to stick witness with an assegai if he did not depart. Matumbu took everything away from Sigidi's kraal, including the property of Dinizulu's mother (Nowaka). The royal assegai, which descended from chief to chief, was taken possession of by Mr. Bell, the Magistrate, who afterwards handed it to Dinizulu on the day when Matumbu was chosen headman. Matumbu destroyed Nowaka's hut, and took possession of the remaining six huts in the kraal. Nowaka was now living with her son Dinizulu.

Cross-examined: Witness denied that he was on bad terms with the defendant Matumbu. "I do love him," he said, very energetically. When Matumbu came with his armed men there were councillors with him. He did not know that there had been a meeting of councillors to decide about appointing Matumbu chief. When the cattle were counted a number of councillors attended. Dinizulu also took away a number of cattle in payment for a wagon, the price of which Sigidi owed him. He also took the wagon. The rinderpest was not at the great place at that time, but it was raging when Matumbu went there and took away the stock which he had enumerated. The rinderpest raised the price of stock. Krelil did not send an ox when Matumbu was circumcised, because he was dead. Sixotyana, and not Matumbu, was the leader of the circumcision party, his position as a son by Nowaka, the great wife, being recognised by Sigidi, his father, as superior to that of a son by Nohakise, the mother of Matumbu, the defendant. Witness had never known of a case where a chief had disinherited the eldest son of his great wife. Nowaka, the mother of Dinizulu, was recognised as the great wife, and Nohakise was not so acknowledged. Sigidi afterwards repented of his desire to make Nohakise his great wife, and admitted his error to Krelil. Sigidi was not an old man when he died, and he died a Christian, like Dinizulu.

Re-examined: Dinizulu's mother, lived for nine years as Sigidi's wife before the chief's death.

Dinizulu, the principal plaintiff, and the eldest son of Sigidi by the great wife Nowaka, also gave evidence, corroborating the statements of previous witnesses. Other witnesses followed. It was also proved by other native witnesses that a number of the stock claimed to belong to the plaintiff's executors had been killed or otherwise disposed of by the defendant.

This closed the evidence for the plaintiff.

For the defence.

Mjogola, the eldest son of Sigidi, said Sigidi, his father, had seven wives. For Nowaka, Dinizulu's mother, fifty head of cattle were paid. She was only one of the common wives. Nohakise, the mother of Matumbu, the principal defendant, was the great wife, and all the councillors agreed about her selection. For her, as the great wife of Sigidi, 150 head of cattle were paid. One hundred head were paid at first, and

instalments were still being demanded for that dowry. The witness generally denied the statements made by the tribesmen called for the plaintiffs, and gave a different version as to the number of live-stock which were claimed or seized by Matumbu after the death of Sigidi.

Myololo said Nowaka was the mother of Dinizulu, but was never appointed great wife, because the laws and customs of the nation were not carried out in her case, and she was only recognised as a common wife.

Matumbu, the defendant in the action, said he lived at Sezeli, in the Transkei, and was the son of Nohakise, one of the late Sigidi's wives. When he was a child he was taken to the kraal at Gangelizwe's place, and remained there until he was a young man. They treated him very well, as a chief. The councillors of Sigidi took him back to the place of his birth. His father (Sigidi) received him quite willingly and affectionately, and on his return he was accompanied by some of his father's councillors. When witness's mother returned to Sigidi she went to her own house. Sigidi died about two years ago, and Dinizulu (the plaintiff) was not present at the death, but came there shortly afterwards and took away a number of cattle, horses, and sheep. Subsequently, when theinderpest broke out, witness and his friends took away thirty head of cattle, two horses, and other stock. Witness denied that when he went to Sigidi's kraal to take possession of the stock, at Sigidi's death, he and his party were armed. The cattle were in possession of Sigidi's nephew (Campbell Miti) and others. Nowaka was also there. He moved the great place from Sigidi's to another site, in accordance with Kafir custom. Witness considered himself the heir and successor of Sigidi, and, as such, had full right to dispose of the stock and other property.

The evidence taken on commission at Idutywa was to the effect that Nohakise, the mother of Matumbu, the principal defendant, repeatedly ran away from Sigidi's great place, and stock had as many times to be paid for her when she was brought back. Krell did not assent to the appointment of Nohakise as great wife, Nowaka, the mother of Dinizulu, having been for years recognised as such.

Mr. Walter Stanfords' (called at the request of the Court) said that, in the selection of a great wife by a petty

chief, the paramount chief might be consulted, and her deposition would depend upon the power of the chief to enforce his wishes as against the feeling of the people opposed to the change; but ordinarily such a change did not occur. Were it to occur it would be with the consent of the people. When a great wife was married with the contributions of the tribe, the members of the tribe had some say in the selection. Rank was of much importance in these native alliances. A girl of higher rank who came to the great house would turn out a girl who was already there. The defendant, Matumbu, was appointed headman after due inquiries, the Government having arrived at the decision that he was the real heir of Sigidi, and the son of the true great wife. The members of the tribe were almost entirely in favour of the selection of Matumbu. Krell could only be consulted as a friendly adviser when Sigidi selected his great wife, as Sigidi was living in a Government reserve at Idutywa, and Krell was an independent chief.

Sir H. Juta: It is admitted that the executors are entitled to administer the property of Sigidi. Act 38 of 1877, section 1, provides that the law of the Colony shall prevail in the Transkei. Proclamation 110 of 1879, section 37, makes provision for the administration under Colonial law of the estate of a native who had left a will according to the law of the Colony; the Chief Magistrate being substituted for the Master. Proclamation of 1st August, 1899, validated the appointment by the Master of executors although such should have been made by the Chief Magistrate. So that now, if a native makes a will the law of the Colony prevails and the administration is supervised by the Master. If no will is made, then, unless the marriage is registered, the law of intestate succession of the Colony will not apply, but Kafir custom must prevail (section 38). It was intended gradually to introduce the habits of civilisation and to encourage the making of wills.

Mr. McGregor: There is no evidence of registration. I admit that *testamenti factio* is given to natives by the law of the Colony, but that goes no further than the rules expressly direct: it gives the native no more right over his property than the law already gives him; it does not give him power to over-ride native custom as to property which at the time of his death he had alienated absolutely *inter vivos*. The question of

native marriages was considered in *Ngyobela v. Nihle* (10 Juta, 346). The Kafir has no individualistic idea of ownership.

[De Villiers, C.J.: Should not the property be considered as vested in the heir under a duty as executor to distribute it amongst those entitled?]

The nearer analogy in our law is that of fiduciary and fidei-commissary. The chief is fiduciary, and so limited *dominus*, but when he dies his life interest ceases, and the property goes to the fidei commissaries, viz.: the sons of the different kraals to which the property has been allocated. The Chief has power to make disposition of all his property which has not been allocated to any kraal. *Native Laws and Customs Commission Blue Book* (p. 53, Question 25). The evidence shows that Nowaka never was the great wife, but that Nohakise was made so by the consent of the councillors, and it is significant that only after her installation was the allocation of property to the different kraals made, not after Nowaka's installation.

The Court gave judgment in favour of the plaintiffs for the payment of £250 as the value of the stock, wrongfully seized by the defendant Matumbu, with costs.

De Villiers, C.J., said: The most important question for the Court to decide is that with reference to the cattle left for disposal by the testator, Sigidi. There is no satisfactory evidence that Sigidi, at the time of his death, had lost or surrendered possession of his proprietorship in these cattle; and *primâ facie*, the executors are entitled to claim it. The plea of the defendant, Matumbu, amounts to this, that he is the eldest son of the great wife of Sigidi, and that by native law and custom he is entitled to claim all the stock allocated by the petty chief to the great house. The *onus probandi* therefore lies upon the defendant to establish his defence, and to prove that by native law and custom he is the son of the great wife. The history of the Chief Sigidi seems to be this. After marrying three or four wives, he married Nowaka, the daughter of M'passa, and therefore Nowaka became the great wife. Subsequently this Nowaka gave birth to a son, the plaintiff Dinizulu, and then Sigidi married Nohakise, the daughter of another chief. Kreli, the Paramount Chief, never consented to Nohakise being substituted for Nowaka as great wife, and there is evidence to prove that Nohakise, dissatisfied because she had not been recognised as the great wife, and because there was a rival in

the great house, left the home of the Chief Sigidi, her husband, and on several occasions was taken back, Sigidi each time paying tribute for her restoration to his kraal. Ultimately Sigidi tired of sending for her, and Nowaka was finally re-established as great wife. It is extremely difficult to hold that Nowaka was ever lawfully deposed, and she had already given birth to a son. Native customs and laws are very vague, and a great deal depends upon the power of the chief to enforce whatever decisions he arrives at. The Paramount Chief, Kreli, although he could not exercise any physical authority over Sigidi and his people, had a certain amount of moral control, and Kreli's dictum was in favour of the recognition of Nowaka, the mother of Dinizulu, the plaintiff, as the great wife. In giving this decision the Court is not in any way encroaching upon the decision of the Government in regard to the appointment of the defendant Matumbu as headman. No doubt the Government is actuated by motives of expediency in such an appointment, as much as by principles of law, and the Supreme Court is not in possession of the evidence adduced before Sir Harry Elliot, when he appointed Matumbu headman. But the headship of a tribe does not carry the chieftainship with it.

Buchanan, J., in concurring, said: This difficulty would not have arisen had the Legislature not sought to engraft principles of jurisdiction, according to our ideas of civilisation, upon native laws and customs. The deceased Sigidi was not deprived of his property by his allocation, during his lifetime, of that property to the different "houses" of his wives. The judgment of the Court is not in conflict with the decision of the Government with reference to Matumbu's appointment as headman. The latter is simply a question of administration, and the legal point which the Court has to settle is equally simple. Dinizulu was the recognised son of the great wife, Nowaka, and the property, which has been taken possession of by Matumbu, must be declared executable.

Maasdorp, J., also concurred.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

MEYER V. MEYER. { 1899.  
Sept. 7th.

This was an action for divorce brought by Dr. Meyer, residing at Plumstead, against his wife on the ground of adultery. Mr. Currey for the plaintiff, and Mr. Benjamin for the defendant. Evidence having been led, decrees of divorce was granted, and a division of the joint estate was ordered, the Board of Executors being appointed receivers to divide the estate, with the direction that the plaintiff should have the option of purchasing the farm Meyershof at a valuation; the defendant to have reasonable access to the children.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton: Defendant's Attorneys, Messrs. Van Zyl & Ruissinné.]

HAYES V. HAYES. { 1899.  
Sept. 7th.

This was an action for divorce instituted by the husband on the ground of the adultery of his wife, the defendant.

Mr. Searle, Q.C., and Mr. Upington for the plaintiff, the husband, and Mr. Benjamin for the defendant, the wife. Lengthy evidence was taken in this case showing unhappy marital relations, the accusations against the wife being drunkenness and adultery, while the defendant urged cruelty and intemperance on the part of the plaintiff, who, she said, had threatened to blow out her brains.

Plaintiff identified the witness Howard as a man whom he saw running out of his house one night, and positively denied that he had ever bribed him to give evidence as to his wife's adultery.

Decree of divorce was granted, there being no order as to costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Ruissinné; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

MCLEOD V. THE SEA POINT MUNICIPALITY. { 1899.  
Sept. 8th.  
" 13th.

Contract—Drainage work—Value of extra work.

This was an action brought by Angus Thomson McLeod, builder and contractor, residing in Cape Town, against the Municipality of Green and Sea Point.

The declaration was as follows:

On or about the 30th day of July, 1898, the plaintiff and the defendant Municipality entered into a contract in writing, in terms of which the plaintiff undertook to perform certain drainage and other work connected therewith for and on behalf of the Municipality for the sum of £735. The plaintiff annexes a copy of the said contract and conditions annexed thereto, and prays that it may be considered as inserted herein.

Thereafter the plaintiff proceeded with the work under the said contract, and duly performed the same, and the price agreed upon, the sum of £735, has been paid by the defendant Municipality to the plaintiff, but the plaintiff says there is still due to him the sum of £348 13s. 10d., as per account hereunto annexed, for extra work done and performed by the plaintiff at the instance and request of the defendant Municipality, through the duly-appointed engineer of the said defendant Municipality, for which work the plaintiff, in terms of clause 3 of the general conditions of the said contract, is entitled to demand the said sum of £348 13s. 10d.

All things have happened, all times elapsed, and all conditions fulfilled to entitle the plaintiff to demand from the defendant the sum of £348 13s. 10d.

Wherefore the plaintiff prays for judgment in the said sum of £348 13s. 10d. as aforesaid, with interest thereon *a tempore moræ*, alternative relief, costs of suit. For an alternative claim in case the above be dismissed, but not otherwise, the plaintiff says: He craves leave to refer to the matters above pleaded, and prays that they may be considered as inserted herein. The defendants, through their duly appointed servant

and engineer, one Bayley, instructed the plaintiff to perform certain extra work and labour in connection with the said drainage operations over and above the work referred to in the said contract. The plaintiff has duly performed the said work so ordered, and is entitled to demand from the defendants the sum of £848 13s. 10d., which the plaintiff says is a fair and reasonable charge for the work done, labour and material supplied, and time expended by the plaintiff upon the said extra work so ordered as aforesaid.

The defendants in their plea admitted that a certain amount of extra work had been performed for them, and that they were willing to pay a fair and reasonable price for the same; they estimated that price at £164 19s. 4d., which they tendered, together with taxed costs up to date of plea.

Mr. Graham, Q.C., appeared for the plaintiff; Mr. Innes, Q.C., and Mr. Buchanan for the defendants.

Angus Thomson McLeod, the plaintiff, said he entered into a contract with the Sea Point Municipality for certain excavation and drainage works. He was shown a plan or drawing showing the course of the pipes and depth of the trench, the latter being 2 feet deep along the whole of the distance. The trench had to be excavated from the boundary of Green Point and Cape Town to the reservoir at Sea Point, and back along the High-level road. His tender for £735 included the laying of pipes. That amount was paid. He was also instructed to do some extra work. The foreman in charge showed him a plan which had been drawn by W. T. Scott Bayley, the engineer to the Municipality. Witness worked on that plan or section, which was subsequently lost or mislaid. The plan now shown him was exactly similar. Mr. Bayley subsequently decided that the trench was not deep enough, and he accordingly went deeper. The plan he worked upon was drawn by Mr. Esdon from his actual measurements. Before this extra work was ordered witness had laid about twenty pipes at a depth of two feet to a distance of about sixty yards. These had to be taken up again, as they were said not to be deep enough. Mr. Bayley was frequently on the work. The soil through which this excavation had to be made was very hard—a kind of rotten rock or conglomerate. It was taken out by means of picks and wedges, and it got harder the deeper they went. The ground was so hard that it frequently turned

the edges of the picks, occasioning a great deal of extra expense. The ground turned into clay under the action of water, and so did the stones as they became decomposed. It took a man from two days to two and a half days to excavate a cubic yard of this soil. He did not try blasting; in fact, conglomerate could not be blasted, and if he had tried it he might have injured the Cape Town main pipe alongside. Witness told Mr. Bayley that he was running into a lot of expense, but the latter said the scheme would not be a success unless they went down a proper depth. The greatest depth he had to go down was seven feet nine inches to eight feet. At the greater depth it was much more difficult and expensive to excavate, and to lay and join the pipes also, which work he had to do as well. At that depth a joint-hole had to be made for every pipe. As to the basis upon which he calculated his account for extra work, his rock price was 12s. 6d. per cubic yard at a depth of 2 feet. He did not charge for the extra depth, but every foot of depth he went he charged for an extra width of 3 inches. The deeper he went, the greater width was allowed. That was what was called the "Scotch rule." It came to the same thing as if he charged for extra depth.

Witness considered his price a fair one. The Municipality did some private work for him and charged him 12s. 10d. for excavating through softer ground. The extra work was finished about the middle of December. He sent in his account about the end of that month and saw Mr. Bayley, who was ill at the time, but said he would see to it. He was asked by the Council to point out the exact position where the rock occurred, especially on the High-level road. He was not present when the trenches were being opened up, but he saw them when that had been done by the Council. The amount he had actually paid out for wages was £1,148 2s. 2d., which included sharpening tools, but did not include remuneration for his own labour and supervision.

Cross-examined: Witness denied that he was charging for excavation which he did not do. He was charging 12s. 6d. per cubic yard, rock price, and charged for extra width according to the depth, and he had to go considerably deeper than 2 feet, which was the original contract depth. Beyond the sketch or section given to him by Mr. Bayley, the late Municipal Engineer, that official gave him no written



order for the extra work. He could not say exactly when the extra work began. He had sometimes as many as fifty men on the additional excavations. With regard to the nature of the soil, the stiff conglomerate did not extend right to the surface.

Mr. Innes: And yet you are charging as if it were; our case is that there was no rock at all to excavate, it was all earth.

Witness denied that the trench showed only pick-marks, because wedges had to be used as well to excavate. He understood the Municipality dug a number of trial trenches close to his, and was not aware that the cost of digging them was only 3s. a cubic yard. His charge was for 1,288 cubic yards. That was by measurement, according to the Scotch rule. He was quite sure he gave Bayley clearly to understand that he would charge rock price for the extra work. With reference to the work done for him by the Municipal Council, it was a small job, amounting only to a little over £3. He would not say that he would charge less per cubic yard in a small job than in a large one.

Thomas Wilson Cairncross, until recently Engineer for the city of Cape Town, said he had had considerable experience in laying pipes for water service. Roughly speaking, he had laid about fifteen miles of pipes or had excavated for that distance. He had supervised the excavations within the Sea Point Municipality for the water-main close to the trench made by the plaintiff. His rule invariably was to take out all his estimates for excavating in that district on the basis of rock price, and his charge was 10s. per cubic yard; since that time the price of labour had by no means decreased. The ground was more troublesome to take out than rock, as it could not be blasted, and was composed of large quantities of small stones cemented together. The deeper he went the more expensive was the work of excavation. He had worked out the extent of the excavation done by plaintiff at 1,010 cubic yards at a cost of about £500.

Cross-examined: His estimate for work at Sea Point at 10s. included everything—laying the pipes, jointing them, &c. He had always found that they did their work departmentally more cheaply than contractors. It was both cheap and good. He had known of contractors who adopted the Scotch rule in excavating, whereas he always went on the taper-trench system, and by that system the price was much lower than by

the Scotch rule, by which the contractor was allowed for a certain quantity of work according to the depth which was really done. He did not think that 3s. or 4s. per cubic yard was a fair price; it was far too that low. His allowance of the quantity of soil that ought to have been excavated was 1,010 yards; that was what he considered the contractor was entitled to, at 10s. a yard. That was applying the taper system, not the Scotch rule. The total length of plaintiff's excavation was about 2,000 feet.

Robert Esdon, architect and civil engineer, said he had been municipal engineer for Sea Point for six years. No deep excavations were done during his time. He made the tunnel for the Table Mountain waterworks. He had made measurements while plaintiff was laying the pipes, and inspected the material which was excavated. It was as difficult to work in a trench as to work in rock. In estimating the cost of such work, the system he adopted was making an allowance for width according to depth. The allowance made the contractors was 3 inches per foot beyond the contract depth of 2 feet. It was just the same as allowing 25 per cent. for the extra depth. The estimate came out, according to his idea, at not less than 10s. per cubic yard, without the pipe-laying. He had watched the work from day to day, and did not think the plaintiff's price was excessive.

Cross-examined, witness said he was one of plaintiff's sureties. The Municipality did not take out a proper trench when sinking the trial trenches.

George Septimus Firth, a contractor and engineer, said he had also had experience of excavating work at Sea Point, and confirmed the evidence of previous witnesses as to the difficult nature of the soil. His estimate of the price for excavation alone was £370, which would allow a profit to the contractor. In excavation he generally charged an extra allowance for every foot he went down beyond the contract depth.

Cross-examined: He would not classify this material as rock.

Re-examined: When he himself entered into his first contract with the Sea Point Municipality he was not aware of the hard nature of the ground to be excavated, and he therefore lost by it. In his second contract he tendered for a much larger figure, from 6s. to 12s., according to depth. That was through conglomerate.

The evidence of Mr. Bayley, the late municipal engineer, taken on commission, was that the contractor was allowed

extra payment for his work. He was authorised to give orders for the extra work, which was difficult, the excavations being through conglomerate. He estimated the cost of the extra work done by plaintiff at £177. His order for the extra work was ratified by the Council. The nature of the ground was such that an ordinary labourer could not excavate one cubic yard a day. He remembered telling the plaintiff that he had over estimated his work and would have to send in a moderate account.

This concluded the case for the plaintiff.

For the defence,

Herbert Herring, secretary to the Sea Point Municipality, deposed that the extra excavations were commenced on or about 8th October, and finished on 25th November. Mr. Bayley was at that time the Municipal Engineer. Witness was present when the trench was inspected, and so was the plaintiff. In his presence plaintiff said he would agree to Mr. Olive's proposal to take the measurement from the top of the pipe socket, plus 8 inches. During the month of November Mr. Bayley was very unwell.

Witness knew that Mr. Bayley had certified that Mr. McLeod, the plaintiff, was entitled to payment of £177 for the extra work, but the Council declined to disburse any documents.

Wm. Thomas Olive, civil engineer, said he inspected the trench on 22nd February. Both the plaintiff and Mr. Esdon were also there. The whole length of the trench had been opened; it was 2,787 feet in length. There was no sign of rock in the trench; it was all earth, taken out by pick and shovel, as could be seen from the pick marks on the side. Taking the actual quantity of ground excavated, and making an allowance of eight inches for the pipe socket, he made it 949 cubic yards. He deducted what had to be taken out under the contract, namely, 409 cubic yards, leaving 540 cubic yards extra work done. He allowed 4s. per cubic yard as a fair price right through, taking the depth into consideration. He saw the material taken out of the trial trenches, and he priced up the cost of excavation in these at 2s. 8½d. per cubic yard. (Samples of the soil were produced.) The greatest depth was 8 feet, and that was only for a short distance, perhaps 20 feet.

Further evidence for the defence was led, including that of William Cooper (drainage engineer, Sea Point), Richard Henry

Heward, Mr. George Bradford (chairman of the Public Works Committee), and Mr. Wünder (Mayor of the Municipality).

*Postea* (September 13th).

The Court gave judgment.

De Villiers, C.J., said: This action is for the recovery of £418, alleged to be due for extra work performed by the plaintiff under a contract with the Green Point and Sea Point Municipality. Plaintiff contracted to make certain excavations and lay pipes in them. There was no question as to the original contract, and plaintiff has been paid the amount of £735 due to him under it. He now alleges that additional work was performed by him to the extent of £818 13s. 10d. The defendants contend that the extra work amounted only to £121. The contract provided that the Municipal Council, through their engineer, had power to make alterations, additions, or modifications, which would in no way invalidate the contract, and which would be deemed part of the contract, 'the value of the alterations or additions to be ascertained as the case might require. No alterations were to be allowed unless an order for the same was given by the municipal engineer in writing. The orders for this extra work were not given in writing, nor has there been any certificate by the engineer in the proper sense of the term. The only question which the Court has to determine is what amount the plaintiff is entitled to as fair remuneration for the additional work. Unfortunately the engineer became seriously ill and had to leave this colony for Bloemfontein. When the work was almost completed, the engineer informed the Municipality that the additional work would cost £140, but afterwards he seemed to have gone further into the matter, and made additional measurements, with the result that he reported that the cost of the extra work would be £447. In his cross-examination, the engineer showed that he had not really a very clear idea of the actual work performed, and was to a great extent dependent upon what was told him by the plaintiff; but he adhered to the statement that the extra work would cost £447. Mr. Cairncross also valued it from £400 to £500. On behalf of the defendants there have been several expert witnesses—men of great experience—including Mr. Hett, whose estimate was 4s. per cubic yard. Mr. Bradford, also a contractor on a large scale for the Imperial Government, valued the work at about 4s. or 4s. 3d. a cubic yard.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

## A 4

Ernest Morrison Redfern, one of the partners of the plaintiff firm, gave evidence in confirmation of the statements in the declaration. He said he contracted with the defendant, Mr. Notcutt, to begin the work of printing a directory of Cape Town and suburbs, the latter giving him a tariff of prices and estimate. He agreed to pay an account owing to Notcutt, of the Electric Printing and Publishing Company, by Wentzel, of £28 10s. 9d.; also an account owing by witness of £5 odd, and to give the printers advertisement orders amounting to £200, and in addition to pay £50 cash as security when the work of printing the directory began. On 6th January Notcutt called to see how the work was proceeding, and he was informed that the plaintiff's firm had completed their financial arrangements with Mr. George Barker, and he would be paid the amount due him, £84, within a week. He was also offered \$150 worth of orders for advertise-

ments, which he refused to accept, and he declined to commence the work until he was paid his cheque. On the 10th January the defendant Notcutt was paid the sum owing, £34, and witness thoroughly understood that the work of printing the directory would be started at once. On the following day the whole of the Streets section of the directory was taken to the printers, about 200 pages. On January 20 witness and his partner Morrison went round with about twenty pages of advertisements, but could not see Notcutt, and he was informed by one Parsons that he was sorry Notcutt had taken on such a job, as it was too big for their establishment. None of the work had been done, and no extra labour had been employed. Shortly afterwards Notcutt himself gave them every assurance that the work would be proceeded with at once, and by the middle of February they had received about £230 worth of advertisements. Plaintiffs and defendants agreed about getting a circular issued. Notcutt never asked for any "copy" with the exception of the advertisement "copy," which was handed to his printing firm as it was received by the plaintiffs. All the copy was handed in by the end of February. The circular was printed by defendants, guaranteeing the publication of the directory by the end of March. It was of importance that the directory should be promptly issued, at least by the end of March or the beginning of April, as the payment for advertisements depended very much upon its early publication. The first time plaintiffs were asked to hand over the orders for the advertisements was in the middle of March, and in reply the defendants were asked to supply plaintiffs with proofs of the work so far as advanced. Ultimately, on 24th March, the orders for £200 worth of advertisements were handed to defendants, who gave a receipt for the same, but the latter demanded an endorsement authorising payment to them. Further correspondence showed that the work of printing the directory was proceeded with up to a certain stage, and that the orders for advertisements were put in proper form and duly ceded to the defendants. A number of orders for advertisements were repudiated by those who gave them, on the ground that the directory was not published within the stipulated time. The total number of advertisement orders and orders for copies of the book amounted in value to £260 10s. A few of them were cancelled in consequence of the firm giving up business. The cash ex-

pendent by plaintiffs in connection with getting up the work was £200. The price of each copy of the directory was to be 12s. 6d., and it was to contain 50 pages. Witness anticipated a good profit, and intended to make it a yearly publication.

Cross-examined: Witness was at present engaged in compiling Juta's Directory, and his partner, Morrison, was a clerk to the Tramway Company. He did not know Wentzel owed the defendant £112. Witness asked Mr. George Barker to guarantee the cost of bringing out the work, and he consented to the extent of £130. He told Notcutt that he had approached Mr. Ross, Mr. Stephen, and others for support, but without avail. The work would cost more money than he could command, as they were at first desirous of bringing it out on a larger scale. He admitted that he had not paid the costs of an appeal against the defendant, as the Magistrate gave him to understand that it was not necessary. He could have got the work printed elsewhere. Wentzel, who first projected the directory, got into difficulties here and went to Johannesburg. Notcutt never said he would not proceed with the work until he received the advertisement orders properly confirmed and endorsed. He really contemplated being able to sell 1,000 copies of the directory at 12s. 6d. each.

Re-examined: If defendants had gone on with the printing of the directory he would have been quite willing to accept delivery by the middle of April.

Alexander Wm. Morrison, a partner in the plaintiff firm, confirmed Mr. Redfern's evidence as to the nature of the contract with the defendants for the printing of the directory. Witness was now under the impression that defendants had not the necessary appliances for turning out the work.

John Kenny, a compositor, now in the employ of Richards & Sons, said he was formerly on the staff of the Electric Printing Company. In the latter establishment there were six or seven compositors and two girls. Only the two girls were put on the directory, and then only for portion of a day at a time. They were stopped in the work for want of "sorts" in type. For example, they were short of "B's," and therefore could not get on with the alphabetical part of the directory. The directory work was put on one side when the printing of the Synod proceedings was undertaken. There was not enough type for the streets section of the

directory. With two girls who were engaged in the work, at the rate they were going at it, it might have been produced in twelve months, but with the resources and labour put on it it was utterly impossible to publish it in March. There was no overtime on the directory job. Altogether about seventy pages were set up, but some of it had to be put on one side for want of capital B's, required in the Synod work—such names as the Bishop of Bloemfontein and so forth. So far as he knew they were never stopped for want of "copy," but for want of type.

James Cronin, a compositor, said he was also engaged in the defendants' printing office for some months. The directory work was stopped in order to get on with other jobbing. If the whole staff in the office had been put on the directory it might have been issued in a couple of months.

Arthur L. Bessel, manager for Richards & Sons, said his firm could have undertaken to print the directory in six weeks. The defendants' staff might have turned it out, that was, setting up, printing, folding, binding, &c., in about six months.

Cross-examined: He knew nothing about canvassing or collecting, but he was aware that it was a very difficult thing as a rule to collect money. His estimate as to the time for producing the directory would be considerably altered if he knew that defendant employed typographers instead of hand labour in the composing work. If copy were required to be set up in different series of type it was advantageous to have all the copy in hand.

Two canvassers gave evidence as to their work on behalf of the plaintiffs, and said they were instructed to inform advertisers that the directory would be issued about the end of March.

A clerk engaged in collecting the M.S. of advertisements, &c., for the directory, stated that he was partly paid for his work, the plaintiffs informing him that he would receive the balance at the end of March, when the book was to be published.

For the defence,

Ernest T. M. Notcutt, one of the defendants and a partner in the South African Electric Printing Company, said all the negotiations in connection with the printing of the plaintiff's directory went through his hands, his partner, Mr. Hogg, being in England at the time. Prior to commencing the negotiations he had entered into a contract with one Wentzel, who owed him £112,

which was guaranteed by Mr. George Barker. The plaintiffs then came to him, and asked witness if he would produce the book. He agreed to do so, on condition that they found a guarantor as good as Mr. Barker. They promised to do so, and mentioned several names of persons whom they had approached, amongst others Mr. Rosa, Sir James Sivewright, and others. Witness knew that Morrison was a clerk to the Tramway Company, and Redfern told him he himself was doing nothing. Plaintiffs then asked if he would release Barker from his obligation to witness's firm, and he agreed that plaintiffs should pay for the work already done in connection with the directory, amounting to £28, also a small account owing by plaintiffs to witness's firm, and hand £50 to him, which sum would go towards payment for the directory when it was produced. Plaintiffs were also to hand to witness £200 worth of approved orders for advertisements which were to be ceded to his firm, and which he was to collect as security for the printing work. They agreed to do so, and as he regarded the security as of a risky nature, he stipulated that he should receive an endorsement or confirmation of these orders. Plaintiffs had £150 worth of orders and wanted him to commence the work, but he declined to do so, and said he would begin when they got the money. They informed him that the whole of the "copy" was practically ready. Witness, in reply to plaintiffs, said he could not mention any time when the work could be produced, but subsequently he told them it could not be turned out sooner than two months after receipt of the material for each section of the book, so that he could bring forward the work of each section simultaneously. In a book of this nature, not all printed in one kind of type, it was necessary to have a sufficient quantity of "copy" to proceed with each section. On the 10th January witness received the cheque from the plaintiffs, and he prepared to proceed with the printing. He got the Streets section first, consisting of about 100 pages of the directory. He had to get in a few more hands to go on with the work, and it was really started on 21st January. Witness described the printing appliances in his office, which included two typograph machines, each of which would account for the labour of three or four compositors. The total number of employes he had varied

between twenty-three and thirty. If everything had gone on satisfactorily, he had ample labour and appliances to produce the directory within two months. By the end of February he calculated he had done £50 worth of work at contract rates; previous to this he had communications with plaintiffs regarding the copy, and there was also some correspondence. He first pressed defendants to send him their approved orders for advertisements as security when he had completed £50 worth of printing work. Plaintiff Redfern told him that Mr. Barker was willing to guarantee the value of £200 worth of advertisements, but plaintiffs were reluctant to allow witness to handle these advertisements. Subsequently witness was asked by a third partner of the plaintiff firm, Maddocks, who was a connection of Barker's, for proof sheets of the work done, but he refused to give them until he received the orders. In the meantime he was receiving batches of "copy," and witness told them the directory could be produced by the middle of April, if he received the advertisement orders and all the "copy." The orders were first tendered to him on 23rd March, and he found they were not endorsed payable to the order of his firm, but to various other people. He therefore sent them back, and they were returned endorsed. He showed them to his solicitor, and in consequence of advice received, he returned them to the plaintiffs with the statement that they were quite informal and valueless. After that some weeks elapsed, and steps were taken by him to confirm the payment of the orders by sending out a clerk. Subsequently he sent out a circular, with the result that a large number of the advertisers repudiated the orders. Witness was at the time quite prepared to carry out the contract if plaintiffs had adhered to their portion of the arrangements. His profit would probably have been from £75 to £100, but the directory itself as an asset would have been absolutely valueless to him, there being another directory, which sold at 3s. 6d. per copy.

Cross-examined: The contract was entered into with plaintiffs on 10th January under certain conditions, one of them being the payment of the amounts he had mentioned. There were sixteen pages of the Streets section set and printed, and about ten set but not printed. There were

452 "sides" of "copy" handed in for the Streets section, which would make about 100 pages. The largest portion of the directory would have been the Alphabetical section, and the total number of pages would have been about 500, viz., 328 Alphabetical, Streets 100, Advertisements 40, and the remaining pages devoted to other matter. The Alphabetical section could not be set up with the typographer. The greater part of the advertisements, twenty-four pages, were handed in on the 24th January. Of the alphabetical section, forty-eight pages were printed, and twenty-five pages were set up but not printed. The whole of that section and the Trade section were sent to him on 23rd February. The order for the circular about the early date of the publication of the directory had nothing to do with him. It was dated on 23rd February, on which date he had not received a large proportion of the copy. According to the arrangement, the plaintiffs were to cede £200 worth of approved orders for advertisements.

By the Court: The approval of the advertisement orders was to be by witness, his intention being to ascertain from the advertisers themselves whether they would agree to pay him.

De Villiers, C.J.: You had accepted these orders as security, and surely it was your duty to let the plaintiffs know at once when you received the orders whether you approved of them or not.

Witness said he was satisfied with them so far as his first examination of the orders went, with a single exception, but he said to Maddocks, a member of the plaintiffs' firm, "Don't forget, I have got to get these orders confirmed by the people who have signed them, to see if they will pay me."

De Villiers, C.J.: What was your real reason for not going on with the work?

Witness: Because I was not quite satisfied that I would get the money for the orders from the people who had signed them.

What caused the doubt in your mind?—Some of them were very old, extending as far back as the previous November.

De Villiers, C.J.: The moment you received the orders you should have set about inquiring from these people to see whether they would agree to pay you or not.

Witness (proceeding): The amount of the advertisement orders which were repudiated was £70 out of £200. He intended to go on with the directory in the middle of May, if he received the necessary security.

He did not see why a directory should not be issued at that date; it was not necessarily an annual publication; it was valuable at any period in the year. He had made arrangements with Richards & Sons to do some of the work about the end of February. That may have been about the time he undertook the printing of the Synod proceedings.

Re-examined: From the very commencement of the contract he gave the plaintiffs to understand that he would require to have the advertisement orders confirmed and approved.

Alfred William Snashall, in business as a partner of Townshend, Taylor & Snashall, said he had occasionally acted as an expert in printing matters for the Government. The contract prices in the present case were good enough, and he would have accepted them. With regard to the signed orders for advertisements, he would have considered them useless without confirmation by the advertisers. He had inspected the defendant's plant and machinery, and he considered that if defendant had devoted his works entirely to this contract he could have turned out the directory in two months, with twenty or thirty hands. Witness's firm had just turned out a directory of 500 pages in seven weeks.

Cross-examined: Witness would not commence any printing contract of this nature until he had similar advertisement orders endorsed by the persons to whom they were made out, and confirmed by the persons who gave them.

Greenwood Hodgson, a compositor in the employ of defendants, said he received the directory "copy" as it was sent in. Witness gave details of a conversation he had with the plaintiffs, to whom he said the work was gone with honestly, and everything was done to get on with the work. That was really the case. Overtime was worked in connection with other jobs in order to proceed with the directory.

Edward Vincent Parsons, another employé, said he remembered meeting plaintiffs at the Post-office, when he told them he absolutely denied having said to them that the directory could not be turned out in the contract time. Everything was done to push on with the work.

Thomas M. Dunann, partner of J. C. Juta & Co., publishers, &c., said the directory published by his firm contained between 400 and 500 pages, and was sold at 3s. 6d. There was no profit made out of it. He did not

think it would be possible to get a sufficient number of subscribers for a directory published at 12s. 6d. The advertisements in Juta's directory were of the value of between £350 and £400. He would not accept advertisements unless he was thoroughly satisfied that they would be paid for by the people who ordered them.

This closed the case for the defence, and after argument by counsel,

The Chief Justice gave judgment for the plaintiffs, pointing out that in deference to the wishes of the defendants, £200 worth of advertisement orders had been handed to the latter, who gave a receipt for the same. With reference to the evidence given by defendants regarding the necessity for obtaining the consent or confirmation of the advertisers who had given orders being required as the final approval of these orders, such a view of the matter seemed to his lordship to be simply an afterthought. He did not think that the parties ever intended that definition of the term, "approval" to be introduced as part of the agreement. If it had been in the minds of the parties he was satisfied the correspondence would have shown it. As to the question of damages, his lordship's opinion was that if the contract had been carried through the plaintiffs would probably have been the losers. On the other hand, they were entitled to recover the money which they had paid, namely, £50 and £28 10s. 9d., and judgment would therefore be for plaintiffs for £78 10s. 9d. with cost.

[Plaintiffs' Attorneys, Messrs. Scanlen & Syfret; Defendants' Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN.]

## ADMISSIONS.

*Ex parte* HOCKLEY. { 1899.  
 { Sept. 12th.

**Articled clerk—Break in period of service—College.**

Mr. Innes, Q.C., moved for the admission of Mr. Hilton Hockly as an attorney and notary.

From the petition and affidavits it appeared that the applicant had been articled to Mr. J. S. de Villiers, of Somerset East, from the 3rd September, 1885, to the 3rd August, 1886. He then went to the South African College with the intention of matriculating, and then resuming his articles of clerkship. He matriculated in July, 1887, and on the 3rd August, 1897, had his articles transferred to Mr. J. A. Reid, and has served the latter gentleman continuously up to the date of the petition, the 9th September, 1899.

The application was granted and the applicant duly admitted.

*Ex parte* ROBERTS.

Mr. Benjamin moved for the admission of Mr. Hamilton G. M. Roberts as attorney and notary.

The application was granted and the applicant duly admitted.

*Ex parte* DE KOCK.

Mr. Buchanan moved for the admission of Mr. Nicholas C. De Kock as an attorney and notary.

The application was granted and the applicant duly admitted.

### PROVISIONAL CASES.

**KEYTER V. BOTHA.**

Mr. Bisset applied for provisional sentence against defendant for £450 with interest at 7 per cent. on a mortgage bond.

**Granted.**

**SCHOEMAN V. FOURIE.**

Mr. Molteno applied for provisional sentence on a promissory note for £700, value received.

**Granted.**

**MILLS V. VERWEY.**

Mr. Buchanan moved for an order of civil imprisonment on an unsatisfied judgment and writ of execution. The amount sued for was \$127.

Defendant appeared in person, and gave evidence on oath of his absolute want of means to meet the obligation.

The present application was refused, with permission to apply again on the same summons.

THOM V. PAGE.

Mr. Benjamin applied for provisional sentence on a mortgage bond for £280.

**Granted.**

FORREST V. DIETERLE.

Mr. Buchanan applied for the final adjudication of the defendant's estate as insolvent. Ordered.

**Ordered.**

ANDERSON V. VAN BLERK.

Mr. Molteno applied for provisional sentence on a mortgage bond, for £500.

**Granted.**

HOCHSCHILD V. HANNUM.

Mr. Molteno applied for and obtained a decree of civil imprisonment on a return of *nulla bona*.

PRITCHARD V. PRIMER.

Mr. Bisset moved for provisional sentence on a mortgage bond for £100.

Granted.

THE MASTER V. SNYMAN.

Mr. Ward applied for an order upon the defendant, as executor testamentary in an estate, to file an account.

**Ordered.**

**THE MASTER V. CAWOOD.**

Mr. Ward applied for a order upon the defendant to file an account in the estate of which he was executor.

**Ordered.**



DE JONGH V. CONNOR AND OTHERS.

Mr. Maskew applied for provisional sentence for interest on a mortgage bond, amounting to £72 15s. 9d.  
Granted.

WHITE, RYAN AND CO. V. BUHLMAN.

Mr. Buchanan moved for and obtained provisional sentence for £224 on an acknowledgment of debt.

WHITE, RYAN AND CO. V. COLLY.

Mr. Buchanan moved for final adjudication of defendant's estate, a provisional order having been granted by Mr. Justice Buchanan on September 2. The amount sued for was £56 odd.

Defendant's husband appeared in person, and asked for further time to pay.

The Court ordered that the provisional judgment for adjudication should become final on December 1 next, unless in the interim the debt be paid or other arrangements arrived at.

HARRIS V. ROGOW.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £400.  
Granted.

BERKOWITZ V. COLBOURNE.

Mr. Buchanan moved for provisional sentence for £200, less £66 13s. 4d. paid on account.  
Granted.

COLONIAL GOVERNMENT V. A. W. FULLER.

Mr. Ward applied for provisional sentence for two separate amounts of £4 and £3 16s., being twelve months' interest on two mortgage bonds.  
Granted.

BULL AND SINCLAIR V. KENNEDY AND HITE.

Mr. P. Jones asked for judgment for £13 13s. 7d., balance of account rendered.  
Granted.

MARKS V. SIMS.

Mr. P. Jones applied for judgment for £45, rent.  
Granted.

S.A. SUPPLY AND COLD STORAGE COMPANY V. ROBERTS.

Mr. Benjamin said the capital amount in this suit had been paid, and he now applied for costs.

Order granted.

BOSMAN V. BROWN AND CO.

Mr. Molteno applied for judgment for £41 9s. 4d., value of goods sold and delivered, and also a true and full account of a certain consignment of apricots, or, in the alternative, payment of £111s. 7d., the value of the said consignment.

Ordered.

ST. JOHN'S RIVER RAILWAY. — COLONIAL GOVERNMENT V. SNYMAN AND ROBERTS.

Mr. Ward appeared for the plaintiffs, and asked for judgment for £1,000, being an amount deposited in the Treasury of the Cape Colony by the late Richard William Murray, on behalf of the said defendants, as security in connection with the promotion of a certain railway from the mouth of St. John's River to the East Griqualand border; the said amount being now forfeitable by reason of the failure of the defendants to commence the construction of the said railway.

The order was granted.

REHABILITATIONS.

The following rehabilitations were granted:

Harvey Edward Reed, on Mr. Miller's application.

George Hambidge (trading as Hambidge & Co.), on Mr. Benjamin's application.

*In re* MINORS KLUYTS.

Mr. Bisset applied for leave to sell certain property in connection with the estate belonging to the applicants.

Granted.

LYONS V. SCOTT.

This was an application for leave to purge default and plead.

Mr. Searle, Q.C., for the applicant, and Mr. Molteno for the respondent. After argument, the bar was removed, and leave given to plead.

## REMOVAL OF TRIALS.

On Mr. Ward's application, the following trials were removed from the Supreme Court: Queen v. Opperman, to the Circuit Court, Worcester; Queen v. Flink, to the same Circuit Court; Queen v. Walters, to the Circuit Court, Victoria West.

*In re* ESTATE VAN GASS.

This was an application for an amendment of order granted on 25th November, 1897.

Mr. Searle, Q.C., appeared for the petitioners, the trustees in the estate of Van Gass, and Sir Henry Juta, Q.C., for the respondents, Van Gass and two Bothas.

The matter was ordered to stand over until notice is given to Theunis Botha, one of the respondents.

*In re* JEREMIAH EDWARDS.

Mr. Bisset appeared in support of a petition to have a rule *nisi* granted under the Titles Registration and Derelict Lands Act make absolute.

The order was granted.

MADER V. FRASERBURG MUNI- } 1899.  
CIPALITY. } Sept. 12th.

Election of Municipal Councillors—

Nomination—Omission of public notice—49th section of Act 45 of 1882.

*Owing to the neglect of the Chairman of the Fraserburg Municipality to give the twenty-one days notice of the election of councillors, as required by the 49th section of Act 45 of 1882, the applicants, who had consented, at the request of several voters, to become candidates, were ignorant of the day and place of nomination, and were consequently prevented from being nominated.*

*Ordered, that the election of the two Councillors who were elected unopposed, be set aside and that a fresh election take place.*

This was an application on notice calling on the respondents, the Fraserburg Municipality (represented by its secretary) and Messrs. Hugo and Conradie, to show cause

why the election of the last-named respondents as Councillors of the Municipality should not be set aside on the ground of gross irregularity, and a fresh election held. The applicant alleged that he was a ratepayer of the municipality and in June, 1899, having been requested by several voters to stand as a candidate at the ensuing election of Councillors, consented to do so. He made enquiries at the municipal office as to nominations, &c., and was informed that the nominations had to be sent in some time in July. He lived next door to the municipal offices and kept a careful watch upon the municipal notice board outside for the notice required under section 49 of Act 45 of 1882, under which the municipality was incorporated.

From the minutes of the meeting of the Municipality on the 25th July, it appeared that the secretary was instructed to post up a notice calling for nominations by the 1st August, 1899, to fill the vacancies caused by the retirement of the respondents Hugo and Conradie, but no public notice was posted up either of the day of election or of the day within which nominations were required to be lodged, the intention being to prevent the nominations of the applicant, and another applicant named Meiring, which would have been duly lodged had public notice been given. On the 8th August, 1899, no public notice having been given, the applicant again enquired of the secretary when nominations were to be called for, and was informed that this had been done, and that the respondents Hugo and Conradie who retired by rotation had been re-elected.

The affidavit of Mr. Meiring who had also been requested to stand as a candidate was to the similar effect.

The affidavit of one Jacobs in support of the applicant was filed.

The secretary to the Municipality alleged on affidavit that on the 25th July he had had a notice posted on the Municipal Board calling for nominations to fill the vacancies, fixing nomination day for the 1st August, and election day for the 2nd August. That on the morning of the 26th July he saw that the notice was still on the board. On the 1st August, nomination day, he found that the notice had been removed but could not account for the removal. That on nomination day he only received one paper, nominating Messrs. Hugo and Conradie, duly signed by the requisite number of voters. That no further nominations being received, the said Hugo and Conradie were duly

declared elected. That as no contested election had to take place, he did not deem it necessary to post up the names of the nominated candidates. Other affidavits were filed supporting the statement that the notice was posted on the 25th July, and was there on the 26th July.

Sir H. Juta, Q.C., for the applicant.

Mr. Searle, Q.C., for the respondents: The notice calling for nominations was properly posted. There being only two nominations no notice of election was posted. It was not necessary that twenty-one full days notice should be given. There was in no case such an irregularity as should upset the election. *Pearce v. Claremont Municipality and others* (6 Sheil, 251).

De Villiers, C.J.: It is clear that the applicants had the *bona fide* intention of becoming candidates for seats in the Municipal Council. One of them inquired from the secretary when the nominations were to take place, and was informed that it would be some time in July. The applicants therefore took no further steps but simply looked out for the public notice which the 49th section of Act 45 of 1882 requires to be given. That section enacts that "not less than twenty-one days before the day appointed for the first election the Resident Magistrate, and thereafter at any election, the Mayor or chairman of the municipality, shall give public notice of such election" specifying the day and place of nomination of candidates. The election in question was not the first, and consequently the chairman was the proper person to give the public notice, but the twenty-one days notice applies to subsequent elections as well as to the first. I am satisfied that the notice was not given, and it was in consequence of the absence of such a notice that the applicants were not nominated as candidates. The question does not now arise, whether in case the applicants had in some manner received notice of the day and place of nomination, the non-publication of the public notice would have entitled them to relief. In fact they were unaware of the intended nomination. They have thus been deprived by the chairman's neglect of duty of the opportunity to be nominated as candidates. There is nothing to show that the two candidates who were nominated and declared duly elected were aware of the omission, but whether they were so aware or not, they cannot take advantage of it. The election must be set aside and a fresh election ordered, but the cost must be paid by the Council.

Buchanan, J., concurred.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

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EASTERN AND SOUTH AFRICAN TELEGRAPH COMPANY V. CAPE TOWN TRAMWAY COMPANY.

This was an application by the defendant company for a commission *de bene esse*, and for an alteration of the date of trial.

The action was for £50,000 damages sustained in consequence of electrical disturbances alleged to be caused by the running of the defendants' cars. It was desired that the evidence of expert witnesses should be taken on commission in London, and it was proposed to postpone the trial until the 1st February next.

Mr. Searle, Q.C., and Mr. Graham, Q.C., appeared for the applicants; Mr. Benjamin for the respondents.

The Chief Justice: Surely the case could be heard at the next term.

Mr. Benjamin said he did not think the action could be tried during the November term, but he suggested that it might be heard about the middle of December, if it would be convenient to the Court.

The 9th January, 1900, was fixed for the trial, the commission in London being sanctioned to be a joint, open commission, costs to be costs in the cause.

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*In re* MCKENZIE.

Mr. Benjamin applied for an order authorising the registration of the ante-nuptial contract entered into by Richard John McKenzie and his wife, residing at Mount Frere, Griqualand East.

The application was granted.

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# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.O., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

RIPKIN V. FALCONER'S EX- ) 1899.  
CUTOR. (Sept. 13th.

Contract—Sale of houses.

The declaration stated that the defendant, duly authorised by his wife Mary Falconer, sold to the plaintiff in November, 1893, ten houses in Cape Town for £2,050, the purchase price to be paid as follows, £300 at once, and the balance in two months' time, save that £1,400 was to be left on mortgage.

3. The property so'd was described as being in Roose-street, but the plaintiff was informed by the defendant at the time of the sale that Roose-street was the same as Horsley-street, and that plaintiff at the date of the sale believed that he was purchasing and intended to purchase property in Horsley-street which had been previously pointed out to him.

4. The plaintiff paid the sum of £300, but subsequently discovered that the property which he believed he had purchased had already been sold by defendant by a third person before the date of the sale to plaintiff.

5. Thereafter on 9th February, 1899, it was agreed that in place of the above agreement the plaintiff should purchase from the defendant acting on behalf of his said wife certain five houses in Roose-street for £1,012 10s., a mortgage bond for £600 to be passed by the plaintiff in favour of the said Mary Falconer, and £112 10s. to be paid in cash, and transfer to be passed forthwith; the sum of £300 already paid to be taken into account as payment of the balance.

6. The plaintiff had at all times been ready and willing to complete his portion of the contract, but the defendant failed to have the transfer deed passed, and in or about February, 1899, Mary Falconer died and the defendant had been appointed executor dative in her estate.

7. The plaintiff had tendered to pay interest on £112 10s. from the date of sale, and upon £600 upon the defendant accounting to him for the rents collected from the said houses from the date of sale to the present time. The rents amounted to £90.

He claimed transfer of the property, £90 in respect of rents, and £100 damages.

The defendant pleaded that the terms of the first sale, were purchase price £2,025, £300 to be paid at once, the balance in two months' time, transfer to be given when purchase price paid; £1,400 to be left on first bond.

He denied paragraphs 3 and 4, except the payment of the £300. He said that at the request of the plaintiff, he agreed to vary the contract by substituting five houses in Horstley street for five houses in Roose-street on the same terms as the original sale, viz.: £2,025; that the £300 should be taken as payment on account, that the balance save the sum of £1,400 for which a Kusting-brief was to be passed should be paid, and that transfer should be given upon payment together with the passing of the bond. The defendant's wife died on the 8th March, 1899, and defendant had been appointed executor dative.

He denied the other allegations in the declaration.

He offered to pass transfer on payment of £325, and the execution of the Kusting-brief for £1,400. This he said the plaintiff refused to do.

He claimed in reconvention £335 and an order that plaintiff pass the Kusting-brief for £1,400 and also £100 damages.

Mr. Searle, Q.C., and Mr. Molteno appeared for the plaintiff; Sir Henry Juta, Q.C., and Mr. P. Jones for the defendant.

Considerable evidence was led, the point in dispute between the parties, being whether the second agreement was in place of the first entirely, so as to be a purchase of five houses in Horstley-street only, or whether the first agreement was still binding, and the second merely substituted the five houses in Horstley street for five of the ten houses in Roose street.

Judgment was given for plaintiff, with costs in convention, and for the defendant with costs in reconvention, on condition that the defendant give transfer of the property within one month from date, failing doing so, judgment to be for plaintiff in reconvention.

[Plaintiff's Attorney, P. M. Brink; Defendant's Attorney, J. du Preez.]

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

MILLS V. JONES BROTHERS. } 1899.  
} Sept. 14th.

Motion—Ejectment—Contravention of Liquor Act—Lessor and lessee.

*A lease contained a covenant that in case the lessees should be convicted of a contravention of the liquor law, the lessor may without any demand whatsoever re-enter and take possession of the premises. The lessees having been convicted of such a contravention, Held, that the lessor was entitled to apply by motion for an order of ejectment against the lessees.*

This was an application calling on the respondents to show cause why a certain agreement of lease between the parties should not be cancelled on the ground of the conviction of the respondents of contravening the laws relating to the sale of intoxicating liquors, and why the respondents should not be ordered to quit and deliver up the leased premises, and to transfer the licence into the name of the applicant in terms of the lease.

The applicant was the owner and lessor of the Clifton-on-Sea Hotel, and the respondents were the lessees. In the lease there was a clause which stipulated that in case of the lessees being convicted of contravening the Liquor Act the lease should be forfeited, and the right of re-entry vested in the lessor. The lessees had been convicted recently of a contravention of the Liquor Act by selling liquor on a Sunday, and the lessor now wished to take possession of the property.

The respondents alleged that when they entered upon the lease originally, they took over the licence. That licence had been renewed at the last sitting of the Licensing Court. Owing to their insolvency they did not take out their licence, which was paid for by the applicant, and remained in possession of his attorneys. The attorneys refused to hand it to the respondents, and they had not seen it until the conviction for selling at

a time when they were not authorised to sell. They then discovered for the first time that an alteration had been made in the terms of the licence in respect of the house: this alteration was an error which they could have had rectified if they had had possession of the licence. With regard to their Sunday trading, they said that they had followed the instructions of the applicants, though the Magistrate had ruled that a meal supplied by them was not a *bona fide* meal within the terms of the Act. They said further that the applicant could not exercise the right of cancellation under the lease until the 15th September.

The applicant denied the allegations in the respondents' affidavit.

Sir H. Juta, Q.C., for the applicant: The Court will grant an order for ejectment on motion in certain cases, though it is not a usual practice. The lessor will suffer great inconvenience if the lessee remains on after having been convicted; he may lose his licence.

Mr. Graham, Q.C.: This is not a proper matter to be heard on motion. *Olivier v. Potgieter* (6 Sheil, 312); *Elder's Executors v. Cothead* (7 Sheil, 236); *McLoughlin v. Dalaunt* (Foord, 129).

De Villiers, C.J.: The Court has never laid down a fixed rule not to grant orders of ejectment on motion. Where there is no doubt as to the facts, and the right of the applicant to obtain the order is perfectly clear, there is no reason why recourse should be had to the more dilatory proceeding of an action. In the present case no serious doubt exists as to the facts, and the lease itself contains a covenant that in case of the lessees being convicted of contravening the Liquor Act, the lessor, without any demand whatever, may re-enter upon and take possession of the premises. The policy of our law disapproves of a forcible re-entry by one person on property in the possession of another, but for that very reason the Court should give its assistance as expeditiously as possible where the right to such re-entry is clearly established. That right depends entirely upon the validity of the conviction. The Magistrate was satisfied that the respondents had contravened the Act by selling liquor on a Sunday without a *bona-fide* lunch, and there has been no appeal against the conviction. The order for ejection must therefore be granted with costs, but a reasonable time, say ten days, must be given to them within which to quit possession.

Buchanan, J., in concurring, said: Although it is usual to sue for orders of ejectment by action, and not by motion, in a case like this, where the facts are not in dispute, the rights of the parties clear, and great damage might accrue to the applicant if an order of ejectment were not given, I think the circumstances are so special that relief should be granted on motion.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Respondent's Attorneys, Messrs. W. E. Moore & Son.].

#### HAYES V. HAYES

Mr. Buchanan applied for leave to sue by edictal citation in an action for restitution of conjugal rights brought by the wife of one H. H. Hayes. The husband is now supposed to be in Durban, Natal.

The application was granted.

#### LEWIS V. LEWIS.

Mr. Benjamin applied for leave to sue by edictal citation on behalf of the wife of one J. G. Lewis.

Leave was granted, and the citation made returnable on 12th January next.

#### COLESBERG COLLEGIATE ASSOCIATION.

Mr. Benjamin presented the report of the liquidator of the above institution showing that there was £351 15s. 9d. for distribution amongst the shareholders.

The Court ordered the report to be filed.

W. AND G. SCOTT V. PETERSEN { 18.9.  
AND WILSON. { Sept. 13th.

Stamp—Promissory note.

*A promissory note which is not expressed to be payable to order must be stamped, notwithstanding section 5 of the Schedule of Act 13 of 1870.*

Mr. P. Jones applied for provisional sentence on a promissory note for £69 12s. 5d. signed by the defendants as principal, and surety in solidum and co-principal debtor respectively, and made payable to the plaintiffs. The promissory note was not stamped, so judgment was asked for subject to the necessary stamp, which had been deposited with the Registrar, being affixed.

Counsel submitted that a stamp was necessary in accordance with section 12 of Act 3 of 1864, which provided that all docu-

ments falling under the list affixed to the schedule of Act 13 of 1870 should be stamped if produced in a Civil Court of Law.

The Schedule of Act 13 of 1870 was as follows: "Every bill of exchange, promissory note, bank post bill, or other negotiable instrument not exceeding £100. . . ls."

[De Villiers, C.J., referred to paragraph 5 of the same schedule which provides that "no 'good-for,' 'I.O.U.,' or other acknowledgment of debt, not being a promissory note, and not being negotiable shall require to be stamped so long as it shall be retained by the creditor to whom it was first delivered, and it may be paid by the debtor to such creditor without being stamped." Is the document before the Court negotiable or non-negotiable?]

Negotiable, my lord.

[De Villiers, C.J.: But it is not drawn to order. The document simply promises to pay the creditors, W. and G. Scott, and does not say "W. and G. Scott, or order."]

Sub-section 4 of section 6 of Act 19 of 1893 provides that a bill is said to be payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

The Court gave judgment for the sum asked, provided the necessary stamp (1s.) be affixed. The Chief Justice further remarked that as this was the first occasion on which this important question arose, the fine would be merely a nominal one. The fine imposed would be 5s.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew.]

REGINA V. KIRSTEN. { 1898.  
 { Sept. 14th.

Liquor law—British Bechuanaland—  
Proclamation 64 of 1889, section  
2—Proclamation 113 of 1891—  
Bastard.

*The appellant was convicted of having contravened section 2 of Proclamation 64 of 1889 of British Bechuanaland as amended by Proclamation 113 of 1891, by supplying liquor to M., whom one the Magistrate found to be a Bastard. On appeal, the Court refused to interfere with the Magistrate's decision.*

This was an appeal against the conviction of the appellant by the Resident Magistrate of Gordonia, upon a charge of contravening section 2 of Proclamation 64 of 1889 of British Bechuanaland, as amended by Proclamation 113, B.B., of 1891, in that he gave to one Hermanus Maasdorp, a Bastard, for his own use or for the use of one Francis de Juy, who was also a Bastard, two bottles of brandy.

Proclamation 64, B.B. 1889, section 2, imposed a penalty upon any person who should give to or procure for any native in British Bechuanaland any wine or spirituous liquor.

Proclamation 113, B.B., 1891, provided that the word "native" in Proclamation No. 61, B.B., 1889, should for the purposes of the Proclamation in the district of Gordonia, be deemed and taken to include all persons of mixed race commonly called Bastards in the said district, whether such persons be living as members of any native community or not.

Hermanus Maasdorp deposed that he had long brown hair, grey beard, and blue eyes, but he called himself a brown man. In his evidence he stated: "I am not a white man, I am a coloured man; neither my father nor my mother was white. I am a Bastard." It appeared on the other hand, from the evidence that some of Maasdorp's progenitors were of French and German origin, and evidence was adduced to show that Dutch farmers were not infrequently as dark in complexion as this person. It was said also that he could not be correctly described as a bastard, because his parents were lawfully married, and therefore he was of legitimate birth.

The Magistrate found that Maasdorp was a Bastard and found the accused guilty.

Against this conviction the accused appealed.

Mr. Graham, Q.C., appeared for the appellant; Mr. Ward for the Crown.

After argument,

The appeal was dismissed.

De Villiers, C.J.: The definition of the term native is much wider in Bechuanaland than some of the definitions in this colony. It is recognised that Bastards were persons of mixed race, European and native. The Magistrate saw the first witness in this case, who was the person supplied with the liquor, and was satisfied that he belonged to the mixed race commonly called Bastards. The Court can not interfere with the decision of the Magistrate. It has been said

that many of these people have made money, and are well off; and that it is very hard for them to be deprived of their liquor. That of course is a matter for the Legislature. The time will probably come when it will be exceedingly difficult to apply these Act, and to discover who are "natives" and who were not. But with the law as it stands at present, the Court depends to a great extent on the decision of the Magistrate. The appeal must therefore be dismissed.

Buchanan, J., concurred, and said: Evidently the attorney in the Court below depended for the proof of the marriage of Maasdorp's parents to show that he was not a Bastard. It has been proved that he is a person of that mixed race commonly called Bastards, and the question is quite irrespective of legitimacy or illegitimacy.

[Appellant's Attorneys, Messrs. Minchin & Sonnenberg.]

VAN DER BERG V. VAN TONDER.

Practice—Demand.

*A demand before summons need not be in writing.*

This was an appeal from a decision of the Resident Magistrate of Ladysmith in an action in which the plaintiff, now appellant, sued the defendant for £2 damages for wrongful detention of property.

The defendant admitted his indebtedness for the amount claimed and pleaded that he received no demand for the amount claimed, and that he tendered to pay the amount on receipt of summons to the plaintiff's agent who refused the tender, because the costs were not included. He now tendered the £2 into court and prayed for costs.

The defendant in his evidence stated that he received a message before the issue of summons from the plaintiff, that he demanded £3 10s. for compensation, and that defendant must pay by a certain day or he would not receive the money. Subsequently he demanded payment in presence of one Van der Vyfer. Defendant wanted to give him the money but he got angry and went off. He received no written demand.

The Magistrate gave judgment for plaintiff for £2, but ordered him to pay the costs on the ground that as no formal letter of demand was sent, the summons would be regarded as a demand in taxation, and that on receipt of the summons the defendant tendered the amount.

The plaintiff appealed.

Mr. Molteno for the appellant: The demand need not be in writing. *Van der Linden* (p. 260); *Van Leeuwen, Commentaries*, Vol. 2, p. 373; Rule of Court, 312; *Leur v. Morrison* (1 Juta, 30); *Redelinghuys and Wessels v. Jones, Consett and Bail* (3 Juta, 250); *Hepworth v. Dunkley* (3 Juta, 400).

De Villiers, C.J.: In this case the proof is clear that the demand was made, and was admitted by the defendant. There is no hard and fast rule on the point whether a demand should be written or verbal. In the opinion of the Court the Magistrate erred in not allowing plaintiff his costs, and the appeal will therefore be allowed, with costs.

[Appellant's Attorneys, Messrs. Sauer & Standen.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

FALCONER'S EXECUTOR V. { 1899.  
DREWITT. { Sept. 18th.

Writ of execution—Sale—Death of debtor—Ordinance No. 104, section 31.

*Where property has been attached in execution of a writ before the death of the debtor, the Sheriff may proceed with the sale after the death of the debtor before the expiration of six months from the time when letters of administration were granted to the executor.*

This was an application by the executor dative, in the estate of his deceased wife, Mary Falconer, to restrain the High Sheriff from selling the landed property attached in the suit *Drewitt v. Falconer's Estate*.

The applicant stated that the respondent had in January, 1899, obtained two judgments against Mary Falconer, the applicant's wife, upon two mortgage bonds upon property in Horstley and Roos-streets.

That in March, 1899, Mary Falconer died leaving the judgment unsatisfied, applicant was appointed executor and on 23rd June, issued a notice calling on creditors to file their claims within six weeks.

That on August 15, 1899, he received a letter from A. W. Steer, stating that the Judges required applicant's consent to have his name substituted for that of his late wife on the records in the cases of *Drewitt versus* his late wife.

That before he could take steps to inquire into the matter a writ was issued on the 17th August against him as executor, and the property attached.

That on the 14th December, 1898, a writ was issued on the same judgments during his wife's lifetime, and the property attached but proceedings stayed.

That a portion of the property mortgaged under the bonds had been previously, on the 4th November 1898, and the 9th February, 1899, sold to one Rifkin, who failed to carry out his contract, and this contract was the subject of an action pending in this Court.\*

That the assets of the estate were sufficient to pay all the creditors in full, but that the short time which had elapsed between the appointment of applicant, viz., the 2nd June, 1899, and the present time was insufficient to complete some of the houses which were in course of construction so as to enable him to put up the property for public competition, irrespective of the fact that he could take no decided measures in that direction until the dispute between himself and Rifkin had been settled.

That the six months allowed to executors to liquidate estates would only expire in connection with the estate in question on the 2nd December next, and if the property were forced into the market and disposed of at a Sheriff's sale, it would cause considerable loss to the estate.

F. B. Steer, the respondent's general agent, alleged that the applicant had always acted as agent for his wife Mary Falconer under a general power, and had had ample time to complete the unfinished houses on the property. That he declined to consent to a postponement of the sale in execution on the ground that his principal was in want of the money invested in the mortgages upon which judgment had been given, and he would be seriously inconvenienced by further delay.

\*NOTE. This action had been decided when the present application was heard. See *Rifkin v. Falconer supra*, p. 542. R.R.P.



A. W. Steer, the respondent's attorney, alleged that the applicant had had proper notice of the proceedings upon which the order for restitution of the executor had been granted.

Sir Henry Juta, Q.C., for the petitioner referred to Ordinance 104, section 31, *Van Rensen v. Pearson* (Roscoe, p. 231).

Mr. Buchanan for the respondent.

After argument,

De Villiers, C.J.: The second writ of execution was obtained after the death of Mrs. Falconer and before the expiration of six months from the time when letters of administration were granted to the respondent. The terms of the 31st section of Ordinance, No. 104, are clear that such a writ cannot stand, nor can the sale in execution thereof be allowed to take place. The first writ, however, was issued before Mrs. Falconer's death and is not affected by that section, which refers only to the suing out of writs after the debtor's death. The attachment also took place before her death and according to the decision of Cloete and Watermeyer, J.J., in the case cited the Sheriff was entitled to proceed with the sale before the expiration of either period mentioned in the Ordinance. Under the special circumstances of the present case it will be advisable to postpone the sale. The prior mortgagees of this property consent to this course, which is in every way desirable, to enable the executor to carry out the judgment of this Court in the case of *Riffin v. Falconer*. Each party will bear his own costs.

Buchanan, J., concurred.

[Applicant's Attorney, H. P. du Preez; Respondent's Attorney, A. W. Steer.]

AVERY V. LE GRANGE AND THE } 1839.  
 CIVIL COMMISSIONER OF } Sept. 18th.  
 BARKLY EAST. } „ 20th.

Registration of voters — Revising officer — Final determination — Mixed question of law and fact. *The Civil Commissioner of B, having decided in an inquiry under the 25th section of Act 9 of 1892 that the applicants were not resident in the district, and therefore not entitled to be registered as voters, Held, that as the question of such residence was a mixed question of fact and law his determination upon the point was final.*

This was an application by John Avery and twenty-five others, Cape Mounted Riflemen, calling upon A. G. Le Grange and the Civil Commissioner and Revising Officer of Barkly East, to show cause why the proceedings of the Court held for revising and finally settling the voters' lists for the district of Barkly East on the 25th and 26th May, 1899, should not be brought under review and amended by having it declared that the names of the applicants should be included in the list of persons entitled to vote for Parliament in the Field-cornetcy of Ward No. 1, Barkly East, within the Electoral Division of Wodehouse.

The affidavit of H. M. Stone, an attorney-at-law, set forth that he appeared at the Court in question, and the following facts were proved: That Squadron F of the Cape Mounted Rifles were stationed at Barkly East in or about the year 1896, and remained there until about August, 1897. They remained away on duty elsewhere until they returned in July or August, 1898, and continued in Barkly East until they were shifted on the 14th or 15th April, 1899, to the neighbourhood of Kokstad, which is in the same Electoral Province as Barkly East.

On the 2nd February, the officer administering the Government issued a proclamation under Act 14 of 1887, requiring all Registering Officers to prepare the usual provisional lists of persons entitled to vote at the Parliamentary elections within the various field cornetries, and the 17th March, 1889, was the date fixed for the completion of the provisional lists aforesaid.

On the 2nd February, deponent believed, the F Squadron of the Cape Mounted Rifles had no idea that they were to be shifted, and it appears from the evidence submitted that an application was made on behalf of John Avery and the other applicants to have their names included in the provisional lists, but the Field-cornet declined to insert them.

When the provisional lists were completed it was found that the names had not been included, and the usual forms of claim were thereupon filled in and forwarded to the Field-cornet in accordance with law.

The Field-cornetcy in which F Squadron was then stationed was known as Ward No. 1, Barkly East, and the Field-cornet held his Court on the 22nd April, 1899.

An objection under section 10, instead of under section 14, of Act 9 of 1892 was lodged by the respondent Le Grange against the applicants, the reasons assigned being that

they did not possess the necessary salary qualification and were not resident in the division on the 17th March, 1899.

Deponent submitted that this objection was not only bad by reason of its having been made under the wrong section, but also in that the date to which attention should be paid when considering the claimant's residence was the 2nd February, and not the 17th March.

Deponent appeared on behalf of the claimants before the Revising Officer at Barkly East, about the 25th May, and annexed a copy of the evidence taken, from which it appeared that the wages qualification was admitted, but the claims were rejected because it was held that before the sitting of the Revising Court Squadron F had been removed.

It was proved that only in March were orders issued to the squadron to hold itself in readiness, and it was not until the 14th or 15th April that the men were actually moved. That if they were not registered as prayed they would be disqualified from exercising the franchise.

The affidavit of C. A. Hunt, attorney-at-law, set out that he appeared on behalf of Le Grange to object to the applicants' registration at the Field-cornet's Court and also at the Revising Court. He said that F Squadron was stationed in the district for temporary purposes only in connection with the guarding of the rinderpest line. They were replaced by the Cape Police in September, 1897, and on the eve of the general election F Squadron was again transferred to the district presumably for police duties, but as it was generally known for political purposes, as a large number of them were registered as parliamentary voters in the district and every effort was made by the supporters of Dr. Smartt, who was Colonial Secretary then, and had the Cape Mounted Rifles under his control and was a candidate for Parliament for the Electoral Division of Wedehouse, to secure their votes on his behalf.

Deponent denied that the Cape Mounted Rifles had no idea on the 2nd February that they were to be removed, and referred to the evidence taken at the Revision Court.

He said that some of those who were objected to did not reside in Ward I.

He denied that all the objections were lodged under section 10. Some of them were lodged under section 14; some were in

advertently filed under section 10, but the grounds were identical and the applicants were not prejudiced.

He denied that the question relating to the inadequacy of their salary qualification was withdrawn: it was only admitted that the applicants were in receipt of £50 per annum, but the question of their residential qualification as interpreted by recent judicial decision was never withdrawn by the objector's attorneys.

He said further that the applicants might have been registered in Griqualand East if they had taken the proper steps and that it was owing to their own negligence in not doing so that they were disqualified from exercising the franchise.

Douglas Archibald Campbell, the Civil Commissioner and Revising Officer of Barkly East, filed an affidavit to a somewhat similar effect as Mr. Hunt, except that he did not refer to the stationing of the Cape Mounted Rifles in the district for political purposes.

He said further that in some instances the names were inserted in the provisional lists, but it would appear that they were omitted in Ward I because the officers of the squadron told the Field-cornet that it was unnecessary to register them because they were under orders to leave at any time, and this appears to have taken place about the time the provisional lists were being completed, shortly after the 2nd February, 1899.

He denied that the claims were rejected solely because the applicants had been moved before the sitting of the Revising Court; other reasons influenced his decision as well, notably the case of *Sonnenberg v. Pennell* 9 Sheil, 75). Orders had been issued in February, 1899, for the removal of the Cape Mounted Rifles and the applicants' *bona fide* domicile was (Griqualand East, where they ought to have been registered even if temporarily absent.

He referred to the reasons for his judgment attached to the record of proceedings. In these reasons, which were lengthy, he said that he considered that the question which he had to decide was whether the Cape Mounted Rifles were there for temporary purposes or with the *bona fide* intention of permanently residing there, and came to the conclusion that the evidence proved no intention to permanently reside in the division.

Sir H. Juta, Q.C., for the applicants: The question is whether the applicants were resident in Barkly East. For general purposes they were resident there, and civil summonses were served against some of them. It

follows that they were resident there for registration purposes. They were a movable force, but they were subject to the orders of their superiors; except for this they had the *bona fide* intention of remaining in the district as required according to the decision in *Sonnenberg v. Pennell* (9 Sheil, p. 75).

[De Villiers, C.J.: What do you say as to the jurisdiction of this Court? See section 25 of Act 9 of 1892, and *Moll v. Civil Commissioner of the Puarl* (7 Sheil, p. 151).]

This is a mixed question of fact and law, and depends upon the legality or illegality of the Magistrate's action. He has to decide "according to law" and if he does not we must have some remedy.

[De Villiers, C.J.: Does not the section mean that the procedure must be according to law?]

His decision on the merits should be according to law as well as the procedure.

Mr Searle, Q.C., for the respondent Le Grange: This is not a case where an appeal is allowed, so the Court should not interfere with the Magistrate's decision. *Moll v. Civil Commissioner of the Puarl*. The Magistrate is supported in his finding by much evidence. The Field-cornet had up to the 17th March to frame the provisional list, and at that date the Cape Mounted Riflemen were under orders to leave. The applications were sent in after they had notice to leave. The judgments against some of them were given in default, and the exception of non-residence was not taken. *Sonnenberg v. Pennell* is very much in point.

Mr. Ward, for the Civil Commissioner, said he appeared only on the question of costs. The matter being in the nature of a civil appeal, it was not desirable for the Civil Commissioner to have the case argued on the merits.

Sir H. Juta, in reply: If people in the position of applicants can not be registered in Barkly East they will be disfranchised altogether as they may be moved about so as to avoid their registration.

*Postea* (September 2th).

De Villiers, C.J.: This is practically an appeal against the decision of the Civil Commissioner of Barkly East. After full and careful inquiry he has decided that the applicants did not *bona fide* reside in the district, and were not entitled to be registered as voters. There was much conflicting evidence as to whether the applicants were only temporarily in the district, and knew that before the lists were finally completed they would be removed back to Griqualand

East. There was certainly abundant evidence to justify the Magistrate's finding, and as that was a finding upon a mixed question of fact and law, the Court ought not to interfere with it. The determination would be anything but "final" if it were subject to appeal upon a question of fact. If the Civil Commissioner erred upon a clear and simple question of law, it might be said that the Civil Commissioner did not amend the voters' list according to law, but that question does not now arise. The application must be refused with costs.

Buchanan, J., concurred.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Attorneys for Le Grange, Messrs. Findlay & Tait; Attorneys for the Civil Commissioner, Messrs. J. & H. Reid & Nephew.]

KOTZE V. FAURE AND THE CIVIL COMMISSIONER OF STELLENBOSCH. { 1899.  
Sept. 18th.  
" 20th.

Registration of voters—Registering Officer—Civil Commissioner—Revising Officer—Written objections—Re-opening inquiry.

*It is the duty of a registering officer who has received and kept written objections sent to him on or before the day fixed by him for hearing such objections to transmit them to the Civil Commissioner in terms of the 19th section of Act 9 of 1892, although the objectors did not appear before him on the day so fixed to support such objections.*

*The respondent F. having failed to transmit written objections so handed in to him by the applicant, in consequence of which the respondent H., as Civil Commissioner, was unable to decide as to the validity of the objections, The Court directed F. to transmit such objections, and the respondent H. to reopen the inquiry for the purpose of deciding upon such objections.*

This was an application calling upon the respondents to show cause why the proceedings of the Court held at Stellenbosch for

the revision of the Parliamentary Voters' Roll should not be re-opened, and why certain objections lodged with the Field-cornet of the Environs on behalf of the applicant should not be forwarded to the Revising Officer for adjudication upon the merits or otherwise.

Pierre François Haupt, a registered voter for the electoral division of Cape Town, filed an affidavit stating that under instructions from the plaintiff he lodged a number of objections with the Field-cornets of the Environs and Hottentots Holland, and to the Hottentots Holland field-cornetcy he sent a representative, as he was unable to be present at both. The respondent Faure, the field-cornet of the Environs, affixed his provisional lists and his list of claimants to be registered as Parliamentary voters on some fir-trees outside the village. The first rainfall after March 17 practically obliterated them, and the greater portion of the names were illegible. Deponent personally went to these fir-trees from time to time to inspect the lists, and to search for the notices regarding the fixing of the Court to be held by the Field-cornet, but he did not see the notices. After April 7 the respondent affixed the list of claimants to the trees. This was destroyed, and subsequently a new list was substituted, which differed from the one originally put up by having a number of names added thereto. In doing this, it was alleged, the Field-cornet was guilty of irregularity, as the time for receiving names had expired. Having ascertained that Friday, April 21, was the date fixed for holding the several Field-cornets' Courts in the division of Stellenbosch, deponent sent a representative to several of them, and went himself to lodge objections with the Field-cornets of Eerste River Municipality and Environs. He handed in forty-seven objections to the Environs Field-cornet, which, after some discussion, he accepted, and deponent left him under the impression that if he desired further information or assistance that official would apply to him. The following week he proceeded to the fir trees, and found that all the notices and lists which had been affixed thereto were torn or obliterated to such an extent as to be illegible. The Field-cornet did not affix to the trees or any other public place a list showing which claims he had allowed, which objections he had sustained, and what names he had decided to place upon the lists. When deponent appeared in due course before the Revising Officer, and applied for

the objections that had been lodged by him, he was informed that they had not been forwarded by the Field-cornet to the Revising Officer and it was ruled by that official that he had no jurisdiction as Revising Officer to entertain an application to have these objections considered, as they were not before him. The Revising Officer informed him that he must apply to the Supreme Court for an order requiring the Registering Officer to forward the original objections before any evidence could be led in support thereof. A similar order was made with regard to the objections filed with the Field-cornet of Hottentots Holland.

Deponent further averred that the objections lodged to the names appearing upon the Environs list included those against twenty-eight students, and as the Magistrate disallowed about fifty-six students in the field-cornetcy of Stellenbosch Municipality it was quite clear that these persons' names should also have been removed from the lists of the Environs.

Pieter Hendrik Faure, one of the respondents, in an answering affidavit admitted the posting of all lists and notices on some fir trees outside the village, which had been done for many years, being a most "sheltered" as well as "conspicuous" place. He denied that the lists were obliterated, or that the names were illegible. With regard to the averment that forty-seven objections were handed to him by Mr. Haupt, deponent said "The said Haupt and Advocate (Percy Twentymann) Jones drove up to my house together. Jones got down from the cart and handed me the objections referred to. I told him that I was holding my court for objections on the following day at Oude Libertas, the residence of Mr. J. G. Krige, and that he should then hand them in. He, however, insisted on leaving the objections with me, so I took them and put them in my house." Deponent denied that he said he would look into the objections. He did not consider the objections left with him by Mr. Jones, as they were not lodged in accordance with the instructions he had received. The objections not having been adjudicated upon by him, he did not transmit them to the Civil Commissioner. Mr. Jones had handed to him about 139 claims on behalf of various persons, and on going through these claims he found that several were on behalf of minors, others on behalf of persons not residing in the district, and some were forgeries. He wrote to Mr. Jones, re-

queeting him to instruct these applicants to appear before him at Oude Libertas Court.

Advocate Percy Twentyman Jones filed an affidavit in which he said he handed in over 150 claims for registration at the respondent Faure's house on or about 6th April. On the 20th April Faure addressed a letter to him asking him to instruct the 150 persons to wait upon him at Mr. Krige's residence two days afterwards. This request was so unreasonable, considering the difficulty involved in notifying so many persons in so short a time, that he took no notice of it, preferring to fight the claims before the Revising Officer, if the Field-cornet should discard them. With reference to the interview between Faure and himself and Haupt, Mr. Jones said he descended from the cart with the objections, and offered them to the Field-cornet. Faure, however, was not inclined to take them, and Haupt dismounted, taking the objections from him, and he (Mr. Jones) went back into the cart in disgust at the attitude taken up by the Field-cornet. Mr. Jones denied the Field-cornet's assertion that he told him he was going to hold his Court at Oude Libertas; he did not mention Mr. Krige's residence at any time, except in the letter above referred to.

A replying affidavit by Haupt denied some of the allegations in Faure's affidavit. He drew the attention of the Court to the notification in the Civil Commissioner's circular, that the 21st April was the last day for lodging objections.

He said that his name appeared as agent for the objectors and not Mr. Jones. The respondent Faure was correct in stating that in the first instance Mr. Jones handed him the objections, but as he took exception to receiving them deponent descended from the cart and formally handed them to the Field-cornet as agent. The Field-cornet put certain questions to him and deponent offered to go through the whole list with him, but the Field-cornet said he was going out. Deponent left with the impression that the claims had been accepted. Faure at no time intimated to him that Oude Libertas was the place where he intended to hold his Court.

Mr. Graham, Q.C., for the applicant, referred to Act 14 of 1887, section 6, as to posting of the lists. Act 9 of 1892, section 10, provides for notice for five weeks. Here no proper notice was given. See also sections 10, 11, 12, 13, 14.

Mr. Searle, Q.C., for the respondent Faure: The Field-cornet carried out the

instructions of the Government. The applicants did not themselves appear at the claim Court. The delay has been too long to justify the matter being opened up.

Mr. Ward for the Civil Commissioner.

Mr. Graham: Clause 30 of the Field-cornet's instructions shows that all objections whether allowed or not must be sent to the Civil Commissioner. There have been such irregularities as will entitle the Court to make the order asked for.

De Villiers, C.J.: The Court entertains no doubt as to its jurisdiction to direct a registering officer to comply with the provisions of the 19th section of Act 9 of 1892, by transmitting to the Civil Commissioner objections lodged with or handed in to such registering officer. Nor is any further argument needed to satisfy the Court that where the registering officer has illegally failed to transmit such objections, the Civil Commissioner may be authorised to reopen his inquiry under the 25th section of the Act for the purpose of deciding upon the objections. The final determination of all questions brought before him lies with the Civil Commissioner, but if, though the illegal conduct of a registering officer, questions which ought to be so brought before the Civil Commissioner are withheld from his cognizance, an opportunity for obtaining such final determination ought to be afforded to the aggrieved party. It is common cause that the applicant did, though his agent, hand in to the respondent Faure, who is the registering officer for the Environs of Stellenbosch, a written objection to certain students and others, whose names appeared upon the provisional list. This was done on the 21st of April, which was the day mentioned in a notice issued by the Civil Commissioner, as the date on which objections were to be sent in. The registering officer, however, had fixed the following day as the date and, according to his evidence, he stated to the applicant's agent at the time when the objections were handed in that the objections should be made before him on that day. He admits, however, that he accepted the letter of objections and kept it with him. Having accepted the letter he ought, under 19th section of the Act, to have transmitted it to the Civil Commissioner. It is said that it has been decided by several Civil Commissioners, that no objections can be relied upon before them which were not supported by the objectors before the registering officers on the days fixed for that purpose. The Court's order in the present case will not prevent the respondent

Herold, as Civil Commissioner, from making a full inquiry into the circumstances under which the objections were lodged and why they were not supported before Faure on the 22nd of April. He will have the benefit which this Court has not had, of taking the oral evidence of the witnesses upon the disputed points. Our decision goes no further than this, that the registering officer, having accepted the written objections, ought to have transmitted them to the Civil Commissioner, and that when the objections have been so transmitted the Civil Commissioner will have to deal with them in the ordinary course. There is no proof of *mala fides* on the part of the respondents, and consequently there will be no order as to costs.

Buchanan, J.: I concur. The error in this matter originated with the Civil Commissioner of Stellenbosch. He fixed the 21st April as the date by which all objections would be received by the registering officers. Looking at the different wording used in the 14th, 15th, 21th, and 25th sections of the Act, it appears that the registering officer is supposed to make up his list in the first instance. He receives applications through the post or otherwise for additional names; receives objections, and determines upon these objections; but nothing is said as to the registering officer holding a Court, and he has to act more or less in an informal way. It is not even required that he should have the parties before him, which shows that his action is not to be a final decision, or his determination to be binding. The Act specifically requires, on the other hand, that the Civil Commissioner shall hold a court. As the Chief Justice has stated, the Court does not interfere or deal with the merits of the case, but simply orders that the whole matter be reopened by the Civil Commissioner with respect to the present application.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Attorney for respondent Faure, V. A. van der Byl; Attorneys for the Civil Commissioner, Messrs. J. & H. Reid & Nephew.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

W. SEARLE AND SON V.  
ARKELL AND DOUGLAS.

1899.  
Sept. 19th.  
" 20th.

Contract of sale—Construction—  
Time—Essence of contract.

*The plaintiffs, who had entered into an agreement with certain shipping companies, in consideration of a rebate of freight to be made to them, to import goods only by the ships of such companies, ordered 50 tons of sump from the defendants at New York, cost of shipment, insurance and freight to be paid by the defendants, but the goods to be shipped by one of the said companies' steamers between the 1st and 15th of July. One steamer of the company left New York on the 8th of July, but there was no available space for the sump. Another steamer left on the 19th, and the plaintiffs were willing to receive the sump by her, although leaving after the 15th, but the sump was excluded by reason of all the available space having been taken up by other cargo, including 72 tons of goods shipped by the defendants in respect of orders received from the Cape after the plaintiffs' order.*

*Held that, according to a reasonable construction of the contract, the plaintiffs were only bound to ship by available steamers, and that none could be considered available if all the cargo space had been taken up, but that, as there was space for cargo shipped by the defendants on orders received by them after the plaintiffs' order, they were liable for breach of contract.*

*It was known to the defendants that a limit of time was fixed for shipping the samp in order to avoid liability to Customs duty, the imposition of which was expected.*

*Held, that time was of the essence of the contract although, as it happened, the duty was not imposed at the expected date.*

This was an action for £120 damages for breach of contract owing to the defendants failing to deliver 2,000 bushels of white samp (white crushed mealies), at the rate of 10s. per bag of 196 lb., c.i.f.—costs of insurance, shipment, and freight to be paid by the defendants as the shippers thereof.

The plaintiffs were Walter Searle & Son, of Cape Town; the defendants were Arkell and Douglas, of New York, who had been sued by edictal citation.

The indictment set forth the following allegations:

On or about the 2nd of July, 1898, a contract was entered into by the plaintiffs and defendants (through the defendants' manager and duly-authorized agent at Cape Town, one Arthur Manning Grundy) whereby the defendants agreed to sell to the plaintiffs and the plaintiffs agreed to buy from them 2,000 bushels of white samp, for which the plaintiffs agreed to pay the defendants at the rate of ten shillings (10s.) per every bag of 196 lb., costs of shipment, insurance, and freight (afloat to Cape Town) to be paid by the defendants as the shippers thereof.

It was agreed between the said parties, and was a term in the contract, that the said samp should be shipped by the defendants by regular steamer between New York and Cape Town on a day between the 1st and 15th day of July, 1898.

It was an express instruction to the defendants, and was well known to and understood by them, and was a term in the contract, that all goods so shipped for the plaintiffs from New York to Cape Town should be shipped by regular lines only; and such regular lines meant the Union Clan Line and the American-African Steamship Line, as was well known to the defendants, who agreed, and undertook so to ship by such lines only.

Notwithstanding the premises, the defendants wrongfully failed and neglected to carry out their part of the said contract, and wholly failed and neglected to ship the said

samp on or before the 15th July, 1898, and have at no time since the said date shipped or delivered the said samp in compliance with their said contract, and the plaintiffs, though ready and willing to perform their part of the said contract, have not received the said samp, and have been thereby damaged.

All things have happened, all times elapsed, and all conditions been fulfilled to entitle the plaintiffs to receive delivery of the said samp, but the defendants have failed to deliver any part thereof.

By reason of the defendants' breach of contract, as set out in the premises, the plaintiffs have sustained loss and been damaged at the hands of the defendants in the sum of £120.

Wherefore the plaintiffs pray that the defendants may be condemned to pay to them the said sum of £120, with interest *a tempore morae* and costs of suit, or such other and further relief as to this honourable Court may seem meet.

The defendant's plea was as follows:

On or about the 23th June, 1898, the defendants' duly authorised agent in Cape Town, one Arthur Manning Grundy, was requested by the plaintiffs to forward an order to the defendants at New York for 2,000 bushels of white samp, at 13s. per bag of 196 lb., c.i.f., for shipment July 1 to 15th per steamer to Cape Town, and on or about the 2nd July, 1898, the said Arthur Manning Grundy accepted the said order on behalf of the said defendants.

It was an express instruction to the defendants that the said samp should only be shipped by certain steamers belonging to certain companies known as the Union-Clan and American-African Steamship lines, the plaintiffs having entered into a contract with the aforesaid companies, under which the plaintiffs undertook for certain considerations to import all goods ordered by them from America in steamers belonging to the said companies.

The defendants specially say that it was understood and agreed between the plaintiffs and defendants, and formed part of the said contract, that the defendants should ship the said samp between the said dates, provided the said companies referred to in the last preceding paragraph of this plea were ready and willing to accept the same.

The defendants in terms of their said contract were ready and willing to despatch the said samp, but the steamers belonging to the

said lines declined to accept the same, which fact was duly communicated to the plaintiffs.

Thereafter the defendants communicated to the plaintiffs that they were ready and willing to ship the said samp by steamers other than those of the said companies heretofore referred to, but the plaintiffs declined to permit the defendants so to ship the said samp, and on or about the 7th August, 1898, instructed the said Grundy that they declined to accept delivery of the said samp, and wrongfully stated that they would hold the said defendants liable in damages.

Save as above, the defendants deny the allegations contained in paragraphs 1, 2, 3, 4, 5, and 6 of the *intendit*.

Wherefore they pray that the plaintiffs' claim may be dismissed with costs.

In their replication the plaintiffs stated:

They admit paragraph 1, save that they say that the price of the samp to be delivered was 10s. per bag, and not 13s., and for the terms of the agreement of purchase and sale they crave leave to refer to the *intendit*.

As to paragraph 2, they admit that it was a condition of the said contract that the defendants should ship the said samp by regular steamers, being the steamers belonging to the companies mentioned therein, and they admit that they (the plaintiffs) had entered into a contract, prior to their contract with the defendants, whereunder all goods ordered from America by the plaintiffs were to be imported in steamers belonging to the said companies: they say that the defendants undertook to ship the said samp by one of the said steamers between July 1 and July 15, in terms of the aforesaid contract.

They deny the allegations in paragraphs 3, 4, and 5, save that they admit that on or about the 27th July the defendants offered to ship and deliver the said samp by a certain steamer, the *Oberon*, not belonging to the companies aforementioned, and that they (the plaintiffs) refused to accept delivery by the said steamer, and that on or about September 16 the plaintiffs intimated to the defendants that they would hold them liable for the sum of £120 damages for breach of contract: they deny that they refused to accept the said samp by regular steamer, as stated in the plea.

Mr. Searle, Q.C., and Mr. Benjamin appeared for the plaintiffs; Mr. Buchanan, for the defendants.

Walter Searle, partner in the firm of Walter Searle & Son, carrying on business in Cape Town, stated that Mr. Grundy, manager in Cape Town for Messrs. Arkell & Douglas, offered grain to his firm on quotation. Some orders were given, the first being one for wheat, in June, 1898, fifty tons. Mr. Grundy was aware of the arrangement to ship only by certain regular lines, and all orders were subject to that condition, the regular lines being the Union-Clan and American-African Companies. At the end of the year, the practice was for firms to sign a form of certificate that they had shipped only by these regular lines, and they were granted a rebate. At that date the rebate due to witness's firm was about £165. Subsequently another order was given to Mr. Grundy on the same conditions for white samp (white crushed mealies). His firm had only to do with arranging freight at New York; as a matter of fact, it was impossible to do so. A few days afterwards witness asked Mr. Grundy to cable for the name of the ship by which the 2,000 bags of white samp were to arrive, at his (witness's) expense, as he was anxious to receive it before the duty on imported wheat was raised, and he anticipated that that would take place in September; it was not in fact increased until January. The increase was from 9d. to 4s. The reply received to the cable was that the samp had not been shipped. About the 26th July another cable was sent, and Mr. Grundy said he could get the white samp shipped by the S.S. *Oberon*, which was an opposition steamer belonging to the United States and South African Line, a "fighting line," which did not last very long. Witness said he could not ship by that steamer, and some correspondence took place regarding cancellation, witness insisting on damages in that event, as he had sold a portion of the samp to arrive. Mr. Grundy offered to get it shipped by the *Tropic*, and he agreed to that provided it left New York by the 8th of August, but if it left after that date he could not guarantee to take it without prejudice to his contract. Mr. Grundy afterwards said they could not arrange the freight, and told witness he could get it shipped by the *Oberon*, but witness said he could not accept it by that vessel, and as a fact the samp never arrived to his order. There were five steamers which left New York within a few weeks—namely, the *Britannia*, *Strathness*, *St. Giles*, *Munificent* and *Tropic*. By the *Strathness* and *Munificent* he



received other consignments of grain from New York. He had sold 500 bags of the samp, which should have been received through Mr. Grundy, to arrive, at 11s. 9d. In the middle of September the price varied from 15s. 9d. to 16s. 6d. per bag, duty paid. He considered he was morally responsible for the delivery of the 500 bags, and if he were not held to his contract by his customer his damages amounted to £15 odd. If his buyer had not been a friend of his it was highly probable witness would have been sued for damages, and would have had to pay.

By De Villiers, C.J.: There was no written agreement about shipping by what were known as the regular lines, but shippers gave a certificate at the end of the year that they had not shipped by any other, and received a rebate.

Mr. Searle: Why did you sell the samp for 11s. 9d.?

Witness: I had not sufficient floor-space for all the grain which I thought was coming forward.

By Buchanan, J.: If I had known the price was going up to 15s. or 16s., I would not have sold for 11s. 9d.

Cross-examined: Witness certainly understood that the defendants guaranteed shipment between the 1st and 15th July, but he was willing to meet Mr. Grundy, who told him that he had got at difficulty in obtaining shipments. Mr. Grundy understood that he was to be bound down to the dates mentioned, but nothing would have been said if the date was extended by a few days. The freights were by no means regular at that time last year, because there was a freight war proceeding. He declined to accept shipment by the Oberon, because he would have lost his rebate for the previous nine months, as he could not have signed the certificate that he had shipped only by the regular lines. That was a hard and fast rule, as the regular companies were only too anxious to get off paying rebate if they could. He made it a rule never to ship except by the regular lines. The defendants informed him that they tendered the samp on the 11th July to the Strathness, one of the regular steamers, and it was shut out, but if they had applied earlier for shipment by that vessel it would not have been shut out. Taking the existing circumstances, if the samp had been shipped by the Tropic and sold to his buyers for 11s. 9d., there would have been no increase of duty by the date of its arrival. The increased duty was expected

to be imposed on 15th September, but it was not imposed until 1st January. His client never made any claim upon him for damages in consequence of the non-arrival of the samp, but witness informed him that he would bring the matter into court and would get damages.

Re-examined: If the samp had arrived in September by the Tropic he would have accepted it, but he refused to take any risk if that vessel did not leave New York on or before 8th August. A large amount of grain was coming forward, partly on account of the expected rise of duty, and also because of accumulations of stocks at the close of the American war.

By De Villiers, C.J.: He did not intimate to the defendants that they need not send the samp, but told them he would cancel the contract if they gave him damages.

Hyman Liberman, partner of Liberman & Buirski, said his firm were large dealers and shippers of grain. Between 15th August and 15th September last year the price of samp, as sold by him, was 15s. 9d. per bag. He regarded the defendants as merchants. Sometimes it paid him better to lose his rebate, as he made a larger profit by shipping by outside lines. He never received rebate when he shipped by an outside steamer; the regular lines took good care to watch them too well for that.

For the defendants,

Arthur Manning Grundy, representative in Cape Town of the defendant firm, said that his principals in New York were general commission merchants, one of the largest houses there. On 24th June he had an advice from the plaintiffs' firm that all orders must be shipped by the regular lines. As the result of cabling to New York, plaintiffs closed with him for a shipment of white samp between 1st and 15th July. Later on Mr. Searle asked him to cable to New York concerning the name of the vessel, and ascertained that it was difficult to obtain shipment, but he offered shipment by the Oberon. Mr. Searle refused to take it by the Oberon, and defendants offered to have the samp delivered to them from another house. He told Mr. Searle he could give him delivery by the Tropic, a steamer of the regular line, leaving New York from the 10th to 15th August. Plaintiffs gave him then to understand that he did not want the samp if it was not sent forward on or before the 8th August. On the 6th witness received a cable from his New

York principals, stating "Understand Searle's order now cancelled; demands unreasonable, and cannot be admitted."

Cross-examined: He thought the samp might be coming by the Oberon. The arrangement between the New York house and himself was that if no refusal of an order reached him within forty-eight hours, the order was taken to be confirmed. He did not know that the samp arrived by the Oberon and went round to Port Elizabeth. He had no knowledge as to how this consignment of samp was disposed of. His principals informed him that they were not interested in the steamer Oberon, and his instructions were to remain wholly neutral with regard to the various shipping lines. When the Oberon arrived she was not full up with grain cargo. When Mr. Searle mentioned his damages for cancellation of contract at 15s. a bag, witness replied that his claim was rather high.

George Henry Hambidge, manager for Julian Stephens & Co., said he remembered buying 500 bags of samp from plaintiffs at 11s. 9d. in bond, subject to arrival before the duty was increased. His firm had only made a sort of verbal claim upon the plaintiffs, but witness had not troubled himself, as he understood the predicament plaintiffs were in. Had it been any one else he would have gone into the matter and claimed damages.

Evidence taken on commission in New York on behalf of the defendants was read.

De Villiers, C.J.; The plaintiffs, who are merchants in Cape Town, seek to recover from the defendants, who are merchants in New York, the sum of £120 as damages for an alleged breach of contract. In June last, the plaintiffs ordered from the defendants 50 tons of white samp, cost of shipment, freight, and insurance to be paid by the defendants, but the samp to be shipped between the 1st and 15th of July by "regular" steamer. It is agreed that by "regular" steamers are meant steamers belonging to the Union-Clan and American-African Steamship Companies. The plaintiffs had entered into an agreement with these companies to import goods only by their ships in consideration of a rebate of freight to be made to the plaintiffs. The reason for fixing a time limit was, as the defendants knew, to avoid liability to certain additional Customs duties, the imposition of which was expected about September. On the part of the plaintiffs it was contended that whether or not there were ships of the "regular" line leaving New York between the 1st and 15th July, the defend-

dants were bound; in other words, that the effect of their engagement was to guarantee the sailing of the steamers between these dates. Considering that the companies were really the carriers selected by the plaintiffs, this appears to me to be a wholly unreasonable construction of the contract. Its meaning is no more than this, that if there is any steamer available between the dates fixed the samp will be sent by her. No such steamer could be considered available if there was no cargo space for the samp. But if the defendants were able to despatch other cargo by a steamer upon orders received by them after they had received the plaintiffs' order, such a steamer must be held to have been available. That is exactly what happened. The Britannia left New York on the 8th of July, and the samp did not arrive in New York until the 10th, but even if it had arrived before the 8th there would have been no room for it in the steamer. The next steamer left on the 19th, but the correspondence shows that the plaintiff would have accepted the same if shipped by her although four days after the period limited by the contract. The defendants shipped seventy-two tons of cargo by her for Cape ports and there was no room left for the samp. In my opinion she was an available steamer, by which the goods ought to have been sent. The defendants knew that a limit of time was fixed in order to avoid liability to the payment of the expected Customs duties, and although the duty was not imposed until later than was expected, I am of opinion that time was of the essence of the contract. This is certainly not a case in which the Court is inclined to award heavier damages than have been established by strict proof. The greater part of the samp was sold by the plaintiffs at 11s. 9d. to arrive. That might be taken as a fair test of the market price of the remainder, and the result is that judgment will be given for the plaintiff for £28 with costs.

Buchanan, J., concurred.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs. W. E. Moore & Son.]

BEGINA V. ERICKSEN.

{ 1899.  
{ Sept. 21st.

**Theft—Ownership of property —  
Hire and purchase.**

*Where a tradesman obtained delivery of goods upon the hire and purchase system, and left the Colony taking the goods with him with the intention of eluding his creditors, and was convicted of theft of the goods.*

*Held, that he was rightly convicted.*

This was an appeal from the conviction of the appellant by the Resident Magistrate of Cape Town, upon charges of fraudulent insolvency and theft.

The appellant carried on business as a general dealer at Woodstock, and under agreements with certain Cape Town firms obtained delivery of various articles, including graphophones, sewing machines and cash registers, with which he went to England, his object being to elude his creditors until such time as, he alleged, he was assisted by his wealthy mother in Sweden to pay his debts. He was, however, arrested at Southampton, and brought back to Cape Town.

The agreements above referred to were the ordinary hire and purchase agreements under which the appellant could pay the price of the goods in instalments but the property in the goods was to remain in the sellers until all the instalments had been paid.

A preliminary examination was taken against the prisoner, and the case was remitted to the Magistrate for trial, under Act 43 of 1885, 1st on a charge of fraudulent insolvency and 2ndly, on a charge of theft.

The prisoner was found guilty on both charges, and was sentenced to twelve months' imprisonment on the charge of fraudulent insolvency, and to six months' imprisonment on the charge of theft, both with hard labour, the latter sentence to take effect after the expiration of the first.

The appellant appealed on the ground that the ownership in the goods was in him.

Mr. Graham, Q.C., for the appellant: There was no *mens rea*. Appellant being a foreigner, thought he was owner of the goods and could deal with them as he pleased. *Regina v. Tobias* (4 Shell, p. 813); *Quirk v. Liddle* (3 Juta, 392); *Kryter v. Barry's Executors* (1879, 175); *Harvey and another*

*v. Martin* (5 H.C.R., 167); *Voet* (18, 3, 1); *Hunter's Roman Law* as to suspensive creditors

Mr. Ward for the Crown was not called upon.

De Villiers, C.J., in giving judgment, said: It is not denied that the prisoner appropriated the articles in question, and the agreements put in show conclusively that the real ownership of the property was vested in the firm who had hired the goods to the prisoner. He must have known that he was not the owner, and that he appropriated what did not belong to him. The appellant was therefore properly convicted of theft, and the appeal must be dismissed.

[Appellant's Attorneys, Messrs. Scanlen & Syfret]

## SUPREME COURT (IN CHAMBERS).

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice),  
the Hon. Mr. Justice BUCHANAN.]

CAPE TOWN AND DISTRICTS  
WATERWORKS CO. V. CLARE-  
MONT MUNICIPALITY AND  
OTHERS. } 1899.  
} Sept. 26th.

Arbitrator—Act 29 of 1898, section  
8—Appointment by Court.

This was an application under section 8 of Act 29 of 1898, for the appointment of a third arbitrator in certain proceedings about to be taken. The Claremont and Woodstock Municipalities have the right, ten years having elapsed, to acquire the whole of the applicant's property, the amount of purchase to be settled by arbitration. Originally Mr. G. W. Steytler was appointed by the Company, and the Council appointed Mr. J. G. Steytler, and suggested Mr. Carl Jeppe, of Wynberg, as the third arbitrator. Afterwards Mr. J. G. Steytler resigned on account of ill-health, and Mr. J. W. Jagger took his place. The third position was still open, and the applicant now proposed ex-Chief Justice Kotze to fill the vacancy. It also appeared that Mr. J. Rose-Innes, Q.C. and Mr. Abercrombie Smith were suggested,

The Claremont Council was in favour of Mr. Abercrombie Smith, as the question involved was one of account.

Mr. Innes, Q.C., and Sir Henry Juta for the applicants.

Mr. Searle, Q.C., and Mr. Graham, Q.C., for the respondents.

De Villiers, C.J., said: Both gentlemen suggested would make excellent third arbitrators, but the parties have not been able to agree, and as Judge in Chambers, I have now to decide who is to be appointed. In an important arbitration like this we want gentlemen with business capacity, persons who understand accountancy, and also someone who understands law. Looking at the arbitrators, I find that one of them, Mr. G. W. Steytler, is well-known to the Court as an excellent accountant. Mr.

Jagger, I believe, is an excellent business man; but the legal element is wanting, and in my opinion it would be best supplied by the appointment of ex-Chief Justice Kotze, who has had so much experience for so long a time as President of the Transvaal High Court. In that capacity he must have very often decided intricate questions of account, and he will be able to perform the duties entrusted to him. Mr. Abercrombie Smith would have been an excellent arbitrator also, and if the parties had accepted him no doubt he would have fulfilled his office in the same way that he fulfilled other duties. As I have to choose between the two, I consider that under the circumstances of the case, it would be better to appoint Mr. Kotze, costs to be costs in the arbitration.

The order was made accordingly.



# “Cape Times” Law Reports.

## CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

### SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN.]

ADMISSIONS. { 1899.  
Oct. 12th.

Mr. Uington applied for the admission of Mr. Edward Montagu Harcourt Stone as an attorney and notary public

The application was granted, and the oaths ordered to be taken before the Eastern Districts Court at Graham's Town.

Mr. Benjamin applied for the admission of Mr. Adriaan Jacobus van der Byl de Villiers, as an attorney and notary public.

The application was granted.

Mr. Buchanan applied for the admission of Mr. Peter David Bertram as an attorney and notary public.

The application was granted.

### PROVISIONAL ROLL.

SIDNEY V. SIDNEY.

Mr. Bisset applied for provisional sentence for the sum of £75, due for maintenance under deed of separation, less £5 paid on account.

Granted.

DE VILLIERS V. DE VILLIERS.

Mr. P. Jones applied for provisional sentence on a promissory note for £300.

Granted.

W. G. SCOTT V. PETERSEN AND WILSON.

Mr. P. Jones applied for an order for civil imprisonment against the defendants.

E 4

The defendant Petersen appeared in person, and said he could pay £4 to £5 per month.

An order for civil imprisonment was granted against both the defendants, the order against Petersen to be stayed pending payment of £5 per month, commencing from November 1.

SMITHERS V. KEARY.

Sir H. Juta applied for a decree of civil imprisonment on a judgment of £153 2s. 6d., to which a return of *nulla bona* had been made.

A decree was granted accordingly.

PETERS V. DAVIS.

Sir H. Juta applied for a decree of civil imprisonment on a judgment for £11 15s. 6d., given in the Resident Magistrate's Court at Wynberg. The defendant had, since the judgment, come to reside in Cape Town, and application was therefore made to the Supreme Court for a decree of civil imprisonment.

Decree granted.

COLONIAL INSURANCE CO. V. G. GOODWIN.

Mr. Buchanan applied for provisional sentence on a promissory note for £28, less £2 paid on account.

Granted.

GREENAWAY V. BEATHUNE.

Mr. Benjamin applied for provisional sentence on a judgement of the Resident Magistrate's Court at Colesberg, and asked that an erf at Colesberg, belonging to the defendant, might be declared executable.

Provisional sentence was granted as prayed.

—  
SCHOUT V. DIJKMAN.

Mr. P. Jones applied for a decree of civil imprisonment against defendant.

Granted.

—  
GARR V. DE KLERK.

Mr. P. Jones applied for provisional sentence on a mortgage bond for £350.

Granted, and the property specially mortgaged declared executable.

—  
VOSS V. FARMER AND ANOTHER.

Mr. Buchanan applied for provisional sentence for £85 on an acknowledgment of debt, signed by the defendant and his wife as surety, in favour of one J. J. Voss, who had duly ceded over and endorsed his claim to the plaintiff.

Mr. Buchanan pointed out that the wife, though she had renounced the *beneficium ordinis et divisionis*, had not renounced her privilege under the *Senatus Consultum Veltrianum*.

Buchanan, J., said that this made no difference, as the wife had not taken exception to the summons.

Provisional sentence was granted as prayed.

—  
PATTERSON AND OTHERS V. SCHOKMAN.

Mr. Close applied for the final adjudication of the respondent's estate as insolvent. The provisional order had been granted on Circuit at Oudtshoorn, by Mr. Justice Maasdorp.

Granted.

—  
MACKIE, DUNN AND CO. V. VIMPANY AND CO.

Mr. Howel Jones applied for the final adjudication of the respondents' estate as insolvent.

Granted.

—  
EDELMAN V. DE VILLIERS AND DE BRUYN.

Mr. De Waal applied for provisional sentence on a promissory note for £72 4s. 6d.

Granted.

—  
VOSS V. DU TOIT.

Mr. Benjamin applied for provisional sentence on a promissory note for £28, on which certain instalments had been paid, leaving a balance of £19 13s. 6d.

Provisional sentence granted for £19 13s. 6d., less £4 10s. paid since issue of summons.

—  
ROBERTSON AND CURREY V. SHINGLEK.

Mr. Buchanan applied for judgment under Rule 319, balance of an account rendered for £47 17s. 2d., being the balance of account for goods sold and delivered.

Granted.

—  
WHITE BROS. V. MACINTYRE.

Mr. Benjamin applied for judgment under Rule 329D for the sum of £25 19s. 2d., being a balance of an account, and interest.

Granted.

—  
REID V. WHALES.

Mr. Miller moved under Rule 329D for judgment for £150 for work done and material supplied.

Granted.

—  
THERON V. MOCKE.

Mr. Bisset moved under Rule 329D for an order compelling defendant to pass transfer to plaintiff of erf No. 53, situate at Beaufort West.

Judgment as prayed.

—  
HALL V. GUILD.

Mr. Miller moved for judgment under Rule 329D for the sum of £16 10s. for rent.

Granted.

—  
HULL V. JELlicORSE.

Mr. Miller moved for judgment under Rule 329D for £46 for rent.

Granted.

—  
SHANBAN V. PHILIP.

Mr. Buchanan moved for judgment for £41 5s., being brokerage at the rate of 2½ per cent. on the sum of £1,650, purchase price of a property situate in Longmarket-street.

Granted.

—  
IBERAIM V. PHILIP.

Mr. Buchanan moved for judgment for the sum of £1,650 due on the transfer and conveyance of certain property situate in Longmarket-street, which was duly tendered by plaintiff.

Granted.

KOCK V. BENNETT.

Mr. P. Jones moved for judgment under Rule 329D for £33 13s. 6d., the purchase price of butter sold and delivered.

Granted.

DE VILLIERS AND CO. V. SAMPSON.

Mr. Molteno moved for judgment under Rule 329D for £100, the price of two horses.

Granted.

VAN RYN WINE AND SPIRIT CO. V. DOSE.

Mr. Benjamin moved under Rule 329D for judgment for £329 14s. 3d., for goods sold and delivered.

Final judgment as prayed.

R. M. ROSS AND CO. V. SCHINDLER.

Mr. P. Jones moved under Rule 329D for judgment for £36 5s., for goods sold and delivered.

Granted.

SHERWOOD AND SAMSON V. BURROUGHS, BENNETT AND CO.

Mr. Upington moved for judgment under Rule 329D for £326 6s. 9d., for goods sold and delivered.

Judgment as prayed.

PURCELL, YALLOP AND EVERETT V. HOLLIDAY.

Mr. Miller applied for judgment for £329 15s. 6d., for goods sold and delivered.

Granted.

WOODHEAD AND SON V. ROSENTHAL.

Mr. P. Jones moved for judgment for £19 5s. 9d., goods sold and delivered.

Granted.

REHABILITATIONS.

*Ex parte* WILLIAM ROBERTSON.

Mr. P. Jones moved for the rehabilitation of the applicant,

The accounts showed a large preponderance of liabilities over assets. Applicant was a railway contractor, who had embarked on large undertakings, which resulted disastrously.

The application was refused, with leave to apply again in six months.

*Ex parte* ROBERT BENFIELD DE VILLIERS

Mr. De Waal applied for the applicant's rehabilitation, under section 117 of Ordinance No. 6, 1843.

The application was granted.

MINORS MCLAREN V. COLONIAL GOVERNMENT.

Mr. Molteno applied to have a decision of arbitrators in this matter made a rule of Court.

Mr. Ward, for respondents, consented.

Granted.

IN THE MATTER OF THE PETITION OF THE CONSISTORY OF THE DISSENTING DUTCH REFORMED CHURCH OF PHILIP'S TOWN.

Mr. Miller applied that a rule *nisi* under the Titles and Derelict Lands Act might be made absolute.

Granted.

SLABBER AND OTHERS V. SLABBER.

Mr. De Waal moved that a rule *nisi* should be made absolute. The rule called on respondent to show cause why a certain dividend due to the respondent in the insolvent estate of one Kotze should not be attached.

The rule was made absolute.

PIETERS V. PIETERS.

Mr. P. Jones, for the petitioner, moved for a decree of divorce. Personal service of the order for restitution had been effected on the respondent, the wife, at Dundee, Natal, and the condition as to a tender to pay her travelling expenses to Cape Town had been satisfied.

The rule was made absolute.

MILLIGAN V. MILLIGAN.

Mr. Buchanan moved for a decree of divorce on the ground of the defendant's failure to comply with the order for restitution.

Granted.

BLACK V. THE COLONIAL GOVERNMENT.

Mr. Buchanan moved to have an award relating to the expropriation of certain property made a rule of Court.

Mr. Ward, for the respondents, consented.

Granted.

## GULDEN V. GULDEN.

Mr. Benjamin moved for a decree of divorce owing to the defendant's failure to comply with the order for restitution.

The Court granted a decree of divorce, the petitioner to have the custody of the minor children of the marriage.

## DAWSON V. DAWSON.

Mr. Benjamin applied for leave to sue the respondent by edictal citation for divorce by reason of his malicious desertion.

The parties were married at Paddington, England, and came to the Cape in 1891. The applicant alleged ill-treatment and continued drunkenness on the part of her husband, the respondent. He frequently had delirium tremens, and was locked up in the Kimberley Goal. He was last heard of at Bulawayo.

Leave was given to sue by edict, interdict and notice of trial to be served with the citation, publication to take place in the "Government Gazette," and one Bulawayo paper. The return day was fixed for November 30.

## CASEY V STEVENS.

Mr. Bisset moved for the discharge of a rule *nisi*, which had previously been granted in favour of the applicant.

The application was granted.

## IN THE MATTER OF THE MINORS DUTHIE.

Mr. Ward applied on behalf of the executor in the estate of the late A. H. Duthie, who died at Kynsna, leaving a farm situated in that district to his minor children, for leave to sell certain rights to the Colonial Government. The Colonial Government desired to obtain the rights over certain foot-paths leading across the farm to the sea-shore, for use in connection with certain works erected on the coast to facilitate the saving of life at sea. The sum of £20 was offered as compensation for the use of the said paths.

The Court granted an order authorising J. J. Duthie, the executor of A. H. Duthie, to convey the rights over the said paths to the Colonial Government, the same to be registered as a servitude against the farm, and ordered £10 to be paid to the minors, and £10 to the other joint owners of the property.

## IN THE ESTATE OF THE LATE JOHN RICHARD BLACK.

Mr. Benjamin applied on behalf of the Board of Executors, Cape Town, for authority to incur certain expenditure. By the will of the late J. R. Black, all his immovable property was to remain in his estate under the control of the applicants, his executors, until the testator's youngest grandchild should attain majority. One of the buildings in the estate, at Simon's Town, was in a very dilapidated condition. It was now worth about £300, but the value would be considerably enhanced by rebuilding. There was a sufficient balance in the estate to enable the executors to rebuild. There were still four minor heirs in the estate. The heirs and the guardians of the minor heirs consented to the rebuilding of the property, and an order of Court was now asked for, authorising such re-building and the necessary expenditure.

Granted.

## IN THE ESTATE OF JOHANNES GERHARDUS LOMBARD STEYN UNDER CURATORSHIP.

Mr. Upton applied on behalf of the children of J. G. L. Steyn, all majors, for leave to sell certain property, situate at Malmesbury, which had been transferred to the said Steyn.

The Court held that there was not sufficient information before it to justify the order prayed for being granted, and refused the application.

IN THE ESTATE OF THE LATE GEORGE PALMER.—*Ex parte* GEORGE THOMAS PALMER AND JAMES MONTAGU STONE.

Mr. Bisset applied to have a rule *nisi* under the Titles and Derelict Lands Act made absolute.

Granted.

## IN THE ESTATE OF THE LATE CHARLES LEA ALLNUT.

Mr. Molteno, on behalf of the executors testamentary of the late C. L. Allnut, applied for leave to invest the sum of £1,800, which was left by the deceased, in certain eight houses situate at Three Anchor Bay, on behalf of the minor heirs of the deceased. The Master reported favourably.

Granted.



IN THE ESTATE OF THE LATE WILLEM  
JOHANNES VAN DER MERWE.

Mr. Benjamin applied, on behalf of the guardians of the minor children, for leave to take transfer of certain property in payment of a debt due to the estate.

The application was granted, subject to the approval of the Master.

IN THE ESTATE OF THE LATE R. J. UYS.

Mr. Miller moved for a rule for the cancellation of a certain mortgage bond to be made absolute.

Granted.

VAN RHYN V. VAN RHYN.

Mr. Molteno applied for leave to sue respondent, the wife, for divorce by edictal citation. The parties were married in 1888 at Amsterdam, in community, and there were five children of the marriage. The applicant came out to South Africa, went to the Transvaal, and had now been in Cape Town for 10 months. His wife refused to come out and join him.

Leave to sue by edictal citation was granted, the return day being fixed for December 12; personal service to be effected.

IN THE MATTER OF THE METROPOLITAN  
AND SUBURBAN RAILWAY COMPANY,  
IN LIQUIDATION.

Mr. Innes, Q.C., presented the second and final report of the liquidators of the above company.

The usual order for publication was made.

KNUPPEL V. KNUPPEL.

Mr. Benjamin moved for an extension of the return day in this case to January 12, 1900.

Granted.

IN THE MATTER OF THE PETITION OF  
DOROTHEA HENRIETTA BURCHELL.

Mr. Benjamin applied for leave to the applicant to transfer certain property without the assistance of her husband, to whom she was married in community, and who had deserted her 10 years ago. The property was a gift from the applicant's father, and had been acquired since the desertion.

Granted.

# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice),  
and Hon. Mr. Justice BUCHANAN.]

STEPHEN, FRASER AND CO. V. { 1899.  
PORT ELIZABETH HARBOUR { Oct. 18th.  
BOARD.

This was an application by the plaintiffs, Stephen, Fraser & Co. for the removal of the trial of the action from the Supreme Court to the Circuit Court to be held at Port Elizabeth on November 6.

The action was for the recovery of the sum of £68 for damage done to certain cargo in August, 1898. The defendants under their constitution had the right to land goods at Port Elizabeth from vessels there, and were engaged in landing certain goods belonging to the plaintiffs, when the lighter in which the goods were collided with another lighter and was thereafter left out at its moorings all night, while in the morning it was damaged by the fluke of the anchor. The damage to the goods was caused by the entrance of water into the lighter. It was alleged by the plaintiffs that there had been negligence on the part of the Board's servants in leaving the lighter out all night at her moorings after the collision. The defendants said there was no negligence on their part and the collision and the accident with the anchor were caused by perils of the sea, which relieved defendants of liability.

The applicants' affidavit stated that the ground for the application was the enormous expense of bringing to Cape Town some twenty-four or more witnesses, some of whom were gentlemen who would be greatly inconvenienced by having to leave their businesses. It was further pointed out that all the parties to the action resided at Port Elizabeth. In an answering affidavit by Mr. Dyason, a partner in the firm of attorneys representing the defendants, it was stated that this was really a test case, and although the amount in dispute was trifling the decision would be far-reaching and would decide claims to the amount of between £3,000 and £5,000. For those reasons it was desired to have the decision of the Supreme Court on the points raised in the case.

Mr. Innes, Q.C. (with whom was Mr. Benjamin), appeared for the applicants (the plaintiffs in the action).

Mr. Searle, Q.C., appeared for the respondents (the defendants in the action).

After argument.

De Villiers, C.J., said: The grounds on which the removal of the case to Port Elizabeth is now asked for are that there are a great many witnesses to be examined, and that it will be important for the judges to inspect the lighter. No doubt, the number of witnesses is a consideration, but then if there is to be an appeal, the expenses of such appeal will more than counterbalance the expenses of the witnesses. With regard to the inspection of the lighter, if a proper model of it is produced in court, I think the Court here will be in almost as good a position as the judges who inspected the lighter at Port Elizabeth. On the whole, as the matter stands, a question of law being involved, I think it advisable that the case should be continued in this court. The application will therefore be refused. Costs will be costs in the cause, because the Court will be in a better position to judge at the trial whether or not the case should have been heard before the Circuit Court at Port Elizabeth.

Buchanan, J. concurred.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

KAMP V. HUDSON.

1899.  
} Oct. 12th

Provisional sentence — Promissory notes—Partnership—Defence.

This was an application for provisional sentence upon two promissory notes for £813 14s. and £318 4s. respectively.

The defendant filed an affidavit to the effect that on April, 1, 1898, he entered into partnership with the plaintiff for the purpose of importing produce from Australia for sale at Bulawayo. The plaintiff was to finance the business, and was to receive three-fourths of the profits, defendant receiving one-fourth, and the losses were to be borne in the same proportion. After detailing the steps taken in connection with the partnership, and subsequently when defendant and another carried on the business, he alleged that the balance of account in favour of plaintiff was £17 6s. 8d.

The plaintiff in an answering affidavit, denied the allegation as to there being an agreement of partnership.

Mr. Howel Jones for the plaintiff.

Mr. Graham, Q.C., for the defendant.

After argument,

De Villiers, C.J., said: The Court is of opinion that the weight of the evidence is in favour of the plaintiff, who produces the promissory notes, and the defence is inconsistent. Provisional sentence will be granted, but of course it is open to defendant to set up his defence in the ordinary way.

[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

IN THE INSOLVENT ESTATE OF PARKER. { 1899.  
Oct. 13th.  
Nov. 2nd.

Insolvent Ordinance, section 121—  
Residue of estate—Prescription.

*Upwards of thirty years after the surrender of an insolvent estate an asset of the estate, which had not been mentioned by the insolvent in his schedules, was discovered and sold.*

*Held, that his legal representatives (he having died in the interval) were not entitled to claim the proceeds or any part thereof until payment of all the claims which had been proved.*

This was an application for a rule nisi for the payment of certain moneys to the heirs of the late George Francis Parker to be made absolute.

The petition of Bartholomew Henry Parker, upon which the rule was granted set out:—That he was one of the children of the late George Francis Parker.

That the said George Francis Parker surrendered his estate in 1864.

That the trustee realised all the assets of the estate, except a certain piece of land situate in the Cape Flats, and filed with the Master an account of the liquidation of the estate.

That the piece of land in question of which the insolvent was at the date of his surrender possessed, was at that date practically valueless, and the petitioner believed that the trustee virtually abandoned it as being not worth the cost of realisation.

That the said land had recently been sold in execution of an order of Court to satisfy

the rates thereon, and the balance of the proceeds amounting to £1,026 16s. 6d. had been paid into the hands of the Master.

That the creditors of the insolvent estate whose claims were not paid in full were Joseph Maynard, J. C. Berrangé, H. T. Bam, G. F. Parker, jun., J. and G. Smithers, J. T. Pocock & Co. and Marsh & Sons.

Of the said creditors, the two first mentioned were dead, H. T. Bam was unknown to the petitioner, and the firm of J. and G. Smithers had long since been dissolved.

The trustee of the insolvent estate was dead. Although considerable publicity had been given to the proceedings in connection with the sale of the land, no claim had been made by any creditor of the said G. F. Parker to the proceeds and no claim had been made to the balance of the proceeds since it had been paid to the Master.

The prayer was for an order upon the Master to pay the said balance to the heirs of G. F. Parker or to such person as might be appointed as executor of his estate, or for other relief.

T. J. O'Reilly, executor dative in the estate of the late George Smithers, jun., now filed an affidavit setting out that he had perused the proceedings in the Master's office in the insolvent estate of G. F. Parker and found that a claim was proved by the firm of J. and G. Smithers for £606 11s. 9d. on which no dividend was paid.

That no land answering to the description of the property in the present petition mentioned was referred to or mentioned in the insolvent's schedules or the trustee's reports or proceedings in the estate.

That there was nothing in the reports or proceedings to warrant the statement of the petitioner that the trustee virtually abandoned the land as not being worth the cost of realization. On the contrary, the trustee, on the 11th June, 1866, certified that there were no further assets to meet a deficiency in the estate of £975 11s. 7d. the presumption being that he was not aware of the existence of the said piece of land.

That the deponent was not aware of the sale of the property referred and his attention was first directed to the claim now made by the service upon him of the order of Court.

From the further affidavits filed it appeared that George Smithers jun. was a partner of the firm of J. and G. Smithers from about 1863 and that after the deaths of the other two partners about 1876, he took over all the

assets and liabilities of the firm and continued to carry on the business under the same style.

Mr. Benjamin appeared for the applicant.

Mr. Buchanan for the respondent: Title by prescription cannot be declared except upon an action being brought. Prescription does not run against an insolvent estate. *Encyclopædia of the Laws of England* (vol. 7, p. 478.) Where it is due to fraud it does not run until the fraud is discovered. Here it was owing to the insolvent's wrongful conduct. *Ex parte Ross and Hooper* (2 Glyn and Jam., 46.) Title by prescription is founded on actual possession and there is no evidence of such possession.

Mr. Benjamin: The statute of Limitations is very different from the Colonial law of prescription. The former only bars the remedy. Colonial law extinguishes the right. Thirty years having passed since the sequestration of the estate the creditor's right is extinguished.

[De Villiers, C.J.: The land was derelict all that time.]

It was registered in the name of the insolvent.

[Buchanan, J.: It was sold under the Derelict Lands Act.]

Even if there were *malu fides* on the part of the insolvent in not bringing the property up in his schedules, the prescription would not be barred thereby. Neither *bona fides* nor *justus titulus* is required. *Burge's Colonial Laws* (vol. 3, p. 26); *Voet* (41, 3, 7). By section of 98 of the Insolvent Ordinance the trustee is required to sell the property at once. If he does not and it remains in the possession of the insolvent for 30 years the latter acquires the title.

*Postea* (November 2nd.)

De Villiers, C.J., said: This is an application by one of the heirs of the late G. F. Parker, for an order declaring that the said heirs are entitled to the balance of the proceeds of a sale of certain land recently sold in execution under the Derelict Lands Act. At the time of such sale the land stood registered in the name of Parker, but he had long since died after having surrendered his estate as insolvent. In his schedules he did not, as he ought to have done, specify the land in question as part of his property, and the trustee of the insolvent estate does not appear to have been aware of the land being an asset of the estate. Long after the death of the trustee and more than thirty years after the date of the proofs of debts made by the creditors, the land, which was

derelict, was sold under Act 28 of 1881, for the payment of Divisional Council rates which were overdue. After satisfying the claim there remained a balance of £1.026 16s. 6d., which was paid to the Master of the Supreme Court, but is now claimed by the applicants. The respondents, as heirs of the creditors who had proved upon the estate, contest this claim and contend that they are entitled to receive payment of the debts duly proved in the estate. The applicant's claim is founded on the 12<sup>th</sup> section of Ordinance 6 of 1843, which enacts that any residue of an insolvent estate which may remain after payment of all claims thereupon, shall be paid to the insolvent or his legal representatives. Under such claims must be reckoned interest in terms of the concluding portion of the 33<sup>rd</sup> section. The only question to be determined is whether the debts which have been proved can be regarded as claims in terms of the 12<sup>th</sup> section, seeing that more than thirty years have elapsed since the proofs of debt were admitted. In my opinion this question must be answered in the affirmative. The ownership in the land became vested in the insolvent estate, and the only condition on which the heirs of the insolvent can claim back the ownership or the proceeds of the land, is that the claims proved be first satisfied. The burthen of proving their title lies upon them and their title is not proved until the condition of paying the claims is satisfied. Independently therefore of the general question of prescription, I am of opinion that the plaintiffs are not entitled to receive any portion of the proceeds until the claims of the creditors have been satisfied, but the costs of this application may fairly be paid by the estate. A trustee will have to be appointed for the purpose of distributing the money.

Buchanan, J., said: The property, the proceeds of which is the subject of this motion was at the time of the sequestration of Parker's estate registered in the name of the insolvent. It was not realised by the trustee of the estate, as its existence was apparently unknown to him, the insolvent not having brought the property up in his schedules. The insolvent having died, the applicant as his heir now claims the proceeds on the ground that prescription has run since the sequestration and since the confirmation of the liquidation account in the estate. The foundation of this claim is based solely on the fact that the property remained registered in insolvent's name. No

physical possession was had of the property. It remained unoccupied, and has now been sold under the Derelict Lands Act. By the Insolvent Ordinance (No. 6, 1843, section 46), on the sequestration of his estate all Parker's property became vested, first in the Master, and then on appointment in the trustee of the estate. Though registered in insolvent's name in the Deeds Registry, he was by operation of law divested of the property, and could no longer deal with it, or pass title to it. The trustee, and he alone, could give a valid transfer. The onus therefore is upon the applicants to show a subsequently acquired right. It is said there was an abandonment of the property by the trustee. The circumstances of the case do not justify such a view being taken of the facts. Moreover, as already remarked, there was no taking possession of the land after the sequestration by the insolvent or by anyone on his behalf, upon which to found a right by prescriptive user. This is not one of those rare instances in insolvency where the creditors have been paid in full, and the insolvent is entitled to the surplus of the estate. And even where there is such a surplus, it is doubtful whether the insolvent is entitled to receive the balance until he has obtained his discharge. (See *Liquidators of Union Bank v. King's Trusts*, 10 Juta, 101.) It is not shown that Parker was ever granted his rehabilitation, but whether he was or not, there is the fact that the trustee did not hand this property over to him. The trustee would not be justified in doing so until all the creditors had been paid. There is nothing, therefore, which can be laid hold of to show that Parker, after the sequestration of his estate, in any way acquired or attempted to acquire a right to this property. The fact that the property was not transferred out of his name gave him no such right, as it was no longer vested in him. The insolvent estate not having been divested of the property, is entitled to receive the proceeds, which will now be administered according to law. The English case of *Ross v. Hooper* (2 Glyn and Jam., 46), cited on behalf of the creditors in support of the view that prescription does not run against a trustee, is not directly in point here, for that was a case between the trustee and the *cestui que trust*. This is not a question between the trustee and the creditors. It may well be that the Statute of Limitations might apply where the parties did not occupy any fiduciary relationship.

It is unnecessary, however, to pursue that question. In this matter the applicant has not established his claim: but while refusing the application, costs may well be allowed to come out of the fund, for the respondents admit that, but for the action taken by the petitioner, they would have remained ignorant of the existence of the moneys.

Mr. Buchanan applied for an order on the Master to have a trustee appointed.

The Court granted an order that the Master be directed to take proceedings for the election of a trustee, the costs of this application also to come out of the estate.

[Applicant's Attorney, Messrs. W. E. Moore & Son; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

STORMONT AND OTHERS V. } 1899.  
MZIMBA AND OTHERS. } Oct. 12th

Contempt of Court—Costs.

This was an application made by the acting chairman and members of the Deacons' Court of the native congregation at Lovedale of the Free Church of Scotland for the personal attachment of the respondents for contempt of Court in not complying with its order. On February 28, 1899, an order of the Supreme Court was obtained declaring that the applicants were entitled to all moneys, books, documents, and all assets belonging to the congregation, the defendant Mzimba was to pay over £388 traced into his possession, and Cala had to pay the amount of £973.

The defence set up by the respondents was that the books, documents, &c., were not in their possession, but in the possession of one Makatiele. As to the £973 traced into the possession of Cala, it was stated that that had been divided among the members of the congregation previous to the order of the Court.

Mr. Innes, Q.C., appeared for the applicants, and Mr. Graham, Q.C., for the respondents.

Mr. Innes said Mzimba had paid the £388 and the costs of the action, and in view of the affidavits now put in he could not ask them to commit Cala for contempt of Court, he having handed over the money to be divided among the congregation, while it was now shown that the books, &c., were not in the possession of the respondents. He pointed out, however, that the applicants had been obliged to come into court to get the real truth as to where the books were, and there-

fore at all events they should not pay all the costs. Under the circumstances he asked the Court to consider whether it could not grant a rule calling upon Makatiele to show cause why the books and documents in his possession should not be delivered up.

De Villiers, C.J., said that the rule would be discharged and a rule *nisi* granted calling upon Makatiele to show cause by the first day of the next term why all books, papers, and other documents in his possession belonging to the late congregation at Lovedale of the Free Church of Scotland should not be delivered up; the rule to act as an interdict restraining him from parting with the books, &c. The question of the costs of the present application would be considered when the matter was again before the Court.

NDABAZANA NTAPO V. NGUHL- } 1899.  
LENI AND THE SURVEYOR- } Oct. 13th.  
GENERAL. } 1900.  
Feb. 28th.

Grant—Error in name of grantee—

Procedure.

This was an application for an order from the Court authorising the Registrar of Deeds, King William's Town, to amend the title deed of a certain piece of land, being Lot No. 235, situate on the Wolf River, division of King William's Town, at present registered in the name of the first respondent, by the substitution of the name of the applicant in place of that of the respondent, the grounds of such application being that the land was purchased by the applicant and not by the respondent, and that the name of the respondent was erroneously inserted in the said title deed as the owner of the said lot.

The applicant alleged in her petition that she was married many years ago to one Ntapo according to native custom.

That thereafter Ntapo deserted her, and since his desertion she had had to provide for herself.

That in the year 1871, she purchased from the Colonial Government the piece of land in question, as per deed of grant, dated 4th December, 1871.

That she handed the money (£13 10s.) for the purchase of the land to the respondent, her brother, who was then about sixteen years old, with instructions to hand the money to the Resident Magistrate of King William's Town, and to bring her the deed of grant.

That thereafter the respondent did hand her the deed of grant, and it has remained in her possession up to the present time.

That in February, 1899, the respondent first demanded from her the delivery of the title deed, and thereafter, in March, 1899, issued a summons against petitioner for delivery of the said deed of grant in the Court of the Acting Resident Magistrate, Keiskama Hoek, which summons was dismissed through want of jurisdiction of the said Court.

That she first learned that Nguhleni's name was inserted in the said deed of grant and not her own on receipt of the demand above mentioned, namely, in February, 1899.

That the insertion of the name of Nguhleni, instead of that of the petitioner is an error, that the land was purchased by the petitioner with her own money, that she has resided thereon continuously since the said purchase, and has had possession of the deed of grant thereof.

Mr. Graham, Q.C., appeared for the applicant.

The Court decided that notice must be given to the Surveyor-General, and the application could then be renewed.

*Postea* (28th February, 1900.)

The application was renewed.

The Surveyor-General filed an affidavit in which he alleged that all original grants of land in this colony are registered in the office of the Surveyor-General of the Colony, and the Registrars of Deeds have no control over such deeds.

That he was not aware of any case in which the Court had ordered the amendment of a grant made by the Crown.

That the usual course which is adopted when errors are made in grants of land is to apply to His Excellency the Governor, who, if satisfied that a *bona-fide* error has been made, sanctions such amendment as may be necessary.

That in the limited time at his disposal he had been unable to trace the records of the grant in question, and therefore could not say whether the applicant had a good claim for rectification or not, seeing that the transaction took place under the Kaffrarian Land Regulations, and dates twenty-nine years back.

He submitted that it was not desirable for the Court to order the amendment of a title deed until the ordinary and usual methods of procedure had failed.

Mr. Howel Jones was heard in support of the application.

Mr. Sheil, Q.C., for the Surveyor-General.

The Court ordered the application to stand over *sine die* until application had been made to the Governor, as suggested by the Surveyor-General.

[Applicant's Attorneys, Messrs. Innes & Hutton.]

HAUMAN V. THE PAARL LICENSING COURT AND WARD. { 1899.  
Oct. 13th.

Liquor Licence—Cancellation—Act 25 of 1891, section 13.

*Where a memorial under section 13 of Act 25 of 1891 was presented to a Licensing Court, and a licence granted, upon its subsequently appearing that certain signatures appeared improperly upon the memorial and that without these, there was not the majority required,  
The licence was cancelled.*

This was an application on notice to the respondents, calling upon them to show cause why the proceedings of the Licensing Court held on the 6th September, 1899, as regards the granting of a licence to the second-named respondent should not be declared null and void, and the licence cancelled.

The affidavit of Johannes Stephanus Hauman, the applicant, set out that he was a landowner at Frenchhoek, in the Paarl division, a Divisional Council voter, and a member of the Licensing Court. At the meeting of the Paarl Licensing Court last September an application was made by the respondent Ward for a retail liquor licence for the municipality of Frenchhoek, and granted. There were 102 voters in the Municipality of whom one was dead, and a petition signed by a majority of them—52—against the licence was presented but not allowed, as not being in strict compliance with section 24 of Act 28 of 1883, owing to an irregularity, the places of residence of the signatories not being appended. On the memorial in favour of the licence there were 77 signatures, but of these 10 were disallowed on the ground that they were not registered for the municipality. It was alleged that a number of other signatures were not properly obtained. There appeared the names of five persons who declared that they had never signed the memorial nor authorised any person to do so.

on their behalf. The names of fourteen other persons who could not write appeared on the memorial, and it was alleged that these persons had not made a mark on the paper and had it duly witnessed by a registered voter as required by law but had simply touched the pen with which their names were added to the memorial. Eighteen people, who stated that they had been misled in signing the memorial, they having understood that it was in a hotel without a liquor licence, had signed another memorial withdrawing their names, but owing to some informality the Licensing Court had held it could not consider these. There were objections to other names on the memorial, bringing the number of signatures admitted down from sixty-seven to twenty-five.

Affidavits in support of the applicant's affidavit were filed.

Mr. Innes, Q.C., for the applicant, referred to Act 25 of 1891, section 13, sub-section 3. Also Act 28 of 1883, section 24, and Act 25 of 1891, section 13, sub-section 6. The position of persons who cannot write was considered in *Potgieter v. Barkly West Licensing Court* (7 H.C.R., 147, at p. 158).

Mr. Ward appeared on behalf of the Licensing Court to submit to judgment.

The respondent Ward was unrepresented.

De Villiers, C.J., in giving judgment in favour of the applicant, said it appeared to him that that licence had been obtained in a scandalous manner. It was clear that after deducting the names improperly appearing on the memorial, there was not the majority of voters required, and the application for the cancellation of the licence would be granted, with costs against the respondent Ward.

[Applicant's Attorneys, Messrs. Walker & Jacobssohn; Attorneys for the Licensing Court, Messrs. J. & H. Reid & Nephew.]

#### SEARLE V. WILLIAMS.

This was an application by the respondent, Searle, for the discharge of the petition lodged by the petitioner Williams in connection with the recent Parliamentary election at Port Elizabeth.

Mr. Innes, Q.C., appeared in support of the application, and Mr. Benjamin appeared on behalf of Williams, and stated that he had intended to withdraw the petition.

Leave was given to withdraw the petition. No order was made as to costs.

REGINA V. MULLER. { 1899.  
Oct. 14th.

Act 27 of 1882, section 10—Abusive language.

*Where a person whilst within his own house uttered abusive language to another person within the same house,*

*Held, that he was not guilty of a contravention of section 10 of Act 27 of 1882.*

This was an appeal from a sentence passed upon the appellant by the Assistant Resident Magistrate of Queen's Town at a Court held by him at Sterkstroom on the 18th August, 1899.

The appellant was charged with contravening Act 27 of 1882, section 10, in that upon or about the 15th day of August, 1899, and at or near Sterkstroom the said Muller did wrongfully and unlawfully use threatening, abusive, or insulting words or behaviour, to wit, shouting "You b—— bitch" and "You b—— whore," with intent to provoke a breach of the peace, or whereby a breach of the peace may have been occasioned in the market square, it being a public place.

The appellant pleaded not guilty, but after evidence had been led he was found guilty, and sentenced to pay a fine of £3, with the alternative of thirty days' imprisonment with hard labour, and further ordered to find two sureties in £20 each to keep the peace for three months.

The section under which the appellant was charged was as follows: "Any person who shall use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, in any street, road, public place, or licensed public-house, shall, upon conviction, be liable to a penalty not exceeding £3, &c., &c."

The ground of the appeal was that the words complained of were used by Muller upon private property, and that, therefore, no offence had been committed.

The witnesses for the prosecution stated that they were standing in front of the Court-house, which abuts upon the public square, and Muller's house also abuts upon the square. They heard Muller using the words complained of, the sound apparently coming from his garden. Muller appeared to be swearing at some person inside the house. Afterwards Muller came on the verandah

swearing and shouting, also apparently at someone inside the house. The words could be heard across the square. Accused's wife gave evidence and said that she and her husband had a quarrel, during which he called her names. That was inside the house.

Mr. Buchanan, for the appellant, referred to *Regina v. Meyer* (1877, 19); *Regina v. Fortuin* (1 E.D.C., 80); *Regina v. Williams* (1 E.D.C., 361); *Regina v. Stephenson* (2 H.C.R., 428); *Regina v. Parish* (3 H.C.R., 369); *Regina v. Mostert* (4 Juta, 50); *Regina v. Brown* (7 Juta, 101); and *Regina v. Meitje Ross* (3 Scheil, 155). In all those cases the Court held that the words were not an offence unless uttered in a public place. The furthest extent to which the Court has gone was in *Regina v. Brown*, where it was held that a person who standing on his own property used abusive words towards a person standing in the street committed an offence.

Mr. Ward for the Crown: If words which fall under the category described in section 10 of Act 27 of 1882 are used in such a way that they can be heard in a public place that is a contravention of the Act irrespective of the place where the words are uttered.

De Villiers, C.J., said: The Court went very far indeed in the case of *The Queen v. Brown* in holding that a person standing on his own property, and using abusive language towards another person standing in a public place was guilty of a contravention of section 10 of Act 27 of 1882. The ground of that case was that the tendency of such language would be to provoke a breach of the peace, one of the persons being in the public street. The present case is different, because the person uttered the words in his own house, although he seemed at one time to have been under the verandah, while in both instances the person to whom they were addressed was inside the house, and the words were therefore not calculated to lead to a breach of the peace, which was the sole mischief the Legislature intended to prevent. Under those circumstances, I am of opinion that the Magistrate was wrong, and that the appeal must be dismissed.

Buchanan, J., concurred.

Appellant's Attorney, Gus Trollip.

*Ex parte CRAMER, Re* } 1899  
TABORYSKI V. HENCKELS } Oct. 14th.  
AND CO.

Attachment *ad fundandam jurisdictionem*—Discharge—Bills of lading—Bills of exchange.

D. obtained an order for the attachment of goods *ad fundandam jurisdictionem* in an action against H. C. applied for the discharge of the writ on the ground that he had become security for £70 to the manufacturers of the goods and was the owner thereof.

The Court ordered the attachment to be discharged unless the plaintiff paid £70 to the Registrar within seven days.

This was an application by F. L. Cramer, on notice to the plaintiffs in the action between Taboryski and Henckels & Co., to have the goods referred to in the order of Court of the 11th August declared the property of F. L. Cramer and to have the said order cancelled and the writ attaching the goods to found jurisdiction set aside.

The affidavit of A. P. E. Matthews, manager of the Cape Town Branch of the National Bank of the S. A. Republic, set out:

That about August 1st last the bank received a communication from the Hamburger Filiale der Deutschen Bank enclosing a draft drawn by Henckels & Co. upon Taboryski & Co. for acceptance, together with the bills of lading and certain goods for which the draft was evidently the purchase price.

That deponent caused the draft to be presented for acceptance, but the drawers declined to honour it, and he thereupon referred in the ordinary course to Hamburg for instruction.

That about the 11th August, the Sheriff presented him with a writ authorising him to attach and keep possession of the goods covered by the bills of lading and deponent thereupon handed them over to the Sheriff and reported what had transpired to Hamburg.

That about the 25th September, he received a reply from Hamburg from which it would appear that the goods were the property of one F. L. Cramer, to whom the documents had been endorsed by Henckels & Co. Deponent annexed the letters received from Hamburg.



That leave was reserved to the bank by this Court to move on notice to set aside the attachment and deponent had given instructions for such application to be made.

Jacob Taboryski, the plaintiff in the action, filed an affidavit in which he stated that he believed F. L. Cramer was the manager for Henckels & Co., and he annexed a letter signed by him on behalf of the firm stating that they had ceded all documents and bills to the said Cramer, who held himself responsible to the manufacturers of the goods for the order and requested the deponent to honour the firm's bill for £70 13s. 9d. at 90 days' sight. He annexed another letter of the same date from Cramer himself informing deponent that he would pass the bills of the firm drawn on deponent for £70 13s. 9d. through the Hamburg branch of the German Bank there, and that the bank had instructions to advise its Cape Town correspondent to give up the documents on payment.

Deponent alleged further that all his dealings had been with Henckels & Co., and he had not known Cramer in any way.

Mr. Benjamin for the applicant: If the *dominium* or the *jus dispositionis* of the goods had *bona fide* passed to Cramer they could not have been attached at the suit of Taboryski against Henckels. But on the acceptance of the draft, the *jus dispositionis* passes to the consignee. *Benjamin on Sale* (Fourth Edition, pp. 369, 371). As the bill of exchange was transferred to Cramer the bill of lading was transferred too.

[De Villiers, C.J.: It is important to have the bill of lading before us but we have not got it.]

*Benjamin on Sale* states that it usually passes with the bill of exchange, and that was endorsed to Cramer. *Shepherd v. Harris* (L.R., 5 Eng. and Jr. App., p. 116).

Sir H. Juta for the respondent Taboryski: The argument for the applicant confuses *dominium* with the right to obtain the money for the goods. The *dominium* remains in Henckels & Co. Cramer may possibly have a preferent right to the purchase price, which he can put up in action, but he has not the ownership of the goods. I do not admit any preference. The rights between the various parties can only be determined in action, but it is the ownership *prima facie* which determines the question of attachment *ad fundandum jurisdictionem*.

De Villiers, C.J., said: It is impossible to make a final order now. No doubt it looks strange that the manager of Henckels' business should become security, in the way

stated, to the manufacturers, still the statements made can be verified. The only way for the Court to meet the difficulty is by giving an order discharging the attachment unless the plaintiff shall within seven days pay into the hands of the Registrar of the Supreme Court the sum of £70 13s. 9d. as security for Cramer's claim, and then if the goods should be accepted and sold the proceeds will be paid to the plaintiff.

An order to the above effect was made, costs to abide the result.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinac; Respondent's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA V. H. JOHNSON. { 1899.  
Nov. 1st.

Buchanan, J., said: This case has come before me for review, as Judge of the week. The accused, H. Johnson, was charged before the Resident Magistrate of Victoria West with giving a Kafir a glass of brandy, which he had procured as agent of the said native, and with thereby contravening Act 28 of 1898. The proceedings generally were in order, but the Magistrate passed sentence of £10 fine, with the alternative of six months' imprisonment with hard labour. Now the Act imposes, as the highest penalty, a fine of £10 or six weeks' imprisonment with hard labour. The Magistrate has therefore exceeded his jurisdiction in inflicting an alternative of six months. The Court will therefore reduce the alternative sentence to six weeks, and the accused will have to pay a fine of £10, or go to prison with hard labour for the term of six weeks.

## ADMISSIONS.

*Ex parte* NIGHTINGALE.

Mr. Innes, Q.C., applied for the admission of Mr. Lacy Gamaliel Nightingale, as an advocate.

The applicant was admitted, and took the oaths.

*Ex parte GOCH.*

Mr. Buchanan moved for the admission of Mr. Samuel Frederick Goch as an advocate.

The applicant was admitted, and took the oaths.

*Ex parte DELL.*

Mr. McGregor moved for the admission of Mr. James Douglass Dell as an attorney and notary.

Granted

*Ex parte GROENEWALD.*

Mr. Buchanan moved for the admission of Mr. Cornelius Nicholas Groenewald, as attorney, notary and conveyancer.

Granted.

*Ex parte GRIFFITHS.*

Mr. Miller moved for the admission of Mr. Fred. James Griffiths as an attorney.

Granted.

*Ex parte MOODIE.*

Mr. Buchanan moved for the admission of Mr. William McIntyre Moodie as an attorney and notary.

Granted.

*Ex parte DELL.*

Mr. Benjamin moved for the admission of Mr. Arthur Edward Dell, as an attorney and notary.

Granted.

## REHABILITATIONS

Mr. Benjamin applied for the rehabilitation of Charles Frederick Beer, formerly trading as C. F. Beer & Co.

Granted.

Mr. Nathan applied for the rehabilitation of Frans Kuffner, formerly trading as Kuffner and Malzer.

Granted.

## PROVISIONAL ROLL.

## WHITE BROS. V. DUNCAN BROS.

Mr. Benjamin moved for the final adjudication of the respondents' estate as insolvent.

Granted.

## DYER AND DYER V. WHELAN AND ANOTHER

Mr. Nightingale moved for the final adjudication of the respondents' estate as insolvent.

Granted.

## NIEUWENHUISEN V. VLOK.

Mr. Benjamin applied for provisional sentence on two promissory notes signed by defendant for £88 and £48 respectively, with interest.

Granted.

## CONRADIE V. SWANEPOEL.

Mr. Howel Jones moved for provisional sentence on a mortgage bond for £400, with interest at the rate of 6 per cent. from October 1, 1899.

Granted.

## SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY V. DU TOIT.

Mr. Howel Jones applied for provisional sentence on a bond for £1,250, with interest at 6 per cent. There were two obligors on the bond, but one of them, Theron, was insolvent, and judgment was now prayed against Du Toit alone.

Granted, the property specially mortgaged being declared executable.

## RAPOHL V. KAISER.

Mr. Currey moved for provisional sentence on a bill of exchange for the sum of £36 2s. 9d.

Granted.

## CUNNINGHAM V. VOSS.

Mr. De Waal moved for provisional sentence on an acknowledgment of debt for £100, dated June 5, 1895.

Granted.

## WILEY AND CO. V. RUCK.

Mr. Bisset moved for judgment under Rule 329D for the sum of £122 12s. 2d., due for goods sold and delivered.

Granted.

## RILEY V. RILEY.

This was an action for divorce, brought by the husband, R. E. Riley, against his wife, A. Riley, by reason of the defendant's alleged adultery with one Bosco.

Mr. Buchanan appeared for the plaintiff. The defendant was in default.

Richard Edward Riley, the plaintiff, said he was a mason. He married the defendant on December 14, 1891, at Mossel Bay. There were no children of the marriage. The parties resided at various places in the Cape Colony, and ultimately went to Johannesburg, whence they returned to Mossel Bay. His wife then left Mossel Bay, and came to Cape Town on a visit. Owing to certain information received, plaintiff's suspicions were aroused. He heard that his wife passed under the name of Madame Cohen. Plaintiff came to Cape Town, and saw one Savage, a boarding-house keeper. He found out that one Bosco, known as "Professor Bosco," lived at the place. He saw certain boxes, which boxes had been left with Savage. These were his boxes, and were in his wife's possession when she left Mossel Bay. He gave Savage a letter for his wife, and received a reply. His wife admitted in her letter, dated November 28, 1897, that she had gone to the bad. He had given her no cause of complaint. He produced a photograph of his wife.

Harry Savage, importer, said he kept a boarding-house in Cape Town. In 1897 Professor Bosco came to his place. He came at eight in the morning and asked if witness had room for a married couple. Bosco and a certain woman took and occupied a room. The woman was the same person appearing on the photograph produced by plaintiff. The persons occupied the room for about a week.

The Court granted a decree of divorce as prayed.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn.]

STADLER V. STADLER. { 1899.  
Nov. 1st.

This was an action for divorce, brought by the wife, J. L. Stadler, against her husband, by reason of the defendant's alleged adultery with one Minnie Crathorn.

Mr. De Waal for plaintiff; defendant in default.

Johanna Louisa Stadler said she resided at Salt River. She married the defendant in community on October 26, 1886. They lived happily together at Salt River until November, 1891, when her husband deserted her. Later on she heard that he had been living with a woman named Minnie Crathorn. He lived with Crathorn until May, 1899, when Crathorn died. In July last defendant wanted witness to join him,

but she refused. He had given her £3 in al since his desertion. There were two children of the marriage, aged 11 and 9. She claimed the custody of the children.

Martha Maria Jacobs said she resided at Cape Town. She knew the defendant and also Minnie Crathorn. They had cohabited together, and passed as husband and wife. Crathorn had three children, of whom defendant was the father. Witness knew that defendant was married to plaintiff.

Daniel White said he lived at Cape Town, and knew the defendant. He corroborated the evidence of Mrs. Jacobs.

A decree of divorce was granted, the plaintiff to have the custody of the children.

[Plaintiff's Attorney; D. Tennant.]

#### KORLER V. KORLER.

This was an action for restitution of conjugal rights, or, failing that, for divorce.

Mr. Close appeared for the plaintiff: the defendant was in default.

Dina Dora Korler, the plaintiff, said she was married to August Karl Korler, the defendant, in the English Church, Port Nolloth, on July 30, 1892. After the marriage the defendant took to drink and ill-treated her. They then went to her father's farm, in the district of Clanwilliam. There they stayed some time, and then defendant left her, in order to go and make his fortune. This was in April, 1896. The parties corresponded for some time. The defendant then asked plaintiff to join him in German Namaqualand. On account of the Witbooi War she was unable to go. Defendant sent her £33 wherewith to pay his creditors. He continued to write for about six months, and then ceased. She wrote to inquire about him and got no reply. She then advertised in the local newspapers, and was finally to communicate with her attorneys. The defendant's address was given her as the Post Office, Roselank. She wrote to that address, but received no answer. Her letters were not returned. She had heard nothing from defendant since the end of 1896. There was one child of the marriage, who was now dead.

A rule nisi was granted calling on the defendant to return to or receive his wife on or before January 15, 1900, or show cause on February 1, 1900, why a decree of divorce should not be granted, failing which the decree to be made absolute.

[Plaintiff's Attorney, D. Tennant.]

## GENERAL MOTIONS.

HILDEBRAND V. THE DIVISIONAL COUNCIL  
OF KING WILLIAM'S TOWN.

This was an application for the discharge of an order of Court granted on July 12th, 1899, in terms of section 2 of Act 23 of 1891, whereby special leave had been given to the applicant to sue the respondents in an action for £500 damages on deposit of certain security. Since the order had been made no further steps had been taken by the applicant, and no security had been deposited. Notice of application had been given to the respondents.

Mr. Graham, Q.C., appeared for the applicant: There was no appearance for the respondents. The order was discharged as prayed.

WINTERBACH V. HEATLIE AND { 1899.  
ANOTHER. { Nov. 1st.

Jury trial—Act 23 of 1891, sections 6, 7.

*When an application is made under section 7 of Act 23 of 1891, for leave to have a case tried by jury good cause for the application must be shown.*

This was an application by the plaintiff in the action for leave to have the action tried by a jury, and for a date to be fixed for such trial.

The affidavit of the applicant's attorney set out that plaintiff claimed the sum of £1,000 as and for damages for an assault. The defendants, by their plea, tendered the sum of £25. The jury would thus have to decide a question of damages.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Innes, Q.C., for the respondents: As a matter of practice, when such an application is made, there should be some information before the Court, upon which it can act. As a matter of fact, no such information has been given, and this should have been done, as a mere matter of procedure. Section 6 of Act 23, 1891, provides that any party to a civil case depending in the Court may by notice in writing to the other party or parties to the suit, or his or their attorneys, delivered within two days after issue joined, demand a trial by jury in such case; and section 7 provides: "Although no demand for a trial by jury as aforesaid shall have been made, any party to the suit may

apply to the Court for leave to try such case by jury, and the Court shall order thereon as it may deem fit. Why was not an application in this case made within two days?

Mr. Searle: There is no affidavit by the respondents showing cause why this application should not be granted.

Mr. Innes: There would have been no need for the application if due notice had been given within two days.

Mr. Searle: I cannot say whether proper notice has been given but the application was necessary in any case.

Mr. Innes: Section 6 of Act 23, 1891, is the one which refers to the two days' notice required without an application; section 7 permits an application without notice.

De Villiers, C.J., said: The Court is of opinion that the application can not be granted, in the present form of the petition. It does not appear that notice has been given, as required by section 6 of the Act. When an application is made under section 7, good cause must be shown for the application. On the application as it stands no cause whatever is shown. Consequently, if no notice has been given, as required by section 6 of the Act, no order can be granted. If notice has been given the Court will fix a date for the hearing of the cause. If notice has not been given, the application can be renewed. But in its present form the application must be refused.

Buchanan and Maasdorp, J.J., concurred.

## KOCK V. KOCK.

Mr. Howel Jones applied on behalf of Mrs. Janetta Kock, for leave to sue her husband for restitution of conjugal rights by edictal citation. The parties were married at Kenhardt on April 20, 1891, but some time ago the respondent left the Colony, and was last heard of as being in Berlin. His reason for not returning was that he could not face his creditors.

The order was granted, the citation to be returnable on February 1, personal service if possible, failing that, publication in a Berlin newspaper. Leave granted to serve intedit at same time as citation.

IN THE MATTER OF THE PETITION OF THE  
TRUSTEE UNDER THE ANTE-NUPTIAL  
CONTRACT OF GEORGE ADENDORFF AND  
CHARLOTTE HERMINA HENZE.

This was a petition for leave to raise a certain sum of mortgage on landed property settled on the petitioner as the trustee of

Mrs. Adendorff. Buildings had been erected on the property at a cost of £150. Other buildings had since been erected, which would cost £600 when completed. The total value of the property erected was £1,200. There was a settlement in trust for the wife during marriage, then in trust for the survivor, and then in trust for the children. It would be for the benefit of the children as well as of the spouses if the order were granted.

Mr. Howell Jones for the petitioner.  
The application was granted.

LOURENS AND OTHERS v. } 1899.  
POTGIETER AND OTHERS } Nov. 1st.

Arbitration—Award—Rule of Court.

*The award of an arbitrator must be read as a whole.*

*Where an arbitrator in an award to determine the rights of parties to the use of water laid down that P. should be entitled to a turn of three days and a half in duration, but in a subsequent part of the award specified a mode of distribution which would result in P. getting a turn of two days and a half only,*

*Held, that the subsequent modification must be presumed to have been intended by the arbitrator and that the award should not be interfered with.*

This was an application to have an award of an arbitrator made a rule of Court. The applicants were some of the defendants in the action *Du Toit and others v. Potgieter and others* (8 Sheil, p. 467) instituted to have a declaration of the water rights in the Buffels or Vlei River in the district of Oudtshoorn. By the judgment of the Supreme Court, delivered on the 9th January, 1899, it was declared that the plaintiffs were entitled to have flow down to them in the Buffels or Vlei River a supply of water sufficient for their drinking and domestic purposes, for watering their cattle and ostriches, and that they were entitled to a fair and reasonable share of the water in the said river for purposes of irrigation. A deed of submission to arbitration was subsequently entered into by the interested parties for the purpose of having the plaintiffs' share determined. Mr.

H. I. Mulder was appointed arbitrator and had made his award to the following effect: The farms Buffelskloof, Rietfontein and Andrieskraal (which farms were the property of the defendants in the action) were to be entitled to the use of all the water in the river for a term of ten days and ten nights and twelve hours thereafter, consecutively, from Saturday at sunset to the Wednesday week at sunrise, and that thereafter the farm Langverwacht (belonging to the plaintiff) should be entitled to the use of all the water for a term of three days and three nights and twelve hours, consecutively, from Wednesday at sunrise to Saturday at sunset in perpetuity. This water to be awarded to Langverwacht in full settlement of its share of the water in the river for ordinary and extraordinary use.

That whenever the turn of water-leading of the said three upper farms should cease the proprietors should be obliged and compelled to open all their dams and close up the intakes of their water furrows, so that the proprietors of the farm Langverwacht should have the full benefit of all the water in the stream when it was their turn of waterleading.

The answering affidavit of J. J. du Toit set out that he was the largest proprietor of Langverwacht, and also the proprietor of a share in the adjoining farm Andrieskraal, and was one of the plaintiffs in the original case.

That there was at the present time no water distribution between the farms Buffelskloof, Rietfontein and Andrieskraal, except that by an order of Court of 13th December, 1897, Rietfontein had to let the water of the river flow down to Andrieskraal every week from Saturday sunset until Monday morning sunrise, and Buffelskloof from Sunday sunrise till Monday sunrise.

That there was therefore no water distribution between the farms Buffelskloof and Rietfontein, and that they led the water wherever and whenever they like.

That if Mulder's award be made a rule of Court Langverwacht would suffer greatly, for there would be nothing to prevent Buffelskloof from keeping all the water on the upper portion of their farm, and then opening their dams as soon as the turn of Langverwacht commenced. As the distance from the upper dams of Buffelskloof to the upper portion of Langverwacht was about ten miles, the water would take at least twenty-four hours when it was fairly strong to reach Langverwacht after the Buffelskloof dams

had been opened. As Andrieskraal would be entitled to close its dams as soon as the turn of Langverwacht had expired Langverwacht would thus lose all the "af trek" water which would otherwise have flowed down to it, and would thus really only get two and a half days water out of every turn instead of three and a half.

That in times of drought and when there was only a little water in the river Langverwacht would get no water at all if the award were in force.

That if the turn of Langverwacht were to commence from Monday at sunrise, Langverwacht would then have the benefit of its whole turn, for by the order of Court of the 13th December, 1897, the water would then be on the farm Andrieskraal, and it would not take long to flow from there to Langverwacht.

That he respectfully requested that the matter should be referred back to the arbitrator, that he should fix the turn of Langverwacht to commence on Monday at sunrise instead of Wednesday, or else that the water be delivered on the upper boundary of Langverwacht, or for other relief.

Hendrik Johannes Mulder, the arbitrator, filed an affidavit in which he stated that in deciding upon the matters in dispute referred to him, he had carefully considered the points raised in the affidavit of J. J. du Toit, and was not unmindful thereof when he published his award. He said, however, that nothing alleged therein would induce him to make any alteration in the award.

Mr. Searle, Q.C., appeared for the applicants.

Mr. Innes, Q.C. (with whom was Sir H. Juta, Q.C.), for the respondents: The award is inconsistent. It expressly gives the respondents three days and a half in which to use the water, but by the arrangement of the turns they can only get two days and a half. The only mode in which they can get their full allowance of water is by giving Andrieskraal its turn just before the respondents. The respondents are in the same position as the lower proprietors in *Nel v. Du Toit* (7 Sheil, 200).

De Villiers, C.J., said: It is not alleged that the arbitrator has exceeded his powers or done anything inconsistent with the terms of the deed of submission. What is alleged, however, is that three days and three nights and twelve hours of the water are given by the award to the respondents, whereas when the arbitrator comes to actual distribution he gives the respondents less. The

award, however, must be read as a whole; the distribution of the water is clearly laid down, and if in the course of that distribution the full three and a half days are not given, the Court must presume that the arbitrator intended that the award as to the three and a half days should be modified to the extent subsequently shown. There is no uncertainty about it, and the Court is wholly unable to interfere. The award must be made a rule of Court, with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

#### VAN DER VEN V. VAN DER VEN.

Mr. Buchanan applied for a decree of divorce. An order for the restitution of conjugal rights had been made, the defendant (the wife) to return to the plaintiff by October 12, but she had not returned.

The order was granted.

#### KIRSTEN V. KIRSTEN.

This was an application for a decree of divorce. The Court had granted an order requiring Mrs. Kirsten to return to the plaintiff by October 12, which order had not been obeyed.

Mr. Graham, Q.C., appeared for the plaintiff.

A decree of divorce was granted, with custody of the minor children.

#### NEL V. GORDON.

This was an application for an extension of the return day of an edictal citation. The citation had been sent to Johannesburg for service, but owing to the war there was no means of service there. A telegram had been received stating that the respondent was in Ladismith, Cape Colony.—The Court ordered a copy of the citation to be served on respondent at Ladismith, and extended the return day to 23rd instant.

#### IN THE MATTER OF C. M. G. SPOLANDER.

Mr. Currey applied for the appointment of a curator in place of Franciscus Hermanus Spolander (deceased).

The application was granted and the secretary of the General Estate and Orphan Chamber appointed curator.

IN THE ESTATE OF THE LUNATIC JOHANNES JURGENS BADENHORST.

Mr. P. Jones applied for leave to sell a certain farm known as Taasboschdraai, belonging to J. J. Badenhorst, a lunatic. £1,100 had been raised on the farm, but no more could be raised. The fees for keeping the lunatic were in arrear, and the curator desired to sell the farm or a part thereof. The sale was advised by the Resident Magistrate of the district.

The petition had been referred to the Master for his report, and the Master reported that under the circumstances it appeared that it would be advisable to sell the farm, and to retain an erf belonging to the lunatic in the village of Strydenburg, and the movable assets towards the support of the family.

Ordered in terms of the Master's report.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### ADMISSION.

*Ex parte* SCHOEVERS. { 1899.  
Nov. 2nd.

On the motion of Mr. Close, Mr. Jacobus Engelbertus Schoevers was admitted as an attorney and notary.

### MACAULAY V. CONRAD COHEN.

Mr. Molteno moved for judgment under Rule 329 for the sum of £250, due as the purchase price of certain property, the plaintiff tendering transfer of the property, and also for the sum of £50, purchase price of certain shares, less £50 paid on account.

Judgment granted.

### ANDERSON AND CO. V. D. J. COETSEE.

Mr. Miller moved for judgment under Rule 329 for the sum of £23 3s. 7d., goods sold and delivered.

Judgment granted.

### IN THE MATTER OF THE MINORS MARX.

Mr. Nathan moved for an order releasing the tutor dative from his trust. The applicant was the grandfather of the minors, and was appointed tutor dative in 1885. His reason for the application was his advanced age.

Order granted, the appointment of a fresh tutor being left in the hands of the Master.

### ZIETSMAN V. JELICORSE.

Mr. Miller applied for provisional sentence upon a mortgage bond, on the ground that the interest was overdue. As the bond did not state that the principal would be due if the interest was not paid up, provisional judgment for the interest only (£14 1s. 8d.) was granted.

QUAEN V. VAN DER POEL. { 1899.  
Nov. 2nd.  
Theft—Evidence.

*H. left his house for a short while, leaving a purse containing money on his bed. On his return, he met the appellant coming out of the gate of the premises. The appellant was lawfully on the premises in the performance of his duty of delivering bread. H. subsequently missed the purse. The appellant was convicted of the theft on the ground that he was the only person seen on the premises, and no other person could be suspected. On appeal, the conviction was quashed.*

This was an appeal from a decision of the Acting Resident Magistrate of Beaufort West. The appellant, a European shop assistant, aged thirteen, had been charged with the theft of a purse containing 8s. from one J. C. Hattingh, whose house he occasionally visited for the purpose of selling bread. He was found guilty, and sentenced to fourteen days' imprisonment with hard labour. The evidence for the prosecution was to the effect that Hattingh had left his house for a little while, leaving his purse, containing 8s. 6d., lying on the bed. On his return about half an hour later he met the appellant coming out of his gate, and on questioning the lad, the latter asked prosecutor if he wanted any bread, it being a part of the appellant's duties to deliver bread from a hand-cart, which he had with him at the time. On going into his room prosecutor

missed his purse. Several days later suspecting the lad, he complained to the appellant's parents on the matter. Some days later prosecutor found the purse, minus its, lying under his bed. It was suggested that the boy, after he was suspected, seized an opportunity to throw the purse through a window into the room. The evidence of a neighbour was to the effect that the accused had gone to complainant's back gate with a hand-cart. He entered the gate, which led to the kitchen, and remained within for from 15 to 30 minutes. He came out just as complainant returned. There were several entrances to the property. In his reasons for his finding the Magistrate admitted that the boy had, according to the evidence, previously borne a good character, but he found him guilty because he was the only person seen on the premises, and no other person could be suspected.

Sir Henry Juta, Q.C., appeared for the appellant, and Mr. Ward appeared for the Crown.

After argument, the appeal was sustained and conviction quashed.

De Villiers, C.J., said: This appears to be specially a case in which the accused should have had the benefit of any doubt in the mind of the Magistrate. The appellant is a mere child, thirteen years of age, and seems to have borne a very good character, and certainly he should not have been convicted merely on suspicion, and this appears to be a case of conviction on suspicion alone. It is impossible to say that nobody else could have committed this theft, unless there were people guarding the house all round, seeing that there were at least four means by which entrance might have been effected. After hearing the whole of the evidence read I am quite satisfied that there are very few magistrates who would have convicted, and therefore the Court will quash the conviction. In this case it is not really a question of credibility, but of inference from proved and admitted facts, and the inference in this case does not justify a verdict of guilty.

Buchanan and Maasdorp, J.J., concurred.  
[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

#### ATMORE V. CHADDOCK.

Mr. Graham, Q.C., moved that the rule nisi for the attachment of certain moneys granted on March 3) last be made absolute.

Mr. Innes, Q.C., for the respondent, consented to the rule being made absolute.

The rule was made absolute, with costs.

MAXWELL V THE TOWN COUN- { 1899.  
CIL OF CAPE TOWN. { Nov. 2nd.

Magistrate's jurisdiction—Municipal regulation—Placing goods on public street—Future rights—Title to land—Act 20 of 1856, sections 8, 42—Act 26 of 1893, section 185.

*The jurisdiction of a Magistrate to deal with a contravention of a Municipal regulation which prohibits any person from placing goods on a public street is not affected by the fact that there is a dispute as to the ownership of the land which constitutes the street.*

*The contravention of a Municipal regulation penalised by fine or, in default, imprisonment is a criminal and not a civil matter.*

This was an appeal from a sentence passed upon the appellant by the Assistant Resident Magistrate of Cape Town.

The appellant was charged with the crime of contravening section 37 of the Cape Town Municipal Regulations framed under the provisions of Act 41 of 1882, and promulgated by Government Notice 456 of 1889 and amended by Act 26 of 1893, in that upon (or about) the 11th day of September, 1899, and at Cape Town the said George Robert Maxwell did wrongfully and unlawfully place or caused to be placed certain goods, to wit, eight rolls of lead, in the public street outside his premises at No. 37, Burg-street.

The defendant filed the following exception: Defendant excepts to the jurisdiction of this Court on the ground that the complainants are not the owners of the land on which he placed the sheet lead. That he has the right to place the same there. That future rights are involved and that any decision given by this Court will bind future rights. This exception was overruled.

For the prosecution clear evidence was given that the lead was found lying outside the defendant's premises within the line of street, and that no permission had been given by the Council for its remaining there.



For the defence the son of a previous owner of the property deposed that he knew the property for upwards of forty years and that he had often seen cases of merchandise lying where the lead had been found, by night as well as by day.

There was further evidence as to prescription adduced for the defence.

The appellant was found guilty and sentenced to pay a fine of 1s., or to be imprisoned until the rising of the Court.

From this sentence he now appealed.

Regulation 37 provided in effect that no goods, wares, or merchandises shall be allowed to be placed on any public street, square or lane, nor on any stoep, pavement or sidewalk.

Sir H. Juta, Q.C., for the appellant: The main point is that the Magistrate had no jurisdiction to try the case because the title to the land is in dispute. The whole of the evidence was directed to the question whether the land is part of the public street, or is a portion of the private property of the Argus Company.

[De Villiers, C.J.: The title has nothing to do with it. It might be a public street even though it were private property.]

There can be no public street where the property is private.

[De Villiers, C.J.: There might be a servitude over it on the part of the public.]

It is not so in this case. The question of servitude has not been raised. This property can only be a street if there is a prescriptive right to it in favour of the public. But the fact that there are "stoeps" adjoining it is against the theory that it is part of the street. If the Magistrate's decision is upheld this matter becomes *res judicata* between the Town Council and any person putting any obstruction there in the future. Future rights become bound.

Mr. Innes, Q.C., for the respondents: Section 185 of Act 26 of 1893 gives the Magistrate jurisdiction in all cases of contravention of the Municipal regulations. This is not a case where future rights are involved, but even if it were the Magistrate has ample power under section 185 to deal with it. This is a criminal matter, and there is no limit to the Magistrate's jurisdiction. The limit imposed by Act 20 of 1856, section 8, applies only to civil actions. Even under Act 20 of 1856 the Magistrate has jurisdiction, by virtue of section 42. The same point was taken in *Lawrence v. Cape Town Town Council* (8 Sheil, p. 114). The decision of the Magistrate in this case can-

not make the ownership of the property *res judicata*. As to the appellant's claim to put the goods in question on the place, whether he has a prescriptive right to do so or not, is a matter of evidence which the Magistrate could deal with and decide upon.

Sir H. Juta: This is not a criminal case but a breach of a municipal regulation. The Magistrate cannot decide upon the ownership of the land.

Mr. Innes referred to *Railway Maintenance Department v. Glynn* (3 E.D.C., p. 295).

De Villiers, C.J., said: The only question the Magistrate had to determine was whether the spot on which the lead was placed was a public street or not. In my opinion he had jurisdiction to decide this question. It is not a civil case, but a criminal case, because the punishment for the offence is a fine, or in default, imprisonment. Therefore, clearly it was not a civil case, and the Magistrate had jurisdiction. On the point of the merits of the case, the evidence on behalf of the prosecution is to the effect that this land is part of the public street, and several witnesses stated that at one time a fire-escape was stationed on this very spot. The Town Council could not have placed the fire-escape on that spot and the owners of the property would not have allowed it to be placed there unless the land was part of the public street. I put the question whether a person passing over that place would be checked, and received no satisfactory answer, and I should certainly not think that any person passing along would have been prosecuted for trespass. This place is open; there is not even a stoep on nor a rail round it. However, it is not really a question of ownership, because it would be quite consistent with ownership being in the accused that the public might have the right to use the land as a street, and if the public had this right, then it came under the municipal regulations. It is not alleged that the regulation is *ultra vires*, and, therefore, upon the evidence it is impossible for us to interfere with the judgment of the Magistrate.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorneys Messrs. Van Zyl & Buissinne; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton]

REGINA V. COETZEE.

 1893.  
 Nov. 2nd.  
 " 3rd.

Theft of stock—Act 35 of 1893—  
 Re-marking sheep.

*The appellant directed that a certain sheep which had come upon his farm and bore the owner's mark should be shorn and re-marked it with his own mark. He was charged with theft under the provisions of Act 35 of 1893 and convicted.*

*The Court, on appeal, refused to disturb the conviction.*

This was an appeal from a sentence passed upon the appellant by the Assistant Resident Magistrate of Qnean's Town, on the 21st September, 1899.

The appellant was charged under the provisions of Act 35 of 1893 with the crime of theft in that upon (or about) the month of July, 1899, and at or near the farm Tongvole, Bengolo, in the district of Queen's Town, the said Pieter Ernest Coetzee did wrongfully and unlawfully steal two sheep, the property or in the lawful possession of one Seymour Harding, a farmer now or lately residing at the farm known as Queen's Park, in the district of Queen's Town aforesaid.

The accused pleaded not guilty, but after evidence had been led, was found guilty and sentenced to twelve months' imprisonment with hard labour. From the records of the Court below it appeared that the sheep (a ewe and a lamb) were stolen from Harding's farm, which adjoined that of accused. The ewe had been sold to Harding by one Fincham, and bore the marks of both Harding and Fincham. The chief evidence for the prosecution was given by two natives, Hermanus and Pokwane, who stated that accused knew of the sheep being on his farm, while Pokwane said that he told accused that the ewe and lamb belonged to Harding, but accused answered, "No, it is mine." Pokwane stated that he then pointed out the marks on the ewe, whereupon accused plucked out the wool where it was marked, and proceeded to mark the lamb. As to the marks on the sheep there was some discrepancy between the statements of the two witnesses. Accused denied the truth of the statements made by the two witnesses mentioned, and accounted for the sheep being in

his possession by saying that they must have strayed in from Harding's farm, and other witnesses called for the defence said they had seen sheep do the same thing on several occasions. There was also evidence as to the accused having given notice to Harding that a lamb and a ewe had strayed on to his (accused's) farm, but for the prosecution this was said to have referred to another ewe and lamb, which were returned. There was some evidence to the effect that accused had himself shorn and re-marked the ewe, but this was denied by him. It also appeared from the evidence that when steps were about to be taken against him accused endeavoured to effect a compromise, and even offered Harding all his sheep if he would not prosecute.

Mr. Innes, Q.C., for the appellant.

The offence which the prisoner really committed was allowing stray sheep upon his farm: without giving notice to the poundmaster, for that he might have been penalised under the Pounds and Trespases Act 15 of 1892, section 29. If he marked the sheep with his mark knowing that they were not his sheep, he would be guilty of theft. But the evidence of the witness who says that he did that is quite incredible. The definition of theft in Act 35 of 1893, under which the prisoner was charged, includes "being or having been in unlawful possession, not being able to give a satisfactory account of such possession." It appears that the magistrate has applied the principle that prisoner was guilty because he was in possession of the sheep. The evidence shows that the sheep strayed on to his farm, and were not taken there.

Mr. Ward for the Crown.

The appeal was dismissed.

De Villiers, C.J., said: This case depends entirely upon a question of credibility, and if the witnesses for the prosecution are to be believed, then undoubtedly the accused was guilty of the theft. He had the sheep—the ewe and the lamb—belonging to the prosecutor in his possession, and on the ewe were the marks of Fincham and of the accused. These marks were visible, and in spite of his being warned by his Kafir servant that the sheep belonged to the prosecutor, the prisoner directed that the sheep should not only be shorn, but that they should also be re-marked. This re-marking, if done with the knowledge that the sheep belonged to the prosecutor, would constitute the crime of theft. The Magistrate must have believed

the witnesses for the prosecution, and as he has come to this conclusion, and has done so upon evidence that he apparently believes, it would be acting contrary to the practice of this Court to interfere. A jury would be quite justified upon this evidence in convicting accused, and a judge would be justified upon such evidence in telling a jury that he thought there was sufficient evidence to entitle them to convict. For these reasons I think that in the present case the Court ought not to interfere with the finding. I must say there is one part of the evidence that weighs very much with me--and but for this part probably I might have been inclined to have quashed the sentence--and it is the conduct of the accused after he was charged. If a man were really innocent he would not be prepared to compromise and offer all the sheep he possessed in order to avoid a prosecution. Conduct of this kind is very suspicious, and that conduct, with the other facts of the case, leads me to believe that the Magistrate was right. The appeal must be dismissed.

Buchanan, J., concurred, and pointed out that before the Magistrate the accused was defended by a professional gentleman and the case was very fully investigated, but yet the Magistrate believed the evidence for the prosecution, and found accused guilty.

**Maasdorp, J., also concurred.**

[Appellant's Attorney, Messrs. Fairbridge,  
Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

MSINDO V. MORIARTY. } 1899.  
Nov. 3rd.

**Native law—Procedure—Proclamation 110 of 1879.**

*Under Proclamation 110 of 1879  
a suit to which a European is a  
party must be dealt with according  
to the ordinary law of the Colony.  
An action having been brought in  
a Native Magistrate's Court by a*

*European against a native the defendant died, whereupon the Magistrate allowed the defendant's father to be substituted as defendant, both in his capacity as father and as surety under native law for his son, and gave judgment for the plaintiff.*

Held, that the proceedings were irregular and that native law was not applicable.

This was an appeal from a judgment of the Acting Resident Magistrate for the district of Ngamakwe. The respondent, Moriarty, had sued one Moyahe in the Magistrate's Court for a debt of £5 10s and the summons called upon the defendant to appear upon the 8th September. Upon that day the plaintiff's agent applied for a postponement of the case to allow him to amend the summons because the defendant was dead. The case was postponed until the 15th September, and the summons amended by striking out the name of Moyahe and inserting instead, "Johnny Msindo, both in his capacity of father of his deceased minor son, Moyahe, and in security for the same for a debt of his said deceased son." A copy of this amended summons was served upon Msindo upon the 11th September, but the date "8th September" still appeared upon the face of it as the return day. The case again came before the Court upon the 15th, and Msindo being in default, provisional judgment was given against him.

Subsequently, in October, the defendant Maindo applied for leave to reopen the case, and was allowed by the Magistrate to do so, if he first paid the costs of the original case. His attorney objected to paying the costs, but undertook to pay them, and stated at the same time his intention of bringing the point before the Supreme Court.

The case was then re-opened, and the defendant excepted as follows to the summons: (a) That the copy served upon the defendant was not a true copy of the original owing to the amendments inserted; (b) that he was not liable for the debts of his deceased minor son, nor could he be sued in his capacity of father of Moyah, as Moyah was not his lawful son; (c) that there was no allegation of excussion of the principal debtor. There were other exceptions which were not pressed on appeal.

The Magistrate overruled all the exceptions, and confirmed the provisional judgment with costs. In his reasons he said, *inter alia*: Defendant was a native, and native law can apply when both parties or the defendant is a native. It is a very well-ascertained fact that in native law a father is responsible for his son's debts until he provides him with a kraal. It is therefore quite beside the question to inquire whether appellant actually stood security for his son, though from the common practice among traders in this district, I have no doubt that such was the case.

The defendant appealed.

Mr. Miller for the appellant: The service is bad because it was made three days after the case was set down. The costs of service and summons for first hearing were not incurred by appellant's default. The date "15th September" should have been inserted instead of "8th September." *Smith v. Muff* (11 S.C.R., 20). As to the exception that defendant is not liable for the debts of his deceased son, it is clear from Proclamation 110 of 1879, section 23, that native law does not apply.

There was no appearance for the respondent.

De Villiers, C.J.: The proceedings in this case, judged by the standard of proceedings in Colonial courts of law, were quite irregular. When the case came on for trial the Magistrate allowed the name of the defendant's father (the present appellant) to be substituted for that of the original defendant, who had died after the date of the summons. The appellant was made a defendant not only in his capacity as father of the deceased defendant but as surety for him. As father the appellant could not represent his deceased son unless he had been appointed his executor. The Magistrate held that by native law a father is responsible for his son's debts until he provides him with a kraal, and on that ground also allowed the father to be made a defendant, and gave judgment for the plaintiff. But native law could clearly not be applied in the present case. The original defendant, it is true, was a native and so is the appellant, but the Proclamation relied upon provides that the law of the Colony shall apply, unless all the parties interested are natives, in which the proceedings may be dealt with according to native law "and where the parties are of different tribes then according to the law of the defendant's tribe." The plaintiff was a European, as may be judged from his name

and from the Magistrate's reasons, and consequently the Colonial law was applicable. The appeal must be allowed.

[Appellant's Attorneys, Messrs. Dempers & Van Ryneold.]

FOURTH AFRICAN ELECTRIC } 1899.  
PRINTING CO. V. REDFERN, } Nov. 3rd.  
MORRISON & CO.

#### Damages—Contract—Costs.

*R. & Co. sued the P. Co. in the Supreme Court for damages for failure to print a Directory in accordance with contract. They recovered £78, which was the amount which the Court considered were their disbursements caused by the unfulfilled contract. Subsequently the P. Co. sued R. & Co. in the Magistrate's Court for £8 12s. 6d. for supplying certain specimen sheets. The Magistrate found that these specimen sheets were supplied in connection with the contract for printing the Directory and gave judgment for the defendants.*

*Held, on appeal, that the P. Co. should not, after the judgment in the Supreme Court, have claimed the amount in question and that the appeal must be dismissed.*

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the present appellants sued the respondents for £12 0s. 8d. Of this amount £2 12s. 6d. was for work and labour done and £9 8s. 2d. for goods sold and delivered. The latter amount was made up of the amounts of £8 12s. 6d. for 5,000 specimen sheets and 15s. 8d. for several small items of stationery. The defendants pleaded specially that on the 15th September, 1899, the Supreme Court had decided an action between the same parties which involved all disputes between them to that date, and that judgment was given in favour of the defendants in this case (plaintiffs in the Supreme Court) for £78 10s. 9d., which has since been settled. This allegation was denied by the plaintiffs, and the pleadings in the Supreme Court action were put in and evidence led. The pleadings showed that Redfern, Morrison

& Co. had claimed in the Supreme Court £1,000 damages for breach of a contract whereby the South African Electric Printing Co. undertook to print for them a Directory of Cape Town and Suburbs. They proved payments of £78 10s. 9d. to the South African Electric Printing Co. On account of this contract and for this amount the Supreme Court awarded them damages. (*See supra*, p. 533.) The Magistrate gave judgment for £2 12s. 6d., holding that all the other claims in the account, including the 5,000 specimen sheets, were supplied for the purpose of compiling the Directory, and that that matter had formed the subject of the action in the Supreme Court. He refused plaintiffs their costs because when the case was called on they denied that any portion of their claim was involved in the Supreme Court action.

The plaintiffs appealed.

Mr. Graham, Q.C., for the appellants, referred to the declaration in the previous case. The present claim has nothing to do with the claim set up there; the specimen sheets, which are now claimed for, had nothing to do with the contract for printing.

Mr. Searle, Q.C., for the respondents: The item £8 12s. 6d. is clearly connected with the printing of the Directory which was the subject of the previous action. The Magistrate found that it was not to be paid for until the Directory was completed. As the Directory was not completed in time the amount was wasted. If it had been brought to the notice of this Court in the previous action that the plaintiffs had to pay this amount the Court would have included it in its award of damages. The Magistrate's reason for making no order as to costs was that the plaintiffs had caused unnecessary costs by insisting at the first that this claim had nothing to do with the Directory. *Wake v. Peake* (8 Sheil, 326).

Mr. Graham in reply.

The appeal was dismissed.

De Villiers, C.J., said: In the action brought in the Supreme Court by Redfern, Morrison & Co., against the S.A. Electric Printing Company, the Court held that there had been a breach of contract on the part of the defendants, and that the plaintiffs in the case were entitled to damages. The measure of damages was the amount, £8 10s. 9d., which had been paid by the plaintiffs in respect of this contract, and for that amount the Court gave judgment. If it had been brought to the notice of the Court at the time that a further sum of £10 had been

paid, undoubtedly that amount would have been added to the damages, and indirectly this item of £8 12s. 6d. was involved in the previous action for damages. The Electric Printing Company ought not, in my opinion, at all events, to have claimed this item of £8 12s. 6d. after the judgment of the Court in the action for damages in which the principle was laid down that the amount which the then plaintiffs were out of pocket should be the extent of the damages, and I think this £8 12s. 6d. really formed part of the damages which had been sustained. Therefore, I think the Magistrate was right in giving judgment for the sum of £2 odd only. Then as to the question of costs. Under ordinary circumstances the successful plaintiff is entitled to his costs, but in the present case the amount claimed is so very much larger than the amount awarded, and as the Magistrate has come to the conclusion that the plaintiffs ought to have known that the larger items should not have been included, under such circumstances I am not prepared to find fault with the Magistrate when he refuses to award costs. The appeal must be dismissed.

Buchanan and Maasdorp, J.J., concurred.

[Appellants' Attorneys, Messrs. Silberbauer, Wahl & Fuller; Respondents' Attorneys, Messrs. Scanlon & Syret.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

KEYTEL V. KEYTEL { 1899.  
Nov. 6th.

This was an action for divorce on the ground of the defendant's adultery.

Mr. Molteno appeared for the plaintiff; the defendant was in default.

Francis Henry le Sueur, clerk in charge of the marriage register, produced the record of the marriage from the Colonial Office.

Emily Keytel, the plaintiff, said that she was married to the defendant on February 23, 1887, by ante-nuptial contract. She had lived most of the time since that date in Cape Town, and there were no children of

the marriage, though witness had a son by a former marriage. Her husband, during a number of years, had been a timber merchant, and during the past few years he had been addicted to drink and had been unfaithful. She had seen her husband in a house of ill-fame in Longmarket-street, and had taxed him with unfaithfulness, which he denied at first, but subsequently admitted, saying that it was witness's own fault for having turned him out of her room.

Robby Thomas, a cab-driver, gave evidence as to driving the defendant to disorderly houses.

Frederick William Marting said that the plaintiff in the action was his mother. He had seen his step-father in a house of ill-fame, to which witness had been driven, in company with his mother, by the last witness. On one occasion his step-father came home the worse for liquor, and witness found a visiting card belonging to an inmate of a disorderly house in his pocket. The defendant had lost several situations through drink.

Mr. Molteno read a letter from the defendant's solicitor in which it was admitted that the defendant had visited disorderly houses, and intimating that he had been advised to abandon the defence to the action.

The Court granted a decree of divorce with costs.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SWANEPOEL V. SWANEPOEL AND ANOTHER.	{	1899,
		Nov. 6th.
		" 7th.
		" 27th.
		" 30th.

Boundary—Trespass—General Plan  
—Evidence.

*General plan admitted as evidence  
to indicate boundaries of farm.*

This was an action for damages for trespass.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer, and resides on the farm Brand Vlakke, in the Caledon Division. The defendants are farmers, and reside on a divided portion of the farm Oudebrug, in the Caledon Division, portion of which farm is owned by the plaintiff.

2. The farm Oudebrug has been duly sub-divided and the necessary beacons erected, the boundaries of the portion

owned by the plaintiff being clearly defined, as will be seen from the plan annexed hereto, the said portion being marked A, B, C, D.

3. The first-named defendant is the owner of that portion of Oudebrug marked E F on the above-named plan.

4. About the month of April, 1898, the plaintiff erected a wire fence on that part of his property which adjoins the ground leased and occupied by the first defendant, which fence the defendants, with their servants or agents, acting under their instructions, wrongfully and unlawfully pulled down and removed on or about the 20th day of May, 1898.

5. Thereafter the said defendants or one or other of them continued to trespass on the said property of the plaintiff, and by themselves, their servants or agents, drove and pastured their cattle and sheep on the same or divers dates during the years 1898 and 1899, although continually warned by plaintiff not to do so.

6. On or about the 16th day of June, 1899, the defendants with their servants or agents acting under their instructions entered upon the said land of plaintiff, and did plough and sow a certain portion of the said land, without plaintiff's knowledge or consent.

7. By such unlawful and malicious acts of trespass the plaintiff has suffered damages to his crops, pasturage, and fences in the sum of £150, which sum, although duly demanded, the defendants neglect and refuse to pay.

Plaintiff prayed (a) an interdict restraining defendants from entering on the said land or in any way disturbing plaintiff in his peaceful occupation and possession thereof; (b) £150 damages; (c) alternative relief; (d) costs of suit.

Defendants pleaded as follows:

1. The defendants admit paragraph 1, save that they say that the first-named defendant does not reside on the said farm.

2. They admit that the farm Oudebrug has been duly sub-divided, but they deny the other allegations in paragraph 2, and they specially deny the correctness of the line A D, and that it is the true and correct boundary of the plaintiff's land.

3. They say that the portion, E F, is leased to the second named defendant.

4. They deny paragraphs 4, 5, 6, and 7, and say that plaintiff caused to be erected a wire fence not upon his own land, but upon land leased to the second defendant, and that upon notice given to the plaintiff to discon-

inure with the erection of the fence, the plaintiff removed or caused to be removed the said fence.

5. The defendants further say that the plaintiff by himself, his servants or agents, planted certain poles in a certain road over which the defendants were lawfully entitled to drive their wagons, and which road was situated upon land not belonging to the plaintiff, and by means thereof obstructed the said road, and the first-named defendant, whilst lawfully driving over the said road, was prevented by reason of one of the two poles planted therein from driving on, and he thereupon removed the said pole, as he was lawfully entitled to do.

6. The defendants further say that the plaintiff wrongfully and unlawfully, by himself, his servants or agents, erected a wire fence across a threshing floor belonging to the defendants' and which was situated on land leased by the second-named defendant, and which had been used by the owners of the said land and their predecessors in title their lessees and servants, for upwards of 20 years, and the said defendant thereupon removed the said fence, as he was lawfully entitled to do.

7. They deny that they trespassed upon or ploughed or sowed or depastured cattle or sheep on any land belonging to the plaintiff.

In reconvention the defendants claimed, (a) an interdict re-training plaintiff from entering on the said land, which he had unlawfully entered upon, or in any way disturbing the defendants in their peaceful occupation and possession thereof; (b) £200 as and for damages to a certain wire fence, and for the destruction of a crop of tobacco on defendants' land; (c) alternative relief; (d) costs of suit.

The replication was general.

Mr. Graham, Q.C. (with him Mr. Miller), appeared for the plaintiff; Sir Henry Juta, Q.C. (with him Mr. Nathan), for the defendants.

Mr. Graham said that the plaintiff could not succeed in getting a declaration of rights in this action as the matter stood at present, as the owners of the farm had not been joined. It would be better, however, to have the matter settled once for all, and that they should be joined; as the present defendants were the parties really interested, the joinder of the owners would be a merely formal matter.

Sir H. Juta having consented, said that the evidence could proceed, but summons should be issued against the owners, and judgment

would not be given until they had had an opportunity of entering appearance. If they wished to cross-examine plaintiff's witnesses, those witnesses would have to be recalled.

Hendrik Johannes Swanepoel, the plaintiff, said he had owned a portion of the farm Oudebrug, in the Caledon division, for four years, and had known the farm since his childhood. The beacons on that portion had been pointed out to him by his father, from whom he purchased the farm. The defendants occupied the adjoining portion of the farm. Witness fenced his portion along the line of Kuys' beacons, viz.: A D, on the plan, but the defendants cut the fence in two places, and subsequently he removed the material. The defendants also came on to his farm, and ploughed and sowed, and consequently he had been prevented from using his property, and had sustained damages to the extent of at least £100.

Tudhope had surveyed the farm and his survey differed from Moll's. Defendants ploughed between Tudhope's line and Moll's line. Tindall's survey also differed from that of Moll.

Johannes Jacobus Swanepoel father of the last witness, stated that he was 66 years of age. His son bought a portion of Oudebrug from him. The survey was made by Mr. Kuys, and witness assisted him to erect the beacons in the year 1865. He saw the beacons and they were still there. Moll surveyed the farm twice. The second time Moll took another line and there were different results. There was never any dispute about the beacons until last year, when it was stated that the beacons had been wrongly placed. Witness employed Mr. Meiring and Mr. Tudhope to survey the property, and their surveys agreed with that of Mr. Kuys, except with regard to one beacon. They did not agree with Moll's. The fence erected by plaintiff was along the line of Kuys.

Cross-examined: Kuys made the survey over 20 years ago. He then lived at Biesjeegat. There was flat, level ground between the farms, and he could see the beacons. He bought part of the farm only once in Stiglingh's time. His son's beacon was about 80 yards from the fountain. Kuys' beacon was next the fountain. From the time of Kuys' survey to the time of his lease he had nothing to do with the beacon. Moll surveyed the farm in 1878. The first dispute was about 8 years ago. The threshing floor had been there 10 or 11 years. Meiring's line corresponded with Tudhope's. They disagreed about the lower beacon.

Meiring gave him the right to enclose. His brother always sowed on the disputed ground, taking Moll's line. He saw the compilation plan of the farm.

Sir H. Juta objected to the compilation being put in as evidence. In *Barrington v. Colonial Government* (4 Juta, 406) it had been decided that the general plan was not admissible as evidence for the purpose of construing the grant.

De Villiers, C.J., said: In *Barrington's* case the plan was relied on to explain the facts. Here it was simply put in to indicate the boundaries.

The evidence was admitted.

Alfred Dryden Tudhope, a surveyor, stated that he surveyed the farm in 1893, and framed a plan. Mr. Meiring was surveying at the same time, and both their surveys practically agreed with Mr. Kuys'. One beacon was found to be different from Kuys' survey. There was a slight divergence in witness's survey, which gave defendants about 60 feet more than they were entitled to. Witness's beacons did not correspond with Moll's. The witness gave further evidence detailing the positions of the beacons on the plans.

This closed the case for the plaintiffs.

For the defence, Hendrik Barend Daniel Beukes said he was aged 50, and resided on the adjoining farm. He knew defendants' farm well. His father bought it in 1865. He had seen the farm eight days ago, and recognised all the old beacons. The north beacon was at a spring. The plaintiff's beacon was away from the spring. It was not there in 1866. The beacon at the spring was correct. He knew nothing of the other beacon.

Cross-examined: He did not see anyone put up the beacons. He had not been there since 1874. There was never any dispute about the beacon at the spring.

Reinier Johannes Moll, surveyor, gave evidence of his survey of the farm. This was in 1877 or 1878. The beacon was at the spring. The beacons were there when he made the survey. The other beacon was about 100 yards away. In 1894 he made a fresh survey. The beacons agreed with the former survey. He found the beacon at the spring. There was rotten wood and a heap of stones. He had no doubt whatever as to the beacons.

Cross-examined: His survey did not agree with that of Kuys. He made no diagrams.

Henry Edward Tindall, Government land surveyor, said he had been on the farm Oudebrug. He was employed by defendants

to survey their property. He made the survey in February, 1898. He surveyed the whole place. He had the original diagram and the deductions from it. He found the beacon at the spring. It was on high ground. No marshy ground was near it. In framing a diagram he would represent a spring as it was shown on the original diagram. The plaintiff's line ran right through the threshing-floor. His line was to the north, and threw the threshing-floor right into the defendants' line. He went there again in June, 1899, simply to satisfy himself. The other beacon claimed by defendants was newly made up.

Cross-examined: He surveyed the whole farm. He had seen the compilation framed by Kuys. Kuys made the deduction in 1865. The beacon was shown on the compilation plan. His survey agreed fairly well with the deduction. He took the sides and angles, but did not take the area. He thought he agreed with Moll's beacons. They were shown him by young Swanepoel. He never was on the ground with Moll at all.

Johannes Jacobus Swanepoel, one of the defendants, said his father bought a portion of Oudebrug from the late Hendrik Beukes in 1870. It was then surveyed by Kuys. Witness was now the lessee of a portion of the farm. His brother had the other part. Witness was on the farm when a boy. In 1830 Langenhoven hired the farm. He came back to the farm in January, 1883. That year the threshing-floor was made. The then owner of plaintiff's part was Stiglingh. He had always used the threshing-floor since 1883. They were first prevented from using it in January, 1898. The line was marked by a ploughed furrow, made by his father. On the north side of the floor was a "kraal," in which he grew tobacco. He always used it. It was first disturbed in 1898. There was a road from his place above the floor. A fence was put up by his father along the line. This was also disturbed. Below the floor was arable land. One part was used by plaintiff, the other by defendants. The wire was put up by Swanepoel and his son. It was put through his sowed lands, and through his threshing-floor. He lost his tobacco crops when plaintiff's cattle entered his ground. Plaintiff's men destroyed the fence. He was unable to thresh on the floor until Tindall made his survey. He had always used the land until last year. He had sustained fully £200 damages. He had known the farm all his life. He was often



at the spring, where in his early days he tended the sheep. The sheep grazed near the beacon. No such beacon as that claimed by plaintiff was there formerly. That beacon stood on a sandy spot, about 80 yards away.

Cross-examined: He first saw the plaintiff's beacon about three years ago. He always heard his father say the beacon at the spring was Moll's beacon. That was also Kuys' beacon, according to the general opinion. His father and plaintiff's father had disputes about beacons. His father got Moll to fix the beacons. The line remained as it had always been. Tindall surveyed the farm for a week.

This closed the defendants' case.

It appeared that due notice had not yet been given to the executors in the estate of defendants' father, the late P. A. Swanepoel, to intervene.

The Court therefore ordered the executors of the late P. A. Swanepoel to be made co-defendants in the action, and ordered the further hearing of the case to be fixed for Monday, November 27, 1899, plaintiff to be allowed to amend his declaration by inserting a claim for a declaration of rights.

*Postea* (November 27th).

Plaintiff having claimed a declaration that the true boundary line of the farm is the line A, B, C, D, and the executors having joined in the original plea,

H. E. Tindall, recalled, said he was requested to re-survey position of the beacon at the outspan place near Oudebrug. He had drawn up a plan showing the position which he put in. There was no line beacon at all at the outspan place. The blue line on the plan would throw the beacon E out entirely. The beacon was almost on the line D, E. It was more than a degree off the line D, E.

Cross-examined: Witness made this survey last week. It was evidently a beacon, but not a beacon of the farm, it may have been put up for the purpose of herds.

David Johannes Negriini said he was born in 1820. He often trekked over the ground with cattle near the disputed beacon. He had to pass round the corner beacon of Oudebrug. The beacon was in a hollow, and the spring issued just below the hollow. The other beacon was 80 or 90 yards away, it was not there formerly. He knew the threshing-floor and the tobacco kraal.

Cross-examined: He was about 60 years of age when he left the farm. He saw the second beacon for the first time two weeks ago: it seemed to be a couple of years old.

David Mei said he was 58. He had known Oudebrug from 1865 to 1874, and knew the beacons well. The corner beacon was at the fountain. He was there last week and found the same beacon at the fountain. The other beacon, 80 yards away, was not there between 1865 and 1874. Beukes himself showed him where the corner beacon was.

Cross-examined: In 1874 there was only one beacon. The other beacon was recently put up.

After argument upon the facts,

J. J. Swanepoel, recalled, said he knew the beacon claimed by the plaintiff: it had been newly made up again and looked like a new beacon. He saw the beacon which was now claimed by plaintiff put up by his uncle. The other was put up by Moll. The beacon claimed by his son was put up by Kuys. The beacon put up by Tudhope was not Kuys' beacon. They accepted Tudhope's beacon and the wire ran along the line.

Cross-examined: Hisson put up the fence: the line claimed was the line along the fence.

H. E. Tindall, recalled, said he found no beacon on the line or fence. The wire fence was on the remaining extent five or more yards outside the fence.

H. J. Swanepoel, recalled, said he claimed the beacon A2, he told his attorney he took the line for his fence. It was on the line.

De Villiers, C.J.: The only question to be decided in this case is what is the true boundary line between the properties of the plaintiff and the defendants. We have nothing to do with the question as to what is the northern boundary of the defendants' property except in as far as it shows what line Kuys took in making his survey. The decision of this point depends on what Kuys intended to be the beacon. Whatever Kuys decided to be the beacon shows what was intended to be the boundary. Now on this point we have the evidence of old Mr. Swanepoel, who was present when Kuys made the survey, and who says that this beacon was accepted until Moll came to survey the farm. When Moll made his survey he went thoroughly into the question of the different beacons. It was then discovered that Kuys had apparently made a mistake in his survey, and if Moll's survey were taken it would

completely throw out the line taken by Kuys. The evidence of old Swaenepoel must be accepted in regard to the position of the corner beacon, in the absence of any evidence to contradict him. From his statement D seems to be the original beacon intended by Kuys. The Court can make no order as to the line B, C. The Court will declare however that the line A2 (red) to D on Tudhope's plan is the true boundary line and that the defendants should pay the costs.

Sir H. Juta said that the line which the Court held to be the true boundary was not the line claimed either by the plaintiff or by the defendants. It would therefore be reasonable and the defendants should not pay all the costs.

De Villiers, C.J., ordered the question of costs to stand over for an affidavit to be made by Tudhope with respect to the line.

*Poste* (November 3th).

De Villiers, C.J., said: Mr. Tudhope has made an affidavit in which he clearly states that the wire fence was made from A2 (red) to D. That being so costs must follow the result. Plaintiff must have his costs.

[Plaintiff's Attorneys, Messrs. Dempers and Van Ryneveld; Defendants' Attorney, C. W. Herold.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

JOPLING V. JOPLING. } 1899.  
Nov. 7th.

This was an action for a decree of divorce on the ground of the defendant's adultery with one Aggie Taylor.

Sir Henry Juta, Q.C., appeared for the plaintiff, and Mr. Gardiner for the defendant.

Henrietta Dunn stated that defendant had resided at Newlands at her home with a woman named Aggie Taylor, the couple passing as Mr. and Mrs. Jopling.

Aggie Taylor admitted living with the defendant as his wife.

Mr. F. K. Wiener (by whose firm defendant was employed) said defendant might earn £20 to £25 a month in good times.

The defendant said his wife left him two and a half years ago, after a long course of disagreement. He had asked her to return to him, but she refused. During the two and a half years he had not supported her; she had been living with her parents. His earnings had been over-stated; he received only £4 to £5 a month as commission above a small salary.

The Court granted a decree of divorce, plaintiff to have the custody of the children, and defendant to pay £2 per month towards the support of each of the three.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

WILLENZICH V. GELB. } 1899.  
Nov. 7th.

Building contract.

*The plaintiff sued in the Magistrate's Court for the balance of an amount due to him under a building contract. The Magistrate found on the evidence that he had received everything that was due to him. Appeal against the judgment dismissed.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the plaintiff (now appellant) had sued defendant for £15, being the balance due on a building contract. The defendant put in receipts for the sum alleged to be due, three of which receipts the plaintiff denied. Defendant further put in a counter claim for £20 damages sustained through plaintiff's delay in completing the work, but this claim was dismissed. The defendant said a sum of £4 10s. was still owing on the work, but this he had to pay out on account of damages sustained through plaintiff's defective construction of the building. This sum plaintiff alleged was still due to him. Plaintiff further stated that defendant had offered him £7 10s. to settle the case, and called two witnesses to support this. The defendant, however, denied such an offer.

The Magistrate gave judgment for the defendant on the claim in convention and absolution from the instance on the claim in reconvention. In his reasons he said: For

the plaintiff it is contended that the agreement, which was a verbal one, was for the erection of two kitchens, one at £21 the other at £7, and that the sum of £13 has been paid on account. In his evidence the plaintiff says that on the day of hearing the defendant offered him £7 with costs. The defendant's version is that the contract was for £20 and that the amount due had been paid. Upon careful consideration of the evidence I was unable to accept the statements of the plaintiff's witnesses, and on the facts gave judgment for the defendant, believing as I do his evidence in preference to plaintiff and his witnesses. The claim in reconvention was not proved to my satisfaction, though there appears good grounds for making it. I accordingly absolved the plaintiff from the claim.

The plaintiff appealed.

Mr. Nathan appeared for the appellant.

Mr. Gardiner for the respondent.

After argument,

De Villiers, C.J., said: It is clear that the plaintiff has received all the money that he was entitled to. There might have been some difficulty with regard to the item of £4 10s., but upon referring to the evidence we find that the amount was paid by the defendant for work which had to be done in consequence of the plaintiff's defective construction of the roof of the building. The appeal must therefore be dismissed.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorney, C. Friedlander; Respondent's Attorney, J. F. E. Bernard.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

### ADMISSION.

{ 1899.  
Nov. 9th.

On the application of Mr. Buchanan, William Sydney Charles Harsant was admitted as attorney, notary, and conveyancer.

### REHABILITATIONS.

Mr. Howel Jones applied for the rehabilitation of James William Clarke, lately trading as J. W. Clarke & Co.

Granted.

Mr. Nightingale applied for the rehabilitation of A. D. Swart.

Granted.

### PROVISIONAL ROLL.

EX-OUTORS OF THE LATE CHARLES ROBERT EATON V. DAVID.

Mr. P. Jones applied for provisional sentence on a mortgage bond for £1,400, with interest at 6 per cent. from January 1, 1899.

Granted, and the property declared to be executable.

BUDD V. ALBERTUS DU TOIT.

Mr. Miller moved for provisional sentence on a promissory note for £37.

Granted, subject to a fine of 20s. for non-stamping of the document.

SPIILHAUS AND CO. V. SAMSODIEN.

Mr. Howel Jones applied for final adjudication of the defendant's estate.

Granted.

LIND V. VAN DER SPUY.

Mr. M. Bisset applied for provisional sentence on £68 7s 6d. for moneys paid and services rendered, and £30 on a promissory note.

Granted.

MUNRO V. KRAHE.

} 1899.  
Nov. 9th.

Mr. Buchanan applied for a decree of civil imprisonment against the defendant upon an unsatisfied judgment for £20 and £66 16s. 10d. costs, given against him at the Circuit Court, Worcester, for running over a child.

Defendant appeared in person, and said he was willing to pay £1 a month. He was out of work, and only earning a few shillings commission by selling mules.

Having been sworn he stated that he had carried on a very profitable business as a canteen-keeper at Worcester, but he had to sell it after running over a child, and before the Circuit Court trial to satisfy his creditors. He received £150 for the goodwill of the business, and £200 for stock, which he paid to his creditors. His horse was burned down some time in January of this year. He got £900 from the insurance company, but £1,400 worth of damages was occasioned, and he lost £900 by that. His

creditors got that money also. He was living at present off the proceeds of a horse which belonged to his wife and had been sold.

The Chief Justice : Can you manage to pay £3 a month ?

Defendant : I will try.

The Court granted a decree of civil imprisonment, and suspended the order subject to defendant paying £3 a month, the first payment to be made on the 15th instant.

### ILLIQUID ROLL.

#### PALM V. ZINN.

Mr. De Waal applied for judgment under Rule 329 for the sum of £2,700, being the purchase price of a certain farm.  
Granted.

#### STEER AND CO V. SCOTT.

Mr. Benjamin moved for judgment under Rule 319 for a sum of £24 ls. for conveying charges and £7 4s. 11d. taxed costs.

Granted.

#### LLOYD'S BUREAU V. RAYMOND FARLEY.

Mr. P. Jones moved for judgment under Rule 329 for a sum of £61 3s. 5d. for services rendered.

Granted.

#### WATSON V. WATSON.

{ 1899.  
Nov. 9th.

This was an application by Thomas Hunter Watson and Frances Wilhelmina Watson, his wife (married in community) for an order authorising the payment to the second-named petitioner of certain moneys paid into court. The petitioner had entered into a notarial deed of separation some time ago. Subsequently the wife, being anxious to institute an action for divorce or judicial separation, had applied to the Court and obtained an order upon her husband to assist her in obtaining a certain inheritance due to her, the money so obtained to be paid into the hands of the Registrar of the Court and £30 to be paid to her for the purpose of the costs of the action.

Thereupon an action was instituted to recover the inheritance and judgment obtained for £130 19s. 8d., interest, costs to come out of the estate, and on the 3rd August, 1899, £46 7s. 3d., being the balance of the said money was duly paid into the

hands of the Registrar. The petition stated that the wife had now approached her husband with a view to confirming the notarial deed of separation aforesaid, except that in lieu of the monthly payment therein specified to be made to her by her husband she was prepared to accept in full settlement the balance of the money now in the hands of the Registrar, that she was quite prepared to allow her husband custody of the children of the marriage hereafter. The prayer was that the Registrar might be authorised to pay the said balance to the second-named petitioners in terms of the agreement arrived at between them.

Mr. Benjamin appeared for the petitioners. The order was granted.

#### Re ESTATE OF G. P. GERICK.

Mr. Benjamin, on behalf of the executors, applied for leave to sell certain movable property and certain immovable property in British Bechuanaland, the proceeds of which would be invested on behalf of the beneficiaries, who were all minors.

De Villiers, C.J., said that it was no use trying to sell property in British Bechuanaland at the present time. Leave to sell the movables would be granted.

#### KAISER V. COHEN AND PHILIP.

This was an application for a rule nisi for the delivery of possession of certain premises at the corner of Chapel and Tennant-streets to be made absolute. A contract was entered into between the parties whereby the premises were to be altered and completed by the respondents within a certain time. Applicant considered there was undue delay in their completion, and had entered into possession. The respondents had then assaulted applicant's servant and taken possession forcibly of the buildings. Applicant had thereupon obtained the rule nisi.

The respondents applied for an indefinite postponement on the ground that the second-named respondent, Phillip, had left Cape Town on active service as a member of a Volunteer Corps, and the first named said he knew nothing about the matter.

Mr. Innes, Q C, for the applicant.

Mr. Nathan, for the respondents, referred to *Casson v. Conolly* (1 Juta, 68).

After argument,

The Court made the rule absolute on the ground that the respondent Phillip had had ample time before going on active service to file an affidavit,

MCOLAY V. CARTER. { 1899.  
 { Nov. 9th.

Interdict—Shares—Syndicate.

This was an application for an order restraining respondent from parting with certain syndicate shares in the C.H. Syndicate, Limited.

The applicant alleged that he was one of the promoters of the C.H. Syndicate, of which Carter was appointed the vendor, that the scrip of all the syndicate shares were made out in his name and that it was his duty to endorse all the scrip of the syndicate before its issue. The applicant, under the terms of an agreement, had to receive fifty fully paid up £5 shares. The scrip was now ready, and all of it had been duly endorsed, with the exception of the fifty shares due by Carter to him, which Carter refused to endorse and retained possession of. Applicant was bringing an action against respondent to compel him to endorse and deliver the scrip, and now prayed that pending the action an order should be granted restraining respondent from parting with the said fifty shares. The affidavit of the chairman of the syndicate was to the effect that the statements above were true to the best of his knowledge.

The respondent alleged that Carter had no interest in the promotion of the C.H. Syndicate, nor any rights or interests therein. The capital of the syndicate consisted of 1,200 shares at £5 each, whereof 600 shares were set aside for respondent, as for his patentee's rights in the manufacture of certain artificial stone, and his interests in certain concessions of mining and other rights in the divisions of the Cape and Stellenbosch. The applicant had been temporarily appointed secretary when it was contemplated forming a syndicate and the respondent was then prepared to offer him a bonus of fifty £1 shares as remuneration; but the syndicate fell through, and the applicant became intemperate in his habits. The present syndicate was not the one originally proposed. Respondent contended that applicant was no longer entitled to any of the shares.

E. J. Payne and R. H. Peycke, two of the original signatories to the C.H. Syndicate, corroborated the respondent's statements, and said the present syndicate was one with a very much smaller capital than that originally proposed, and that it was clearly understood that the applicant should not be employed, and that he had no interest therein.

I 4

The applicant in a replying affidavit said that it was agreed that he should be entitled to fifty £5 shares in the present syndicate incorporated on the 30th August, 1899, as remuneration for his work done in acquiring the assets and floating the syndicate. He annexed a letter dated 18th August, 1899, from the acting secretary, who wrote, "Your C.H. Syndicate shares are pooled with the rest until allotment, which I expect will take place within ten days or a fortnight. Your holding is at present fifty £5 shares."

Mr. Miller, for the applicant: There is a *bona fide* dispute between the parties, and the applicant has shown a *prima facie* case.

Sir H. Juta, for the respondent: Applicant must show more than a *prima facie* case: he must show that there will be irreparable damage. He has altered his case in his replying affidavit. With regard to the letter of the acting secretary there has been no pooling: the prospectus of the syndicate shows that out of 1,200 shares issued 600 are to go to the vendor, and 600 to the public. There is nothing in applicant's affidavit to show that the respondent is unable to pay damages.

Mr. Miller, in reply to the Court, said that the summons in the action had not yet been issued.

The Court refused the application, with costs, leave being granted to the applicant to include the amount of the costs in his action for delivery of the shares.

[Applicants' Attorneys, Messrs. Dempers & Van Byneveld; Respondents' Attorneys, Messrs. Tredgold, McIntyre & Lisset.]

GREEFF V. KREYNAUW. { 1899.  
 { Nov. 9th.

Encroachment—Building—Damages.

*The defendant, bona fide thinking that he was building upon his own land, encroached with the wall of his building upon five inches of the plaintiff's property. The eaves of the roof of the building hung over the plaintiff's property to a further extent of eleven and a half inches. Upon discovery of the encroachment he tendered a certain amount as damages in respect of the five inches.*

*Held, that he had not tendered sufficiently, inasmuch as the plaintiff was also entitled to damages for the eleven and a half inches.*

*The plaintiff consenting to give transfer to the defendant of the strip of land encroached upon, judgment was given in his favour for the value of the whole extent of the encroachment.*

This was an action for damages. The declaration set forth that the parties resided at Salt River. Each of them owned a plot of land at Rutter's Field, and the plots adjoined. The defendant had erected a certain building on his land, which building encroached on the plaintiff's land. The plaintiff had suffered damages thereby to the extent of £25, and now claimed an order compelling defendant to remove the said building from his land, the sum of £25 as damages, alternative relief, and costs of suit.

The plan annexed showed the encroachment to be 5 inches by 67 feet.

Defendant's plea admitted the allegation of encroachment, stating that he had built upon the ground in question in the *bona-fide* belief that the land was his, and with the full knowledge and consent of the plaintiff, and that the encroachment could not be removed without great loss and damage to him; that he had tendered the sum of £10 as compensation, which sum the plaintiff had refused to accept. The tender was repeated in the plea.

Mr. Benjamin appeared for the plaintiff.

Mr. Graham, Q.C., and Mr. Close for the defendant.

Bevan Greeff, the plaintiff, said he was a baker at Salt River, and also a builder with considerable experience, acquired here and at Johannesburg and Kimberley. He was the owner of lot No. 2 on the plan, and defendant owned lot No. 1. There was no building on lot 2. Defendant erected a building on lot 1, and had encroached five inches on lot 2. Witness was not aware of the encroachment when the building was in course of erection. He bought the land in June, 1898, and took transfer in July, 1899. The defendant began to build in July, 1898. Shortly before he took transfer he discovered the encroachment. He gave defendant no permission to encroach. He was going to erect a semi-detached double-story house, with single frontage. Each house would fetch £5 10s. per month. He wanted to start in July. He never spoke to the defendant. The defendant offered to let him insert his beams in

the party wall but the offer was useless, as the eaves of the house projected 11½ inches over the wall. The eaves were in the way. He paid £100 for the ground, with transfer fees. Land had appreciated in value in that neighbourhood, having gone up in one case from a price of £15 three years ago to £60 to-day. The frontage of his house was 15 feet long.

Cross examined: It would cost defendant £20 to alter his house. It would not be necessary to remove the whole of the roof. When he bought the ground defendant had not begun to build. He asked Heydenrych, the contractor, to build up to his boundary, as he also wished to build right up to the boundary. He had not bought or sold any property recently. He had been prevented from going on with his building.

David Antony Krynauw, the defendant, said he was a carriage examiner at Salt River Works, earning 5s. 4d. a day. He bought the property in March or April, 1898, and got transfer in May, 1898. He paid £75 for a corner lot, the same size as plaintiff's lot. Heydenrych put up the building for £889. Plaintiff never complained about any encroachment. The first complaint was made in the beginning of 1899. First he offered £5 as compensation, and then £10. There had been no depreciation in the value of the ground.

By the Chief Justice: He would take £1,200 for the house and ground.

Gert Heydenrych said he was a builder and contractor, and was present when the foundations of the house were laid out. There were no signs of any pegs on the surface. There had been no depreciation in value. Defendant's ground was more valuable than plaintiff's. The whole value of plaintiff's lot was £70. He could build a house on plaintiff's property as large as defendant's. It would not cost less than £100 to alter the building.

Conrad Willem Steensma, builder and contractor, said he owned considerable property near Salt River. The value of what he owned was about £7,500. Property had decreased in value at present. He would give £60 for plaintiff's property. He had bought and sold ground in the neighbourhood. He inspected the property and found that a peg had been recently put in. Five inches would take a little value off the property. The loss would be about £5. The loss would be considerably more than £5 if there was a difference of 16 inches, that is,

If the eaves were included. If defendant only took five inches he would have to alter the eaves.

The Chief Justice said it appeared that the only solution of the matter would be for defendant to buy the 18 inches.

Henry Jones, appraiser and auctioneer, said the market value of the land encroached on was 14s., taken at 6d. a square foot.

Johannes Martinus Moller gave similar evidence. He thought the value of plaintiff's lot was £65.

Mr. Benjamin: The plaintiff is entitled to removal of the defendant's encroachment. *Pike v. Hamilton, Ross & Co.* (2 Searle, 191). In *Myburgh v. Jameson* (4 Searle, 8) an order for removal was refused but in that case the encroachment had existed for some years without objection. According to *Voet* (8, 4, 6) it was a general custom in Holland that if a year and a day had elapsed the complaining party was not entitled to demand the destruction of the encroaching party but could only claim damages. *Voet* referred to *Grotius*, *Groenewegen* and *Matthæus*. See also *Voet* (8, 2, 17). There has been no acquiescence in the encroachment. It is impossible to use the wall as a party-wall without removing the roof. The estimate of the value of the land made by witnesses is based on the bare cost of the ground. The encroachment makes a considerable difference to the size of the rooms.

Mr. Graham: *Pike v. Hamilton, Ross & Co.* is the only case in which the removal of the building has been ordered. There each party claimed a party wall. Here it is common cause that there has been a *bonâ fide* mistake. Both parties were ignorant of the exact position of the boundary. As to damages see *Christie v. Haarhoff* (4 H.C.R. 340).

De Villiers, C.J.: Are the parties prepared to give and take transfer of the strip of ground, against payment of damages?

Mr. Graham: Yes.

De Villiers, C.J., said: It is admitted in this case that there has been a trespass on the plaintiff's plot. The wall encroaches to the extent of five inches, and the eaves on defendant's roof overhang to an extent of 11½ inches, making a total of 16½ inches, or, in round numbers, 18 inches. The defendant tendered the sum of £5 as damages for the encroachment of five inches, but no tender has been made in respect of the overhanging eaves. The Court is of opinion that for the 18 inches a fair compensation would be £20. For that amount judgment will be entered

for plaintiff on condition that plaintiff gives transfer to defendant of the strip of ground. In estimating the value of strip it is impossible to take into consideration the *pro rata* value of the whole ground. The plaintiff bought the land on the supposition that it had a frontage of 15 feet. The question is not what he paid for it, but to what extent he has suffered inconvenience by the encroachment. The Court is of opinion that £20 is a fair estimate of damage. The defendant has made no tender of £20, but has only tendered in respect of the five inches.

Judgment for plaintiff for £20 damages and costs, plaintiff to give defendant transfer of the strip of ground. Defendant to pay costs of transfer.

[Plaintiff's Attorneys, Messrs. W. K. Moore & Son; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

EDGAR V. SCOTT. { 1899.  
Nov. 10th.

Mr. Molteno applied for judgment in terms of a consent-paper.

The plaintiff had originally applied for provisional sentence upon a judgment of the Supreme Court of the Colony of Victoria, but the Court had ordered the parties to go into the principal case. The defendant had now consented to judgment.

Judgment for the plaintiff in terms of the consent-paper.

BEAUFORT WEST MUNICIPALITY } 1899.  
V. MCINTYRE. } Nov. 10th.

Nuisance — Abatement — Interdict — Practice.

Where a nuisance dangerous to public health exists the Court will grant an order on motion restraining such nuisance.

This was an application on the part of the Commissioners of the Municipality of Beaufort West for an order calling upon the

respondent, William Hall McIntyre, to abate a certain nuisance and for an interdict<sup>1</sup> restraining him from the use of a certain water closet, and ordering him to comply with the municipal regulations pending an action for £100 damages to be brought in consequence of the said nuisance and trespass on property of the said municipality.

The affidavit of certain of the applicants set forth that there had been numerous complaints of the sanitary condition prevailing in the neighbourhood of the Queen's Hotel, Beaufort West, which was the property of the respondent. The sanitary arrangements of the municipality were based on the bucket system, without pits. The respondent had made certain connections from a room upstairs, used as a water closet of the hotel, by means of pipes with the municipal main, and employed a method of flushing through certain trenches and sewers which he had constructed into a specially made pit or so-called French drain. Paragraph 9 of the affidavit alleged that this pit was made without the permission of the municipality upon municipal land about 5 yards from the main road. A hole to the depth of about 5 feet had been filled loosely with stones and this constituted the outfall into which the sewage was drained and was the so-called French drain.

They alleged, further, that it was against the regulations of the municipality to use the water from the said main for other than drinking purposes, and these regulations were known to the respondent. A detailed description was given of the method of flushing employed by the respondent, which, it was alleged, had become an intolerable nuisance.

The affidavit of the respondent admitted the formal allegations. He went on to say that although the minutes of the Municipal Board had been published, there was no reference in them to the complaints made against him. Before the affidavits in this case had been filed he had caused his buckets to be removed by the municipal scavengers and the nuisance had, as a matter of fact, entirely ceased. The municipality had never informed him that the water from the hotel was to be utilised for drinking purposes only. Respondent had refrained from making any further use of the closet after he had been notified concerning the alleged nuisance. He denied the nuisance, and said that if it had ever been committed, it had long since been abated. He said that the

allegations contained in paragraph 9 (*inter alia*) of the applicants' affidavit dealing with the pit were purely hearsay and therefore inadmissible.

T. W. Maddison and Dr. Duvelheuk corroborated the affidavits of the respondent in so far as they stated that the room upstairs referred to, had been locked up and the sanitary condition of the Queen's Hotel could afford no cause of complaint.

The petitioners, in their replying affidavit, said that their regulations had been made known to the respondent. They had received numerous complaints. The respondent had promised to remedy the nuisance, but had never done so.

Mr. Innes, Q.C., for the applicants: The application is made under Ordinance 9 of 1836, section 42, which authorises the abatement of public nuisances injurious to health and enables the Municipal Commissioners to sue for damages. Section 134 of the Municipal regulations deals with the removal of night soil and shows the system adopted. It is admitted that the respondent does not carry out the regulation. He does not deny the allegation in paragraph 9 of the applicants' affidavit, viz.: that he has made an excavation on municipal land. The applicants contend that he should take out the stones put in by him, close up the drain and abate the nuisance pending the action about to be brought against him for trespass and damages.

Mr. Graham, Q.C.: The applicants have mistaken their remedy; their grievance is not one which can be removed on motion. Before the affidavits were sworn to a complaint had been made by the municipality and the respondent abated the nuisance at once. The municipality after that opened up the pit and discovered night soil; it is owing to their own action that this nuisance now exists. If there has been a trespass an action must be brought and the respondent has a good defence, but the nuisance has been abated and there is no ground for an interdict, as no one is damaged.

Mr. Innes in reply: An order for abatement of nuisance pending action may be obtained on motion.

[De Villiers, C.J.: Will you be satisfied with an undertaking to remove the nuisance, and fill up the excavation?]

Yes.

De Villiers, C.J., said: The Municipal Commissioners are charged with the duty of attending to the public health, and where it



It is clear that a matter will be dangerous to the public health if it is not interfered with, the Court will grant a rule restraining such a nuisance on motion. There is no rule to the effect that the Court will only grant such an interdict in an action brought for the purpose. In the present case it appears that the respondent has constructed certain drains and pits, which he has connected with the municipal water main, so as to flush them. It is clear from the affidavits that a certain amount of unpleasant matter has been allowed to come on to municipal property, and this constitutes a nuisance to residents in the neighbourhood. It is suggested that before the present application was made the nuisance had been taken away. If this suggestion had been made the subject of an affidavit, the Court would have attended to it, and probably considered that there was no ground for interfering. But it is only suggested, and therefore the Court can not attend to it. It appears that there is sufficient ground to grant the application with costs. A question, however, has arisen as to whether the costs of the affidavits should be allowed. Those affidavits are of such a nature that the Court is quite justified in refusing the applicants the cost of the affidavits. The Court will therefore give an order compelling the respondent to close up the trenches and abate the nuisance. It is a mandatory interdict, and no injustice will be done if it appears that the trenches were closed up before the application was made.

**Buchanan and Maasdorp, J.J, concurred.  
Application granted with costs.**

[Applicant's Attorneys, Messrs. Van Zyl & Ruisinné: Respondent's Attorneys, Messrs. Scanlan & Syfret.]

OLSEN V. MCINTYRE. { 1899.  
Nov. 10th.

**Interdict—Sale—Lease—Possession.**

*O. applied on motion for an interdict restraining M. from transferring certain hotel property sold to a third person on the ground that under a certain agreement of lease O. had a pre-emptive right over the property. In the absence of clear proof that a proper agreement of lease had been entered into or that the applicant had at any time been in possession of the property, and the purchaser being an innocent party, the Court refused to grant an interdict.*

This was an application for a rule nisi restraining respondent from passing transfer of the Queen's Hotel, Beaufort West, to the Martienssen's South African Breweries (Limited) to be made absolute.

The applicant alleged that he had entered into a contract of lease of the hotel with the respondent which gave him a right of pre-emption within three years. The respondent was, however, about to sell the hotel to the Martienssen's South African Breweries (Limited).

The respondent's affidavit alleged that the lease had been given on condition that the applicant should not bind himself to purchase liquors for the hotel from any particular firm, or bind himself in any way to any particular firm. The lease was only a draft lease, and was undated and unsigned, having been submitted to the applicant's legal advisers for approval, and the applicant having then suggested certain alterations before signing. The applicant, it had since appeared, was supported by the firm of J. D. Logan and Co. (Limited), and had bound himself to purchase all liquors and other requisites for carrying on the said hotel business from them. The respondent had objected to this agreement, on the ground that it was a breach of the verbal condition entered into between applicant and respondent. The respondent had submitted another lease to the applicant, which lease the applicant refused to sign. Since then the hotel had been sold by respondent to the South African Martienssen's Brewery (Limited) for £5,750.

The applicant in a replying affidavit said that the terms of the lease had been finally agreed to and that only a few immaterial alterations were suggested, such as the rate of interest to be paid.

That the hotel and its contents had been actually handed over to him. He said that the second draft of lease submitted to him differed very materially from that which had been agreed upon.

Mr Innes, Q.C., appeared for the applicant.

Mr. Graham, Q.C., for the respondent  
The e being some doubt as to who was in  
present occupation of the hotel.

Abraham Robertson Truter, the respondent's attorney, called by the Court and sworn, stated that the respondent was in possession of the hotel at present, and the applicant had never taken possession, nor had the property ever been handed over to him.

Mr. Innes: Applicant's statement as to the first lease is quite conclusive, viz.: that the terms were finally agreed upon and nothing else had to be done except the signing. He relies upon the verbal agreement.

Mr. Graham was not called upon.

De Villiers, C.J., said: On the evidence laid before him the judge who granted the rule *nisi* had no option but to grant the rule. There is no doubt, from the affidavits that a lease was granted by which certain rights were given to the applicant. But when we come to go thoroughly into the matter, what do we find? We find that there is only an inchoate agreement between the parties. No proper agreement of lease has been entered into, and, in order to succeed in this application, the applicant must show some right to the possession of the property. Now, the respondent is in possession of the hotel, and not the applicant. It appears that the respondent is quite capable of paying damages in any action which the applicant may bring against him for breach of the contract of sale alleged to subsist between the parties. The applicant can therefore bring an action against the respondent. There is no reason, however, for interdicting the transfer of the property to the South African Breweries Co. The sale has been effected to a party innocent of any of the transactions which have taken place between the applicant and the respondent, and that party should not be made to suffer. They are entitled to transfer of the property, having entered into a lawful agreement of sale with regard to it. The rule will be discharged, with costs.

Buchanan and Maasdorp, J.J., concurred.  
[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

#### STOCKENSTROM'S ESTATE V. GRAND JUNCTION RA LWAY.

This was an application to have a certain award of arbitrators in a dispute between the parties made a rule of Court.

Mr. Buchanan appeared for the applicants.

Mr. Brown appeared on behalf of the respondents to consent.

Granted.

#### IN RE CAPE OF GOOD HOPE PERMANENT BUILDING, LAND AND INVESTMENT COMPANY, IN LIQUIDATION.

Mr. Searle, Q.C., presented the second report of the liquidators.

De Villiers, C.J., asked what had been done in connection with the action brought against the directors of the company.

Mr. Searle read an offer submitted by Attorney Paul de Villiers on behalf of the directors, to settle all claims made on the part of the creditors and shareholders for a sum of £5,351 2s. 10d., the calculation of which was based on the last annual balance-sheet. The offer was made without prejudice.

De Villiers, C.J., said it would be for the liquidators to decide whether or not to exercise their power with regard to the compromise. He took it that so far there was no compromise.

The Court made an order that the papers should lie for inspection in the usual way.

#### IN THE ESTATE OF THE LATE EDWARD DODDS EDWARDS.

This was an application for leave to sell certain property.

Two of the petitioners were the executors testamentary in the estate of the late Edward Dodds Edwards, who died during March, 1899; and the other was the assumed executor in the said estate. The deceased had left a widow, who was one of the petitioners, and three minor children and had bequeathed certain immovable property on perpetual quitrent, comprising the farm Glencullen, in the division of Bedford, one-half to his wife and one-half to the children, the wife to have a life usufruct of the whole. The wife was unable to remain on the farm, and now applied for leave to sell it to the third petitioner, her brother, who had offered to buy it, taking a lease for a term of ten years on condition that he was to receive transfer at the end of that time. The value of the farm for Divisional Council purposes was £2,469 10s., and the brother had offered to purchase for £5,000. There were no other persons offering to purchase. The brother had agreed to tend the cattle belonging to the heirs, and to contribute to the cost of a farm school to educate the children.

Mr. Benjamin appeared for the petitioners.

De Villiers, C.J.: The application is granted, it being understood that these conditions are to appear in the lease.

HEYDENRICH V. HAYES' } 1899.  
TRUSTEES AND SAHER. { Nov. 10th.

Insolvency—Amendment of distribution account—Ordinance 6 of 1843, section 111—Pledge—Removal of goods—Sale,

*E. pledged to H. goods belonging to him and situated in a certain store. Subsequently, without the knowledge of H., he pledged the same goods to S. E.'s estate was sequestrated and S. removed the goods from the store. The trustees of E.'s estate, with the consent of H., agreed that S. should sell the goods for a certain sum and after deducting the amount of his debt pay the difference into the estate, without prejudice to H.'s right to take such action against S. as he might be advised. The trustees did not bring up the matter at all in the distribution account and ranked H. as a concurrent creditor. On application by H. for an amendment of the account, by bringing up the sale price of the goods and awarding him a preference,*

*Held, that in the ordinary course the trustees should have brought the matter up in the account, but that under the special circumstances H. should seek his remedy by bringing an action against S. and joining the trustees as co-defendants.*

This was an application on notice calling on the trustees to amend the account which they had filed in the insolvent estate of Eayrs by bringing up the sum of £1,900 as due to the applicant, and ranking him as a preferent, instead of as only a concurrent creditor.

The applicant alleged that during May, June and July, 1893, the insolvent had pledged certain goods situate in two stores in Loop-street and another street to him for a debt of £2,407. That the respondent Saber alleged that the goods in the Loop-street store were also pledged to him, and had removed the goods without the applicant's knowledge and sold them for £1,900.

That the estate of Eayrs had been sequestrated.

That applicant claimed preference upon the sale price of the goods for the amount of his claim against the estate.

That the trustees of the estate had framed an account in which they had not credited the estate with the sale price of the goods, viz., £1,900.

That applicant was ranked as a concurrent creditor in the estate.

That Saber had not proved against the estate for the amount of his claim.

That applicant had proved as a preferent creditor for the full amount of his claim.

That he claimed that the sale price of the goods should be brought up on the credit side of the account and that this amount should be paid into the estate and be considered an asset thereof.

That he had lodged with the Master of the Court his objections against the account, viz.: That the trustees had not brought up on the credit side of the account the amount of £1,900 and that he was not ranked as a preferent creditor for the amount of his claim.

The affidavit of Mr. E. B. Syfret, one of the trustees, was to the effect that he had no personal knowledge of the alleged transaction between Eayrs and Heydenrych, or between Eayrs and Saber. The applicant was fully aware of the circumstances of the transaction with Saber. A resolution had been passed at a meeting of creditors and signed by applicant, among other creditors, authorising the trustees to deal with Saber in the matter. The correspondence was produced. (This showed that the trustees with the consent of applicant had agreed to Saber selling the goods for £1,900 less brokerage and paying the estate the balance of £150, resulting after deducting his lien. The material letters are quoted in the judgment.) The sequestration took place on April 13, 1899. The goods realised were not in possession of the applicant at the time, and therefore he was not awarded a preference. Saber had settled the matter by paying £250 due on the goods. Applicant had informed Syfret that he intended to proceed against Saber.

The applicant replied that he had never looked on Saber as having any legal claim to the goods. He merely agreed that £1,900 was a good price. There was no consent to deduct the £1,900, as that would have been absolutely against his interests. Saber was a creditor to the extent only of £880.

Sir H. Juta, Q.C., for applicant; Mr. Innes, Q.C., for the trustees; Mr. Searle, Q.C., for the respondent Saber.

Sir H. Juta: The trustees should have brought all the assets up in their account,

including the amount of £1,900, and shown that they had awarded Saber a preference. If the amount does not appear in the account the applicant cannot bring any action against the trustees. The trustees are the only persons who can sue for the amount. The simplest mode would be for Saber to pay the £1,900 into the estate.

[De Villiers, C.J.: The right way would be to show the £1,900 as received from Saber on the one hand, and paid out to Saber as a preference on the other hand.]

Mr. Innes: The trustees found Saber in the actual possession of the goods and failing evidence to the effect that he was not entitled to them they were bound to respect his rights. The proper course would have been for Saber to have handed over the assets but he had disposed of them. Ultimately the trustees settled with him, giving up their commission on the £1,900, as is shown by the correspondence. Heydenrych was a party to the correspondence and completely assented to the sale. An action might be brought in either of two ways; either the applicant might sue Saber and join the trustees as co-defendants, as was done in *Pienaar's Trustee v. Pritchard* (10 Juta, 381), or the trustees might get an indemnity from Heydenrych and sue Saber.

Mr. Searle: The Court cannot decide the matter on motion; the applicant should sue Saber and join the trustees.

Sir H. Juta: Nothing can alter the duty of the trustees to amend the account. The applicant cannot compel a third party to pay money into the estate. He can only complain that the trustees' account is wrong.

Mr. Innes: Section 111 of the Insolvent Ordinance says that the interested party must be joined.

The application was refused.

De Villiers, C.J.: The ordinary course to pursue, as urged by the applicant, seems to be the correct one. The creditor raises an objection to the claim, and the Court decides on the claim. In the present case the trustees have not brought up the matter in the account, and they should have done so in the ordinary course. But in this case the applicant has made an agreement by means of a letter, in reply to a letter from the trustees, who wrote to him as follows: "Referring to the matter of the goods held in pledge by Saber, I beg to state that the trustees, under the authority given me at the meeting of creditors yesterday, intend to agree to the proposal made by Saber, whereby he asked their sanction to his

selling the goods for £1,900, less brokerage. This, you will understand, will, of course, mean that he will deduct the amount of his lien on them and pay the estate the difference, approximately £150. Kindly let me know by Monday morning whether you have any objection to this proposal going through. The trustees think the price a good one." To this the applicant replied:—"In reply to your favour of 17th inst., I beg to state that I agree to the price, £1,900, less brokerage, for the goods pledged to me (the contents of the Loop-street store), which were fraudulently handed over to Mr. Saber by the insolvent, without prejudice to my right to take such action as I may be advised against Mr. Saber, and those concerned with him in the matter. Of course, I also claim preference on the £150." After that letter one can understand that the trustees would not bring up the matter in the account. The best course to be pursued now would be for the applicant to bring his action against Saber and join the trustees as co-defendants. In that action he can claim the costs of this application. The notice of this motion may stand as summons in the action, no objection to be taken to variance from the summons in the declaration, which may embrace additional matters.

Buchanan and Maasdorp, J.J., concurred.

[Applicant's Attorney, C. W. Herold; Attorney for the Trustees, Gus Trollip; Attorneys for Saber, Messrs. Van Zyl and Buissinné.]

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## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

AHLBOM V. LITHMAN AND CO. } 1899.  
Nov. 13th.

This was an application calling on the respondents to show cause why applicant, who was defendant in an action wherein the respondents were plaintiffs, should not be permitted to file his plea, which he had been barred from doing. The summons in the case had been issued on July 17, 1899, and the declaration was only filed on October 9, 1899.

The case involved a matter of accounts extending over a period of years since 1892. The defendant was away when the declaration was filed, and only returned afterwards. Ten days later he filed his plea. It was alleged by the applicant that the plaintiffs had waited a very long time before filing their declaration. The case could not, in any event, be heard this term, as there was an important witness in Sweden, whose evidence would have to be taken on commission.

Mr. Searle, Q.C., for the applicant.

Sir H. Juta, Q.C., for the respondents.

De Villiers, O.J.: It is clear, on the statement of counsel, that Pieters, who is away is an important witness. The Court can therefore not insist on the case being heard this term. The defendant will therefore be ordered to file his plea. The question of taking evidence on commission can be made the subject of a later application. Costs would be costs in the cause.

REGINA V. NGQUYE. { 1899.  
Nov. 13th.

Theft—Stray sheep—Marking.

*An ewe in lamb strayed on to N.'s property. He knew it was a stray sheep and had not informed the owner of the fact, but gave it to his son, and after it had lambed he marked the lamb.*

*Held, that N. was guilty of theft at common law.*

This was an appeal from a sentence passed upon the appellant by the Assistant Resident Magistrate of King William's Town at a Court held at Middledrift on the 11th October, 1899.

The appellant was charged with the crime of theft of stock, in that upon or about or between the 1st and 31st day of July, 1899, the said Ngquye did wrongfully and unlawfully steal one sheep the property of Nqupepe.

A preliminary examination was taken against the appellant and the Solicitor-General remitted the case to be tried under Act 43 of 1885.

The following evidence was adduced for the prosecution.

Nqupepe, sworn, states: I live at James Mama's Location. During July, 1899, I missed three of my sheep when the flock re-

turned from the veld. I made search the same day and recovered two at Fanie's Kraal. They had mixed with his sheep. Fanie's place is about a mile from Ngquye's. I made further search but could not find the third sheep, which was a ewe in lamb when lost. On Sunday, the 10th September. I went to prisoner's place and found my missing sheep which had lambed. When my sheep was lost it was branded "S" indistinctly and ear-marked swallow tail right ear, left ear half moon above and below. I found the lamb ear-marked, right ear slit, left ear not marked. I demanded my sheep from prisoner, but he refused to restore it, saying that it belonged to him. I examined prisoner's sheep brand and found it different to mine, namely, one ear (right) stump and left ear slit; prisoner's brand resembles a "4."

William Mtoba, sworn, states: I am a private of the Cape Police at Fort White. On the 12th September I went with M'Kafana to accused's place and asked him to explain why Nqupepe's sheep came there. He said the sheep in question was his property and the progeny of his sheep and that he had given it to his son Ndabambi, a boy. He further said the ear-mark of the lamb was different because he marked all lambs different to the sheep. I examined another sheep which he said belonged to his boy. Ndabambi, and the ear-mark is quite different to the one in question. He then admitted that the ewe belonged to Nqupepe and had come home about three months ago with his (prisoner's) sheep. He further said that he did not report to the headman or police.

Cross-examined: You did not tell us at first that the sheep had mixed with your flock.

At the preliminary examination the prisoner made the following statement: "The sheep came to my place about three months ago with my flock. The lamb was accidentally ear-marked by me when marking others. I did not know that a stray sheep had to be reported to the police or headman, although the police often pass my place. It will be noticed that I did not alter the ear-mark of Nqupepe's sheep."

The prisoner was found guilty and sentenced to nine months' imprisonment with hard labour.

From this sentence he now appealed.

Mr. Close for the appellant: The case having been remitted by the Solicitor-General not under the Act 35 of 1893, but under the Act 43 of 1885, the prisoner was

tried for theft under the common law and consequently it was not necessary for him to account for his possession as it would have been if he had been tried under the Act 35 of 1893.

Again there was no evidence that he was in unlawful possession. The prisoner received no caution before he made his alleged confession to the policeman.

As a general rule the evidence of native policemen in cases of stock theft is most unsatisfactory.

Mr. Ward for the Crown was not called upon.

De Villiers, C.J.: There appears to have been no doubt whatever as to the prisoner's guilt. An ewe in lamb strayed on his property; he did not inform the owner of it, but appropriated it to his own use by making a present of it to his son, and after the ewe lambed he marked the lamb. He stated before the Magistrate that the lamb was accidentally marked by him. It is clear that he knew it was a stray sheep and he gave it to his son. Clearly there was theft without any reference to the Act 35 of 1893. The appeal must be dismissed.

Buchanan and Maasdorp, J.J., concurred.  
[Appellant's Attorney, D. Godlonton.]

EDISON BELL CONSOLIDATED  
PHONOGRAPH COMPANY V. J. GABLICK AND CO. { 1899.  
Nov. 13th.

#### Patent rights—Infringement—Damages.

*In an action for damages for the infringement of the plaintiff's patent rights for the sale of certain instruments it was proved that before he began to sell the instruments but after he had acquired his rights the defendant sold similar instruments in ignorance of the plaintiff's rights.*

*Held, that compensation should only be given for the actual loss sustained and that the measure of such compensation should be the extent to which the plaintiff's sale had been interfered with.*

This was an action for damages arising out of the alleged infringement of certain patents, in which the plaintiff company asserted that they had the sole rights in the Cape Colony.

The declaration of the plaintiff company was as follows:

1. The plaintiff company is the assignee by deed of assignment, bearing date the 12th July, 1898, and duly registered of certain letters patent, taken out in this colony in respect of sound recording and reproducing machines, and various parts of the same. The defendant resides and carries on the business of a draper in Cape Town.

2. The letters patent above referred to and duly issued according to law were as under: (a) improvements in phonographs and phonograms, bearing date the 11th day of June, 1888: (b) to (f) similar improvements, bearing date December 27, 1888, July 13, 1889 and July 5, 1890.

3. That the letters patent referred to in the above sub-sections (a) and (b) were granted and issued to George Edward Gourand, the first and true inventor of the inventions therein referred to, and were thereafter on the 18th April, 1892, duly ceded and assigned by him to the Edison United Phonograph Co., which company duly ceded and assigned all their right, title, and interest in the said letters patent to the plaintiff company on the 12th July, 1896.

4. That the letters patent referred to in the above sub-sections (c), (d), (e) and (f) were granted and issued to Thomas Alva Edison, the first and true inventor of the inventions therein referred to, and were thereafter on the 21st May, 1892, duly ceded and assigned by him to the Edison United Phonograph Co., which company duly ceded and assigned all their rights, title and interest in the said letters patent to the plaintiff company on the 12th July, 1898.

5. The said letters patent so issued as aforesaid granted and conferred upon the said patentees and their assigns, in whose place the plaintiffs now stand, the sole right and privileges to make, use, exercise, and vend within this colony, for the space of 14 years from the respective dates of the issue of the said letters patent, certain inventions described in the said letters patent, and in terms of the said letters patent the plaintiffs are entitled to have and enjoy the whole profit, benefit, commodity, and advantage from time to time arising and accruing by reason of the said invention during the said period.

6. The defendant since the grant of the said letters patent from time to time between the 16th day of May, 1898, and 1st May, 1899, has infringed the rights of the plaintiffs thereunder by unlawfully selling, offering for

sale, and using within this colony articles of the nature and description protected by the said letters patent.

7. By reason of the premises, the plaintiffs have been deprived of and have lost large profits which would have accrued to them from the said patents.

8. The plaintiffs have sustained damage to the extent of £175 9s. 10d., which they claimed, with costs.

The defendant, in his plea, admitted paragraphs 1 to 5 of the declaration. He denied the amount of damages, and tendered the sum of £5 as and for damages sustained.

Issue was joined on the question of damages.

Mr. Graham, Q.C. (with whom was Mr. Gardiner), for the plaintiffs; Mr. Innes, Q.C. (with whom was Mr. Searle, Q.C.), for the defendant.

Dennis Doyle said he was sole agent of the plaintiff company in Cape Town. Mr. Garlick gave him an invoice showing details of all the sales of material affected by the plaintiff company's patent rights. The total amount was £263. Garlick never sent invoices of his sales as he had promised. Witness was unable to ascertain from the invoices what Garlick actually paid for the instruments in America. Knowing the prices of the machines in America and here, he should say that the defendant had made a profit of quite £184, but witness did not claim so much.

Cross-examined: He had been interdicted by Edison from selling a pattern of the latter's patent. Witness had sold about two dozen machines, and then he paid £50 compensation, and took the plaintiffs' agency. Machines that cost £4 landed here he sold for £10, and records bought by him at 12s. per dozen he disposed of at £2 10s. per dozen. When he himself contravened Edison's patent he did so unwittingly. Mr. Garlick's sales were between May, 1898, and March, 1899, and during that period the plaintiff company was doing no business in Cape Town, but he claimed on the basis of the profits that would have been made. If the defendant made no profit at all, he could not claim damages. Several local firms had been interdicted from selling the machines. Witness had sold about £700 worth of machines, when Edison's agent stopped him, whereupon witness paid £50, and took over the agency for the original machines. From a gross profit of £204 made by defendant, 25 per cent. could be deducted for expenses, leaving a net profit of £184.

This closed the case for the plaintiff.

James Waterhouse said he was manager of the defendant's Remington Typewriting Agency. He joined the firm in August, 1898, when there was very little doing in phonographs, and as a fact there had been a loss all through on those disposed of by the defendant. There were branches in Kimberley, Port Elizabeth, and East London. The loss on the total transactions was £123 0s. 7d. There were various expenses in connection with the sale of phonographs.

Cross-examined: There was a larger loss on typewriters and cash-registers. He remembered a Home phonograph sold to Mr. Muller. This cost £4 13s. 8d. landed, and was sold for £15. Records cost 1s. 5d. each, and were sold at £2 1s. a dozen. Blank records cost 9d. each, and were sold at 15s. per dozen. A "Speaker" cost £1; the selling price was £2 2s. The net cost of the goods sold in Cape Town was £50 and at the branches £56.

John Garlick, the defendant, corroborated. The charge made for expenses was reasonable. One-third of his advertisements were for phonographs. When he first sent his order to America he had no idea that he was infringing anyone's rights: in fact, he got the machines from the original agents in America, who induced him to give them a trial.

Cross-examined: The American makers put a plate on the machines stating that they were for sale in Cape Town.

Mr. Graham: The real test of damages is not the profit which the defendant may or may not have made, but the profit which the plaintiffs would have made if they had sold the articles themselves. It is very easy for the defendant to produce a balance sheet showing no profits: he includes amongst his expenditure the wages of the whole of his staff at all the branches of his business. The account which plaintiff puts in is an account of what he would have made if he had had the sales. He is not suing the defendant for an account but for damages. Every infringement of a patent is a ground for damages. In *United Horseshoe and Nail Co., v. John Stuart and Co.* (13 L.R., Ap. Ca., 401) it was held that the mere probability of no profits arising was no ground for reducing the amount of damages to a nominal sum. A fair amount of damages in that case was held to be the profit the patentees would have made had they themselves sold the nails.

[De Villiers, C.J.: In that case there appears to have been competition.]

The plaintiff's case is stronger because they would have had a monopoly.

[De Villiers, C.J.: But when a new article is introduced do not the patentees benefit by the introduction?]

This cannot be called a new article.

[De Villiers, C.J.: It was new to this country; the phonograph was previously unknown here as an article of sale. The plaintiffs had not sold any before the defendant.]

There were several other sellers who were selling at the same time and who have been interdicted. The plaintiffs cannot be considered to be benefited by them.

Mr. Innes: The plaintiffs have suffered no prejudice through the non-supply of invoices, they received a statement of the sales in Cape Town, and an estimate of the sales in the country. They have information of the cost price in America, and immediately framed an account of profits. It has been clearly laid down in recent cases in England that a plaintiff must elect whether he will sue for damages or an account of profits. He cannot sue for both. *Larson on Patents, Designs, and Trade Marks* (3rd ed., p. 304.) This is an action for damages and the onus of proof is on the plaintiffs. They registered their patent *pro forma* in 1898, but they did not come into the market or sell here before March, 1899, so they claim damages for sales during a period in which they were not selling themselves. It is difficult to see upon what basis they claim these damages, it cannot be presumed that they would sell in the future the number of articles which defendant sold if he had not sold them. If they had sold them they might have made bad debts. In any case they have got the benefit of defendant's enterprise in pushing the trade and making a market. *Nunn v. Albuquerque* (34 Bevan, 595); *Elwood v. Christy* (18 C.B., N.S., 494).

Mr. Graham in reply.

[De Villiers, C.J.: In the case in the House of Lords cited by Mr. Graham, the Lord Chancellor said that compensation could be given for the actual loss sustained, and he was satisfied that the sale of the nails there in question had interfered with the pursuer's sale. That appears to me to be a fair test. Did the sale by the defendant of these phonographic instruments and accessories interfere with the plaintiff's sale? In point of fact the plaintiff did not begin with his

sales until after the defendant had ceased his sales. It was a new article introduced into the market, and it is as reasonable to suppose that the plaintiff profited by the introduction of the article to the public as that he lost subsequent customers by reason of the previous sales. Many persons may have seen the instruments in the hands of previous purchasers and may have been induced to obtain them from the plaintiffs as the only dealers in them. In the absence of any proof of an interference by the defendant with the plaintiff's sales, I am of opinion that the tender is sufficient and that judgment must be given for the amount tendered with costs to date of tender, but that subsequent costs must be paid by the plaintiff.

Buchanan, J.: I concur. This is not a case for substantial damages. Nominal damages are all that the plaintiffs have suffered. Judgment will be for the amount of the tender.

Maasdorp, J.: I also concur. If the sales had gone on the part of plaintiffs and the defendant at the same time, the presumption is that the purchaser would have gone to the person who wanted to sell the articles. But here there is no such presumption. Even if the same goods would have been sold to other persons at a later date, the question is whether there would have been a profit. The plaintiff would have had all the costs of the advertisement, and the other expenses of introducing the phonographs. There is no proof that the profits would have been made if the defendant had not made them.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorneys, Messrs. Van Zyl and Buissinné.]

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. JUSTICE MAASDORP.]

BELL, OTHERWISE TULLY V. { 1899.  
TULLY. { Nov. 15th.

Nullity of marriage—Evidence—  
Marriage certificate.

*A decree of nullity of marriage granted upon evidence of admission by the defendant, that he was*



*married to another woman at the time when he went through the marriage ceremony with the plaintiff, and the mere production, without proof, of the certificate of marriage of the defendant and the other woman.*

This was an action for a declaration of nullity of marriage. The declaration set forth that the plaintiff resided in Cape Town, and the defendant was now resident in Stranraer, Wigtownshire, Scotland. On the 4th January, 1892, the parties entered into a contract of marriage at St. John's Church, Victoria West. Two children had been born of the marriage. Subsequently plaintiff discovered that at the time of the marriage there was a previous marriage existing between defendant and one Mary Ralsten Finlayson. The plaintiff prayed for a decree of nullity of marriage, custody of the children, and costs.

Mr. Benjamin appeared for the plaintiff. There was no appearance for the defendant, who had been personally served with the process.

Francis Henry le Sueur produced a certified copy of the marriage between Sarah Jane Bell, the plaintiff, and William Tully, the defendant.

Sarah Jane Bell, known as Mrs. Tully, gave evidence as to her having gone through the ceremony of marriage with William Tully, who was at that time accountant in the Standard Bank at Victoria West. Two children, both girls, had been born to them. For a month after the marriage the parties lived at Victoria West, and then the defendant losing his situation, they came to Cape Town. Shortly after that witness found in defendant's possession a letter signed by one Mary, with whom he was apparently on terms of more than friendship. That aroused her suspicion against him. Some considerable time afterwards she discovered another letter signed Mary Tully in his possession, and on her charging him with having been married before, he admitted the fact and then took to drink. Witness did not leave him immediately because she had not the courage to do so. Subsequently she left him, and after that received a letter (produced) from him in which he practically admitted the fact that he had been married before he went through the cere-

mony of marriage with her. Witness was at present in a situation and worked for the children.

By the Court: She found out three or four years ago that the defendant had been previously married. It was nearly three years since she left defendant. She did not bring an action before because she had not the means.

John Doran, a tailor in Plein street, deposed that he had been a schoolfellow of defendant, whose father was the schoolmaster.

By the Court: Witness had seen defendant since he came to this colony but was never told that he was married. Witness had been seventeen years in this colony.

Charles Beresford Lee deposed that he knew the parties to this suit. After plaintiff had left defendant, the latter admitted to witness that he had a wife in Scotland.

A copy of the certificate of marriage between defendant and Mary Finlayson was put in.

Buchanan, J.: I doubt whether you would get a conviction for bigamy upon this evidence.

Mr. Benjamin: The Court will not require such strong proof in this case as in a prosecution for bigamy.

The Court granted a decree of nullity of marriage as prayed with costs. As to the custody of the children there was no order on that point made inasmuch as defendant had no claim to the custody of the children.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

#### HAYES V. HAYES.

This was an application for a commission *de bene esse* to take the evidence of the plaintiff on commission in London.

The action was one for divorce, brought by Sarah Hannah Hayes against her husband, Harold Henry Hayes, and it was alleged that the plaintiff could not remain in the Colony, owing to the great expense. Personal service had been made on defendant in Natal, where it was alleged he had gone to evade justice, having embezzled money belonging to his employers. A postponement of the case was also applied for.

Mr. Buchanan appeared for the applicant. The Court granted the application, and appointed Mr. Mackarness as commissioner. Buchanan, J., pointed out that the question of domicile would have to be met when the trial of the action came on. Meanwhile the case would be postponed *sine die*.

[Before the Hon. Mr. Justice BUCHANAN  
and a Jury.]

WINTERBACH V. HEATLIE AND { 1899.  
DE VOS. { Nov. 15th.

This was an action brought by J. C. Winterbach, law agent, of Worcester, against Charles Heatlie, of Glen Heatlie, and De Vos, an insurance agent, of Worcester, for £1,000 damages for assault on the occasion of a public meeting at the Town-hall, Worcester, on July 12. The defendants admitted the assault, but stated that they acted under the impulse of the moment. Before the action was brought they had apologised, and tendered £25, which they considered more than sufficient. The plaintiff, however, declined to accept the tender.

Mr. Searle, Q.C., and Mr. Brown appeared for the plaintiff; Mr. Innes, Q.C., and Mr. Currey for the defendants.

Johan Carl Winterbach, the plaintiff, stated that he was an enrolled law agent, and had lived at Worcester for the past five or six years, and previously had resided in the neighbourhood. He was a member of the Worcester Municipal Council. The notice put in calling a meeting for July 12 to express sympathy with the uitlanders and support of Sir Alfred Milner's policy, he caused to be inserted in the "Worcester Standard." The notice stated that the Mayor would preside, and witness had previously seen the Mayor on the subject, and he had consented to take the chair. On the night in question the Town-hall was packed, there being, roughly speaking, about 500 people present. (The plan of the hall, which was on the second story of the building, was put in.) Witness took up his position near the platform, and he saw that the meeting was going to be a noisy one. The people began to cry for the chairman, and witness advanced to read a letter he had received from the Mayor explaining why he was not present to preside. Mr. J. P. Malan said witness could not read the letter until a chairman had been appointed. The defendant Heatlie afterwards came up, and, taking out his watch, said he would give five minutes, and if no chairman turned up then they would disperse the meeting. Witness replied, "All right; you can go home if you like, and we will hold the meeting." After five minutes Heatlie again came up and said the meeting would now disperse, and Mr. Lindenberg, the Town Clerk, then turned out a light on the platform, while some others lowered the

lights in the body of the hall. Afterwards Heatlie pulled witness on to the table, and then jumping down took witness by the feet and threw him over his (Heatlie's) back, head downwards. He dragged witness in that position through the people to the door and down the steps, although witness resisted all he could. At the top of the stairs witness got his feet against the doorpost, and Heatlie could not get him through until someone came to his assistance. Witness was flung right down eighteen stairs. Afterwards witness saw the defendant De Vos, who was near him, in a threatening attitude, but he did not strike witness. When witness got outside he saw Chief Constable Gibson and Police-Sergeant Richmond, and wanted to lay a charge against his assailants, but Gibson said it was too late. The crowd followed witness to the Police-station hooting and jeering. He could not see whether Heatlie was in the crowd. After that he had considerable pain in the left groin, and other parts of the body. Next day witness went to Dr. Van der Merwe and received some liniment, and three weeks later had again to go to the doctor owing to the pain continuing. For nearly a month, on account of the shock and pain resulting from the assault, he could not lie on his side, and could not sleep. He was not able to attend to his business next day as before. He had suffered considerable inconvenience from this occurrence, and for weeks afterwards he was hooted and jeered in the streets, a thing which had never happened to him before. Subsequently witness took criminal proceedings against the two defendants in the Magistrate's Court, and on July 24 Heatlie was fined £2, and De Vos £1. As to what the affair had cost him, witness had lost £2 in cash which he had in his pocket, and which must have fallen out while he was turned upside down. He then had to pay fifteen guineas to counsel to come from town for the criminal case, because witness could not get any of the local agents to undertake the case. The doctor's account was £1 11s. 6d. Then he lost his hat. Besides this, he was not able to attend to his business for several days. The people at the hall that night were mostly outside people, that was, farmers and others from Goudini and Over Hex River. Witness had no chance to make himself heard in that meeting. He never gave any provocation to Heatlie or anybody else.

Cross-examined: He knew nothing about any general meeting with regard to the establishment of a distillery at Worcester. When Mr. Harris was proposed as chairman, and in declining made a speech, there were cries of "Shut up," because he was talking about blood being thicker than water, and such nonsense.

Mr. Innes: You are not a popular man in Worcester, Mr. Winterbach? You are a fighting man who keeps things lively?

Witness: Yes; that is why they like me.

You keep things pretty lively at Worcester?—Keeping things straight.

Cross-examination continued: Witness was quite cool at the meeting, but the people were excited. He never kicked at Heatlie. After the meeting he went to the Royal Hotel to see some reporters there, who wanted to see him. Witness had almost totally lost his business since the meeting, and did not make £5 the month after it.

Re-examined: He had never been hooted in the streets before that meeting. Two years ago he was elected to the Town Council, and although second on the list, had more votes than any other candidate. His income used to be from £30 to £100 per annum.

Anthony Botha, a retired farmer, said he was born in the district of Worcester, and had always resided there. He was at the meeting, and had never seen such a meeting before. The people were determined not to hear anybody. He corroborated plaintiff as to the assault.

Charles Hall also gave corroborative evidence. It was quite clear that there was an organised opposition, which attempted to break up the meeting.

Dr. D. S. van der Merwe, a medical practitioner at Worcester, deposed that Mr. Winterbach came to him on the morning of July 13, and complained of a pain in his left groin, &c. Witness gave him some liniment, and again treated him a month later, when plaintiff came and said he still suffered from pain.

Henry John Legg corroborated the evidence of plaintiff and the other witnesses as to the assault on plaintiff.

This closed the plaintiff's case.

For the defence,

Charles Heatlie, one of the defendants, said that he went to the meeting with Mr. Maile on. It was a very noisy meeting, and there were calls for a chairman for about five minutes. Plaintiff jumped on the table and

said they would have to hear him if they stopped there all night. When about half an hour had elapsed witness addressed the meeting, and proposed that if no chairman was found in five minutes they should close the meeting. The crowd then began to move towards the door, and plaintiff, who was standing on the table, said, "Now then, you Bond fellows who want to clear out; you go." Plaintiff kicked at witness, who then caught hold of plaintiff by the ankles. He put his head between witness's legs, and then someone calling out "'Loop' Charlie," he walked away, and carried the plaintiff out. As he was going down the stairs he heard De Vos say he had got a hold of plaintiff. He did not throw plaintiff down when they got to the bottom of the stairs, but put him down on his feet. Witness was opposed to the holding of the meeting, but knew of no organised opposition, and was not a party to any such opposition.

Cross-examined: Witness took a great interest in politics, but was not a member of the Bond, and had never been a member of any political organisation. His name had been mentioned as a candidate for Parliament in the Bond interest, but he had nothing to do with what appeared in the newspapers. The audience were singing "Rule Britannia" and "God Save the Queen."

Mr. Searle: Did you join in?

Witness: I never sing.

Mr. Searle: It depends on what the tune is.

Pieter Gysbert Kuhn, M.L.A. for Victoria West, said he resided at Worcester, and was present at the meeting. He was sitting in a position from which he could see what was going on. Mr. Winterbach, who was very excited, got on the table twice. He got up on the table himself the second time. Witness saw Mr. Heatlie putting his head between Mr. Winterbach's legs, lifting him up, and throwing him over his shoulders. There was no violence used beyond that, but witness did not see what took place at the stairs.

Cross-examined: Witness took it as a joke. He had often seen people at meetings carried about like that. Witness took a great interest in politics, but he did not take much interest in that meeting. He had seen Mr. Meiring about it before, and very possibly the night before there was a Bond meeting, but it had nothing to do with that meeting. The Bond meeting was not held with closed doors. They never held a Bond meeting

with closed doors. He had heard nothing about there being any opposition to the meeting. They had only discussed it with regard to this point, viz., that they would not tolerate Winterbach. Witness and Mr. Malan went on the 8th July to see the Mayor about the meeting, and they knew before the meeting that the Mayor would not take the chair. A large number of farmers from Hex River, Goudini, and other places, were at the meeting. Mr. Harris refused to take the chair. Mr. Harris was not, to witness's knowledge, a Bondman.

Wouter de Vos, the other defendant, stated that he resided at Worcester, and was at the meeting, having returned from the Eastern Province a few days before. He corroborated the evidence of Heatlie as to what occurred at the meeting. Witness personally endeavoured to save Mr. Winterbach from injury.

G. H. W. Keyter, who was present at the meeting, also gave evidence corroborating that of the defendants.

H. Biademan also corroborated.

This concluded the evidence.

After argument by counsel, and summing up by Mr. Justice Buchanan, the jury returned a verdict for the plaintiff, assessing the damages at £500.

Mr. Searle asked that judgment be entered for that amount.

Mr. Innes said that entering judgment now would not debar the defendants from having a new trial.

Mr. Justice Buchanan accordingly entered judgment for £500 and costs.

[Plaintiff's Attorney, Gus. Trollip; Defendant's Attorney, V. A. van der Byl]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

### PROVISIONAL ROLL.

VAN RENSBURG V. LE ROUX AND { 1899,  
VAN RENSBURG. { Nov. 16th.

Mr. Benjamin applied for provisional sentence on a promissory note for £24 4s. 2d., with interest at the rate of 6 per cent. per annum.

Granted.

### WATTS AND OTHERS V. SOESMAN.

Mr. Ward applied for provisional sentence on two promissory notes, one for £40 7s. 6d. and the other for £44 12s. 5d.

Granted.

### MARAIS V. D. J. JOUBERT.

Mr. Benjamin applied for provisional sentence for £550 on a mortgage bond, with interest at the rate of 5 per cent. per annum, the said bond having become due by reason of the non-payment of interest, and also that the property specially hypothecated be declared executable.

The defendant appeared in court and admitted the debt.

Provisional sentence granted as prayed.

### ILLIQUID ROLL.

### DE WAAL AND CO. V. R. A. P. VAN EYL.

Mr. De Waal applied for judgment, under Rule 329D, for the sum of £85.

Granted.

### TABORSKI AND CO. V. LEVIN.

Mr. Nightingale applied, under Rule 329D, for judgment for the sum of £25 13s. 6d., balance of account for goods sold and delivered, and for work and labour done by plaintiff for defendant.

Granted.

*Ex parte* ELIZA JANE BLEATHMAN, EXECUTRIX DATIVE OF THE ESTATE OF G. R. BLEATHMAN.

Mr. P. Jones applied that the rule *nisi* granted under the Derelicts Lands Act be made absolute.

Order granted.

*Ex parte* MARIA ELIZABETH KRETZINGER, EXECUTRIX OF H. G. KRETZINGER.

Mr. Benjamin applied that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Order granted.

JAS. SEARIGHT AND CO. V. WEINBERG; *Re* WEINBERG V. JAS. SEARIGHT AND CO.

This was an application by Jas. Searight & Co., the defendants in the action, for postponement of trial pending the result of a certain action instituted by the applicants against the Town Council of Cape Town.

The applicants alleged that the respondent had instituted an action against them for the sum of £309 6s 11d., damages alleged to have been sustained during the month of August to certain goods belonging to respondent, which goods were in applicants' care and control. The action arose out of recent floods in Cape Town, when the applicants' store was amongst those flooded, owing, it was contended, to the negligence of the Town Council. The applicants were themselves bringing an action for £5,000 damages against the Town Council, and the present application was made on the ground that it was important that that suit should be decided before the action Weinberg v. Searight & Co. was heard, as it was quite possible that costs in the latter action might then be avoided.

It was contended by the respondent that there had been delay in commencing the action against the Town Council. It was also contended that it would be very inconvenient for the matter to stand over; that the one case was in no way dependent upon the other; and that the respondent, owing to the state of his health, would have to leave Cape Town shortly.

In the replying affidavits it was stated that the two cases were intimately connected. The occurrences on certain dates in August were admitted, whereby goods belonging both to applicants and respondent had been damaged by floods. These floods, it was alleged, were due to the Town Council having raised the street too high without providing sufficient drains to carry off the water.

Mr. Searle, Q.C., appeared for the applicants.

Mr. Graham, Q.C., and Mr. Howel Jones for the respondent.

In reply to the Chief Justice, Mr. Searle said that the declaration in the action Searight & Co. v. the Town Council could be filed immediately, and he thought the action might come on for hearing this term.

De Villiers, C.J.: If Searight & Co. succeed, will they pay Weinberg the full amount of his claim?

Mr. Searle: They will pay Weinberg an amount as damages which can be settled by arbitration. It will then be a case for arbitration, but now it is a question of liability.

Mr. Graham: If the declaration is only filed now there is no possible chance of the action against the Town Council coming on this term. Weinberg will thus be kept out

of his money, and, besides, there is special urgency because Weinberg will have to leave on account of his health.

In the course of further argument a suggestion was made that the respondent's evidence in the action against applicants should be taken on commission; but Mr. Graham suggested that the evidence of Weinberg and perhaps other witnesses should in preference be heard in court, and then the Court could, if it thought fit, postpone the case until the action against the Town Council had been decided.

De Villiers, C.J., said that the merits of this case could not well be decided until the action brought by Searight against the Town Council had been decided. It would be as well to postpone the trial now, and meanwhile if the parties wished it a commission could be appointed for the examination of Weinberg.

Mr. Graham said he understood that the opposite side had agreed to the evidence of Weinberg and two or three other witnesses who had seen the damaged goods being heard.

De Villiers, C.J., said that then it must be clearly understood that the Court would not decide the case until the other case had been decided.

Mr. Searle having consented to the arrangement proposed by Mr. Graham, the Court intimated that no order would now be made in the application, the costs of which would be costs in the cause.

ESTERHUYSEN AND OTHERS V. { 1899.  
MUNICIPALITY OF CALEDON. } Nov. 16th.

Interdict—Damages—Water leadings  
—Municipality—Erfholders.

*Seventeen erfholders within a municipality were entitled to the use of a stream of water in turns. By arrangement between the Municipal Council and some of the erfholders the water to which these erfholders were entitled during their turn was diverted and collected in a reservoir constructed by the Council. The other erfholders objected to this and applied for an interdict to restrain such diversion. Held, in the absence of clear proof that the diversion interfered with the applicants' enjoyment of the*

*water during their turns, that they should be left to their remedy of an action for damages, if any had been sustained.*

This was an application for an interdict restraining the respondents from diverting or interfering with the stream at Caledon called the Bath Stream.

The applicants, four in number, all aged in their affidavits that they were erfholders in a certain portion of the Municipality of Caledon, and as such were entitled, by virtue of a judgment of the Supreme Court delivered in 1894, to a share in the use of the waters of the Bath Stream. They alleged that on September 9 last, and for the following eight days, the respondents diverted the waters of the Bath Stream to a reservoir constructed by them. Since the expiration of those eight days, the water had been allowed to flow down its proper channel, and had not been interfered with further, but the applicants were afraid that the water would again be diverted during the summer months, and therefore prayed for an interdict as stated.

In an answering affidavit by the Mayor of the Municipality of Caledon, it was pointed out that the Municipality had been forced to build a reservoir in order to provide the township with water. So far it had a sisted greatly, but owing to the scarcity of rain last season it was feared that the reservoir might not be filled before the setting in of the summer. The erfholders in Mill-street, who were entitled to the water in the Bath Stream, were then approached and an agreement arrived at with fourteen out of the seventeen erfholders in question, and it was contended that some of the present applicants had verbally consented to the arrangement. Ultimately a document agreeing to the diversion of the water was signed by all the erfholders, with the exception of the four applicants. The affidavits went on to state that the applicants had not suffered by the diversion of the water, arrangements having been made by which they received their proper share of the water in their turns.

Sir H. Juta, Q.C., for the applicants.

In 1894, the municipality instituted an action against the erfholders for a declaration of rights in regard to the Bath Stream. Absolution from the instance was granted, but it seems clear that the Court came to the conclusion that the erfholders were entitled to the water. *Caledon Municipality v. Bousgaard*

*and others* (4 Sheil, 419). The municipality have now diverted the Bath water from the 9th to the 17th. They deny that the applicants were without their water during that time. The contention of the municipality seems to be that it can use the water as long as it gets the consent of some of the erfholders. But the water is there for the common benefit of all the erfholders and not for the individuals. The matter of turns is simply an arrangement amongst themselves.

[De Villiers, C.J.: If the applicants get the water they are entitled to, how can they be injured?]

*Non constat* that because they get what they are entitled to by arrangement they get all they want.

Mr. Innes for the respondents: This is an application for a perpetual interdict, not merely for an interdict pending action. The applicants know that we do not claim a right to the water. The municipality only wanted the reservoir filled once, and applied for permission. It was proved that the water had for a period longer than the period of presumption been divided amongst the erfholders in certain turns. Therefore each one is entitled to his water. If any erfholder gives the respondents his water they can take it as long as it does not diminish the turns of the others. There is no question of *affoup*. See *Olivier v. Fourie* (9 Sheil, 309). Any erfholder could lead his water away to the reservoir if he had a piece of garden ground there. He could also claim a right of passage of water across the ground of the intervening proprietors.

Sir H. Juta in reply: *Olivier v. Fourie* is not in point. Applicants are in any case entitled to an interim interdict.

De Villiers, C.J.: This case illustrates circumstances under which an action for damages is a fitter remedy than an application for an interdict. There is no clear proof of an infringement of the applicants' rights, while, on the other hand, if there has been such an infringement, damages would be an adequate compensation for such an infringement. There are seventeen erfholders, who are entitled to the use of the stream in turns. By arrangement between the Municipal Council and some of these erfholders the water to which the latter are entitled during their turn has been diverted and collected in a reservoir constructed by the Council. The other erfholders object to this and have applied for an interdict to restrain such diversion. There is no satisfactory proof that the diversion in any way

diminishes the supply of water during the applicants' turn of water-leading, and without such diminution there would be no infringement of their rights. The work constructed by the Council may be of great public benefit, to interdict which might seriously inconvenience the public without any corresponding advantage to the applicants. If they have sustained any loss at all an action for damages will afford them an adequate remedy, but the application for an interdict must be refused with costs.

Buchanan, J.: I concur. One strong ground for refusing the interdict is that there has been no continuous use of this water. The water was taken for a time, and after that time had elapsed the water was restored. If the applicants sustained any damage, they have their remedy in an action for damages.

Maasodorp, J., also concurred.

[Applicants' Attorneys Messrs. Scanlen & Syfret; Respondents' Attorneys, Messrs. Dempers & Van Ryneveld.]

*Ex parte* JULIUS CORNELIUS } 1892.  
AND HIS WIFE, } Nov. 16th.

Mr. Howel Jones moved on behalf of Julius Cornelius and his wife for leave to have an ante-nuptial contract registered. The marriage took place in Wurtemberg, Germany, and before the marriage the parties had fully agreed to enter into the ante-nuptial contract, but owing to petitioners having to leave Germany before the contract could be drawn up by the notary whom they wished to instruct, the intention was not carried out. It was pointed out that no time had been lost on the arrival of petitioners in this colony in applying to have the contract registered.

An order was granted as prayed.

*In re* METROPOLITAN AND SUBURBAN RAILWAY COMPANY, IN LIQUIDATION.

Mr. Innes, Q.C., presented the second and final report of the liquidators of the Metropolitan and Suburban Railway Company (in liquidation). In the report it was stated that the total assets of the company, including the £20,000 received as the purchase price of the railway, were £20,161. The first debenture-holders would receive payment of interest in full and £16,700 for their £25,000. Second debenture-holders and ordinary creditors would get nothing. First debenture-holders had all signified

their assent to the liquidators receiving 2½ per cent. commission on the assets. Mr. Innes pointed out that the first debenture-holders were the only persons who had anything to say with regard to the liquidators' commission, because if the Court thought the commission too high and reduced it, the amount would go to the first debenture-holders, as they had not been paid their claims in full.

The Court granted an order confirming the report and the payment of the liquidators' commission and also dissolving the company, there being no other assets.

VOS V. FARMER AND ANOTHER.

Mr. Buchanan applied for leave to attach a certain life interest in execution of a judgment of the Court.

The Court granted a rule *nisi* calling upon those concerned to show cause why the said life interest should not be attached, the rule to be made returnable on December 12.

BRITISH SOUTH AFRICA COMPANY V. AFRICAN BANKING CORPORATION.

This was an application for an extension of the period within which to prosecute an appeal from the High Court of Southern Rhodesia.

Mr. Innes, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the applicants. Mr. Searle, Q.C., appeared for the respondents.

Mr. Innes said that the time within which the appeal should have been heard elapsed on November 5, but he understood the respondents had no objection to the extension of the time provided applicants paid the costs of that application, and endeavoured to come to trial this term if possible.

The application was granted accordingly.

IN THE MATTER OF THE PETITION OF ANDREW BARCLAY SHAND AS EXECUTOR DATIVE OF THE ESTATE OF THE LATE EDWARD BRUCE.

Mr. Gardiner moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

IN THE ESTATE OF THE LATE ISAAC PETRUS H. VAN DER POEL.

Mr. Innes moved for leave to defray the expenses of certain repairs out of moneys bequeathed to certain minors.

The application was ordered to be referred to the Master for report.

#### KAMP V. GRAHAM BROTHERS.

Mr. Howel Jones applied that the award of arbitrators in the matter between the parties be made a rule of Court. The submission had been mislaid, so there was nothing to show that it had been agreed to have the award made a rule. Application was therefore made under Act 29 of 1893, section 23.

The order was granted with costs.

#### GRAHAM BROTHERS V. STRASBURGER.

This was an application by the defendants for leave to plead and postponement of trial.

The affidavit of applicants' attorney alleged that summons was issued on June 16, but no steps were taken to proceed with the action during the August term, and the declaration was not filed until November 2. Owing to defendant's absence in Natal he had not been able to plead.

In an answering affidavit it was stated that at the time the action was instituted respondent was informed that a material witness was in England, but that witness had now returned. Respondent had no desire to prevent applicants pleading, provided the case came on for trial this term.

Mr. Innes, Q.C., appeared for the applicants.

Mr. Searle, Q.C., for the respondents.

After hearing counsel, the Court allowed the removal of bar, provided the defendant went to trial by December 7, costs of this application to be costs in the cause.

#### COLONIAL GOVERNMENT V. } 1889. BRADY. } Nov. 16th.

Country in enemy's hands—Postponement of interdict proceedings.

This was an application for an interdict calling upon respondent to remove a certain stoep or verandah which was alleged to overhang certain ground in the possession of the Colonial Government at Fourteen Streams.

Mr. Ward appeared for the applicants; Mr. Graham, Q.C., appeared for the respondents.

Mr. Ward said that this case was set down in the first instance for September 12, but on the application of the respondent it was adjourned until October 12. It was then

found impossible to go on with it on that day, and afterwards two circumstances had occurred which affected it, the first being that martial law had been proclaimed in the place where this land was situated, and in the second place he believed that Fourteen Streams Station was in the hands of the enemy. He therefore suggested that the application be allowed to stand over for the present.

Mr. Graham said he thought the Court might first decide the question as to whether the application could be heard on motion. He pointed out that the Government had only a qualified ownership, there being a servitude over the land and the defence was that the verandah had been erected under that servitude.

After hearing counsel on this point, the Court granted the postponement asked for.

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

#### REGINA V. DUBESS. } 1899 } Nov. 16th.

Theft—Indictment—Amendment—Prejudice.

*The appellant was indicted for theft in that he did "wrongfully and unlawfully steal one goat, the property or in the lawful possession of one Ndonge." After hearing evidence for the prosecution the indictment was amended by striking out the words after "possession" and inserting in their place the words "some person unknown" and the Magistrate invited the appellant to give a satisfactory account of the possession of the portion of a goat's carcass found in his possession. After hearing further evidence the appellant was found guilty.*

*Held, on appeal, that there was ample evidence for the conviction of the prisoner of theft and that he had not been prejudiced by the amendment of the indictment.*

This was an appeal from the conviction of the appellant by the Resident Magistrate of Lady Frere upon a charge of theft under the



provisions of Act 35 of 1893. The indictment originally alleged that the prisoner "did wrongfully and unlawfully steal one goat, the property or in the lawful possession of one Ndonje, a peasant residing at Gqebenya." There appeared to be ample evidence to support the charge so laid, but the following appeared on the record: "The Court on considering the provisions of section 6, Act 35 of 1893, amends the indictment, and invites accused to give a satisfactory account of the possession of the portion of a goat's carcass found in his possession." Apparently after hearing the evidence for the prosecution the indictment was amended by striking out the words after "possession" and inserting in place thereof "some person unknown." Evidence for the defence was then called.

The prisoner was found guilty and sentenced to nine months' imprisonment with hard labour.

The Magistrate found the following: The Court does not consider that the accused has given a satisfactory account of the possession of the goat's carcass found in his possession and finds him guilty of being in unlawful possession of a portion of a goat's carcass and not being able to give a satisfactory account of such possession.

Mr. Innes, Q.C., for the appellant: If the evidence for the prosecution was true that the goat belonged to Ndonje the indictment should not have been altered: if it can not be relied upon then the Magistrate ought to have believed that the goat belonged to the appellant. There is stronger evidence that it belonged to him than there is of its belonging to Ndonje.

Mr. Ward for the Crown: Act 35 of 1893 was intended to stiffen the ordinary law as to thefts of stock. See sections 6 and 28. Although the evidence might not have been sufficient for the conviction of the appellant of theft at common law there was nothing to prevent such a conviction under the Act. The Magistrate's reasons show that he did not disbelieve the witnesses for the Crown. He had power under Act 3 of 1861 to alter the name of the owner of the goat.

Mr. Innes: To make section 28 of Act 35 of 1893 applicable the Magistrate had to find that appellant was in unlawful possession *ab initio*, but the only evidence which shows that the possession was unlawful shows also that the goat belonged to Ndonje.

The Court dismissed the appeal.

Buchanan, J., said: The evidence in support of the charge is sufficient, as appellant's counsel admitted, to justify a con-

viction for the theft of this goat, but the Magistrate for some reason or other, and I think altogether unnecessarily, amended the charge by striking out the name of Ndonje and inserting the words 'the property of some person unknown.' The only question, however, which we have to consider is whether the appellant was prejudiced by the amendment. There was no objection taken at the time by the legal representative of the accused, who called a number of witnesses to account for prisoner's possession of the meat. This evidence did not satisfy the Magistrate, who had ample grounds on which to convict. The appellant was not prejudiced by the amendment. The appeal will be dismissed. Maasdorp, J. concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne.]

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## SUPREME COURT

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[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

LEWIN AND SONS V. FISCHER. } 1899.  
   } Nov. 20th.

Mr. Graham, Q.C., prayed for judgment by consent on a promissory note for £365.  
 Granted.

KAISER V. R. A. FALCONER.

Provisional sentence — Promissory note — Consideration — Summons — Copy — Rule of Court 12.

*The plaintiff claimed provisional sentence upon a promissory note signed by the defendant without stating any capacity. The defendant alleged that he was acting for his wife in the transaction for which the note was given, and that he had received no consideration. Held, that if the plaintiff did some work for the amount promised, it was immaterial for whom the work*

*was done, and there was sufficient consideration to entitle him to sue upon the note.*

*The note was written upon a paper bearing certain printed words which on the face of them were not intended to be part of the note.*

*Held, that the absence of these words in the copy annexed to the summons was not such an omission as would entitle the defendant to judgment.*

— — —

Motion for provisional sentence for the sum of £40 alleged to be due to the plaintiff, by virtue of a certain written agreement to pay, bearing date the 13th January, 1899.

The document sued upon was in the following terms:

"I agree to pay Mr. Kaiser, forty pounds for the sale in Roose-street.

"R. A. FALCONER."

It was written on a form of broker's note, but in print there were the words "Sold on account of — to —." These printed words were not in the copy annexed to the summons.

The defendant in his affidavit alleged that the plaintiff acted as broker in effecting a sale of landed property belonging to his (defendant's) late wife to one Victor Rifkin, which formed the subject of a suit recently between the said Rifkin and himself, in his capacity as executor dative of the estate of his late wife, for whom he also acted as agent during her lifetime.

That the plaintiff in acting as such broker was perfectly aware that he was dealing with the property of his (defendant's) late wife and that defendant was only acting as her agent in the matter.

That the sale originally effected by the plaintiff as broker aforesaid, namely that of ten houses in Roose-street, Cape Town, was subsequently repudiated by Rifkin on the grounds, amongst others, that the plaintiff as broker had misrepresented to the said Rifkin and pointed out certain houses belonging to defendant's wife situate in Horstley-street, and that Rifkin instituted proceedings against defendant's late wife to have the sale cancelled and claimed damages alleged to have been sustained by the breach of contract.

That subsequently the plaintiff undertook to endeavour to persuade the said Rifkin to

take five houses in Horstley-street, and five houses in Roose-street and defendant in his capacity as agent for his wife agreed that if he succeeded in getting Rifkin to take transfer of the ten houses (five in Horstley-street and five in Roose-street), that defendant on his wife's behalf would pay him the sum of £40 in connection with the original sale of the ten houses in Roose-street aforesaid, and in connection with which defendant gave him the memorandum now sued upon.

That Rifkin has not up to the present taken transfer of either of the houses in Roose-street or Horstley-street, and that until such transfer is effected no liability can attach to defendant's wife's estate.

That defendant was personally not liable, and never made himself personally liable to pay the plaintiff any brokerage in connection with the sale aforesaid, as he was fully aware that defendant was dealing with the matter as agent of his late wife, in whose name the property was registered.

That personally defendant received no consideration, valuable or otherwise, from the plaintiff in connection with the "memo" now in suit, and he denied all liability in connection therewith.

Lastly, he alleged that the action had not only been wrongfully brought against himself in his private capacity, but also that if the "memo" sued upon was of a sufficiently liquid nature to sustain provisional sentence the action could have been brought in the Resident Magistrate's Court, Cape Town and the heavy expenses incurred in the Supreme Court avoided, or at least considerably minimised.

The plaintiff's attorney deposed that he acted for plaintiff in the action *Rifkin v. Falconer's Estate*, tried in September last.

That by judgment of the Supreme Court the defendant was ordered to give Rifkin transfer of certain five houses in Roose-street, and transfer of certain five houses in Horstley-street, in a complete condition within one month from the date of the judgment.

That defendant had not complied with the said judgment.

That with regard to the last paragraph of defendant's affidavit the defendant at present resides at Observatory-road, where the summons was served, which according to the return of the Deputy Sheriff is at a distance of 3½ miles from Cape Town, and the description of defendant in the summons as being of Cape Town is an error. Besides, it was deemed advisable to have this matter

decided in this Honou-able Court, as this Court is fully cognisant of all the facts connected with the said sale by Falconer to Rifkin.

The plaintiff in his affidavit admitted that Rifkin had repudiated the sale referred to in defendant's affidavit, and that such repudiation was because the property pointed out by plaintiff to him was in Horstley-street, which property had previously been pointed out to him (plaintiff) by Falconer.

That Falconer was not in a position to give transfer of the said houses, as he had already sold them to Dr. Impey.

That thereafter he (plaintiff) was approached by Falconer, who suggested that Rifkin should take ten houses in Roose-street, instead of ten houses in Horstley-street, but when it was found that several of the houses in Foose-street were built on ground of which Mrs. Falconer had not received transfer it was agreed to cancel the sale.

That when Falconer discovered that he could not give transfer he requested plaintiff to persuade Rifkin to take five houses in Roose-street, as he said he was in a difficulty as he had received £300 from Rifkin and was not in a position to give transfer.

That defendant agreed to give plaintiff £10 in addition to the usual brokerage and proceeded to make out a note for the amount.

Plaintiff said that the note must not be signed by him as agent but in his personal capacity. He replied that he would do so, as he did not wish his wife to hear anything about it, and he wished to get out of his difficulty and would pay the money out of his own pocket.

That Rifkin has not taken transfer of the Roose and Horstley-street properties, but that he is perfectly willing to take transfer of the Roose-street property, but he declines to take transfer of the Horstley-street property on the ground that defendant has not completed the said houses and given transfer thereof within the time fixed by the Court in giving judgment in *Rifkin v. Falconer*.

Mr. Scarle, Q.C., for the plaintiff.

Mr. P. Jones for the defendant: The defence is absence of consideration. As it was impossible to transfer ten houses in one street plaintiff was promised the £40 if he were to induce Rifkin to take five houses in Horstley-street.

[De Villiers, C.J.: The Court has held that he did sell those houses.]

The £40 was an additional sum, over and above his commission, to be given to the plaintiff if he personally induced Rifkin to take the Horstley-street houses.

The defendant is wrongfully sued; at first he acted as his wife's agent, afterwards as her executor. He had no authority to sell except as executor.

This is not a promise to pay: it is merely a memorandum. The document is not correctly set out in the summons: the Court has refused provisional sentence where that has happened even if it has not been a material variance. *Rudd v. Theron* (1 Searle, 76); *Serrurier v. Executor of Caut*: (1 Searle, 106).

The Court granted provisional sentence as prayed.

De Villiers, C.J., said: The document is signed by defendant without stating his capacity. The writing is on a form of broker's note, but in print there are the words "Sold on account of ——— to ———"; but on the face of it that was not intended as a part of the promissory note. I do not think the absence of those words in the copy annexed to the summons is such an omission as will entitle defendant to judgment. The only other ground of defence is want of consideration, but if the plaintiff did some work for the £40, it makes no difference for whom the work was done. There is consideration, which entitles him to sue on the promissory note, whether the work was done for one person or the other. I therefore think the plea of want of consideration falls to the ground. The defendant may have a good defence, which he can disclose in the principal case, but with the facts now before the Court I do not think the Court can refuse provisional sentence. It is left for defendant, if so advised, to go into the principal case. Provisional sentence will be granted, with costs.

[Plaintiff's Attorney, P. M. Brink; Defendant's Attorney, H. P. du Preez.]

M'SLOPE V. M'NGAMME. } 1899.  
} Nov. 20th.

Spoliation—Native custom—*Lobola*.

*The plaintiff sued the defendant in a Magistrate's Court for the recovery of certain horses, which he alleged were his property, but which the defendant had possessed himself of. Both parties were natives, and the horses in dispute.*

had originally been given to the plaintiff by the defendant as part of the lobola for the plaintiff's daughter, whom the defendant intended to marry. Before the entire lobola had been paid the plaintiff's daughter died and the defendant took possession of the horses on the ground that the marriage had not taken place and that under native custom he could reclaim the lobola which he had paid. The Magistrate gave judgment for the defendant.

On appeal, the case was remitted for further evidence as to the manner in which the defendant obtained the horses, whether the marriage was consummated, and whether it was to have taken place in accordance with native customs or Christian rites.

— — —  
This was an appeal from a decision of the Assistant Resident Magistrate of Barkly East, in an action in which the present appellant, plaintiff in the Court below, sued the respondent for the recovery of a mare and foal and damages.

The summons alleged that on or about the 18th October, 1899, and at Barkly East the defendant did possess himself of a certain chestnut mare and foal of the value of £10 or thereabouts, the property of and in the lawful possession of the plaintiff, and although demanded the defendant refuses to restore the same to the plaintiff.

By reason of such neglect and refusal the plaintiff has sustained damages in the sum of £2.

Wherefore he prayed that the defendant might be adjudged to restore to him the said mare and foal forthwith, or pay the value thereof as aforesaid, together with the sum of £2 as damages and cost of suit.

The defendant excepted to the proceedings on the ground that the cause of action was *contra bonas mores* arising out of the native custom of lobola or payment of dowry. In case the exception were overruled, he denied the debt and pleaded the general issue.

The plaintiff admitted that the property was portion of a dowry given by defendant to plaintiff for his daughter "Bushman" but he did not admit defendant's right to

remove that property from plaintiff's possession without his consent. He applied that defendant's plea be erased from the proceedings.

This application was refused.

It appeared from the evidence that the plaintiff had received the mare in suit together with three or four other horses as part of the lobola for his daughter "Bushman" from the defendant more than three years ago, but that before the entire lobola, viz., ten horses, had been paid "Bushman" died, and subsequently the defendant took possession of the mare on the ground that he was not married to "Bushman" and that consequently under Kafir custom he could reclaim the lobola which he had paid.

The plaintiff alleged in his evidence that his daughter "Bushman" before her death lived with the defendant as his wife, but this was denied by several witnesses, including some who were called in support of the plaintiff's case.

The Assistant Resident Magistrate gave judgment in favour of the defendant with costs.

The plaintiff now appealed.

Mr. Benjamin for the appellant: The action was brought simply for the recovery of the possession of the stock: it was similar to an application for a writ of spoliation. *Ncotani v. N'cume* (10 S.C.R., 207).

[De Villiers, C.J.: The summons in this case does not make any reference to the use of force or stealth.]

That would be implied from the words "the defendant did possess himself." For this reason no evidence was adduced as to the marriage or as to native custom. Moreover the territory was not Native Territory, and it has been held that within the Colony native marriages are mere cohabitations and dowry given constitutes an immoral consideration. *Nyqobela v. Sihelo* (10 Juta, 316, at p. 368); *Malgas v. Gakaru* (6 E.D.C., 225).

[De Villiers, C.J.: Here there was no marriage and no cohabitation.]

The consideration was immoral.

[De Villiers, C.J.: How do we know that it was not intended that this marriage should be celebrated according to Colonial law? If the parties had been Europeans could not the defendant have recovered the stock?]

We only proceeded on the ground of spoliation and did not go into the merits: we were not allowed to give evidence of the marriage.

Mr. Searle, Q.C., for the respondent: This is not a case of spoliation. No evidence was given of the stock being taken by force or stealth. There is no clear evidence as to how the animals came into the defendant's possession. *Haupt's Executors v. De Villiers* (3 M., 341); *McLoughlin v. Delahunt* (Foord, p. 129); *Van der Linden* (p. 449). If plaintiff came into court merely on the question of spoliation why was some evidence not given of dispossession by force or fraud. There is nothing on the record to show that he was debarred from giving evidence on the merits; such evidence was given and the whole case was investigated.

Mr. Benjamin: The maxim *spoliatus ante omnia restituendus est*, applies to cases of deprivation by stealth. *Neutama v. N'cume* (10 S.C.R., 207); *McLoughlin v. Delahunt* (Foord, 129); *Swanepoel v. Van den Herwer* (1878, 4).

De Villiers, O.J.: The Court is of opinion that the case should be remitted to the Magistrate for further evidence, and after that evidence is sent up the Court will consider it without further argument unless necessary. The case will therefore be remitted for further evidence, first as to the manner in which the defendant obtained possession of the horses; secondly, as to whether the marriage was consummated or not; and also whether the marriage contemplated was to have been according to native customs or Christian rites.

[Appellant's Attorneys, Messrs. Scanlon & Syfret; Respondent's Attorneys, Messrs. Findlay & Tait.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ANLBOM V. LITHMAN AND CO. { 1899.  
Nov. 21st.

Mr. Searle, Q.C., applied for a commission *de bene esse* to take the evidence of Axel Peters, a material witness in the case, at present residing at Gothenburg, Sweden, Her Britannic Majesty's Consul or Acting Consul there to act as commissioner.

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Sir Henry Juta, Q.C., appeared for the respondent to consent to the application. The application was granted.

GARLICK V. GIBBS. { 1899.  
Nov. 21st.

Building contract—Quality of work done.

This was an action for a contribution by defendant to the cost of a party wall built by plaintiff in terms of an agreement for the same, and for damages.

The plaintiff's declaration was as follows:

1. The plaintiff is John Garlick; the defendant is John Henry Gibbs, both of Cape Town.

2. On or about the 18th February, 1898, the defendant agreed to sell and the plaintiff agreed to buy a certain piece of ground, with the buildings thereon, situated in Selkirk-street, Cape Town. The plaintiff agreed to erect upon the boundary between the property so sold to him and certain property retained by the defendant a certain party wall, and the defendant agreed to contribute towards the cost of this erection an amount equal to the cost of erecting a 14-inch wall between certain specified points to a height of eighteen inches above the roof of the defendant's then existing building, and to properly drain the property retained by him, so as to prevent the drainage therefrom flowing on to the property sold to the plaintiff.

3. Transfer was passed to the plaintiff of the said piece of ground by deed dated the 13th day of June, 1898.

4. The plaintiff has duly erected the said party wall, and the defendant's contribution to the cost thereof amounts to the sum of £30 17s. 9d., as will appear from the account hereunto annexed.

5. The defendant has not properly drained the property retained by him so as to prevent the drainage therefrom flowing on to the property sold to the plaintiff, but has allowed the said drainage to flow on to the said property.

6. The said drainage has damaged and continues to damage the buildings, walls, and floors of the plaintiff's premises, and the plaintiff has suffered damage thereby in the sum of £5.

7 All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to payment of the said sums of £30 17s. 9d. and

£50; yet the defendant neglects and refuses to pay the said sums, though called upon to do so.

Wherefore the plaintiff claims: (a) Judgment for the sum of £30 17s. 9d.; (b) judgment for the sum of £50, damages sustained; (c) an order compelling the defendant to make provision for the drainage of his property, so as to prevent the drainage therefrom flowing on to the property of the plaintiff; or, in the alternative, (d) an order authorising the plaintiff to enter upon the property of the defendant and make such provision at the cost of the defendant; (e) alternative relief; (f) costs of suit.

The defendant's plea was as follows:

1. He admits paragraphs 1 and 3.

2. As to paragraph 2, he admits the allegation down to the word "building" in the ninth line thereof; he says that the conditions upon which the said property was sold are embodied in the deed of transfer thereof, and he craves leave to refer thereto; he denies that there was any condition made between the parties as to drainage.

3. As to paragraph 4, he says that the wall in question has not been properly constructed; he is prepared to pay his share of the cost of the said wall when the work agreed under the above conditions to be performed has been properly executed, but he denies that the amount claimed represents the correct sum which he would have to pay.

4. As to paragraphs 5 and 6, he says that the same are irrelevant, and prays that at the trial of this suit the same may be struck out, no claim in respect of drainage being included in the summons in this suit or having been ever advanced or put forward by the plaintiff as against the defendant prior hereto.

5. In case the said paragraphs be not struck out, he denies the allegations therein, and also those in paragraph 7.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant, now plaintiff in reconvention, says:

1. He craves leave to refer to the matters pleaded in the claim in convention.

2. It became, and was the duty of the plaintiff, now defendant in reconvention, to cause the work in and about the erection of the said wall to be executed in a proper and workmanlike manner, but the said defendant has not properly completed the same and the work that has been done thereon has

been constructed in a faulty and inefficient manner, and not in accordance with Municipal regulations.

3. In particular, the "footings" of the said wall were insufficient, and do not comply with the regulations; the "damp-course" has been put in below the level of the property of the plaintiff in reconvention, and contrary to the said regulations; and the roof of the works has been brought down by the said operations, and has been left in an unsatisfactory condition. A concrete gutter should be laid throughout the length of the said party wall.

4. Owing to the improper construction of the said wall and its incomplete condition, the plaintiff in reconvention has been put to considerable loss and expense, and has sustained damages in the sum of £100.

The plaintiff in reconvention claims: (a) That the defendant in reconvention be ordered to complete the said wall and to put the same in a satisfactory and proper condition as above set forth, the plaintiff in reconvention tendering thereupon to pay his due share of the work; (b) that the defendant be ordered to pay the sum of £100 as damages, &c.

The replication was general.

The plea to the claim in reconvention was as follows:

1. With reference to paragraph 2, plaintiff admits that it became and was his duty to cause the work in and about the erection of the said wall to be executed in a proper and workmanlike manner, but he denies that he has not properly completed the same, and that the work that has been done therein has been constructed in a faulty and inefficient manner, and not in accordance with the Municipal regulations.

2. He denies the allegations made in paragraphs 3 and 4.

The following were the material conditions referred to in the plea as being mentioned in the transfer deed: "That the said John Garlick shall have a right to erect an 18-inch wall upon the property of the said J. H. Gibbs adjoining the southern boundary of the land hereby transferred. That this wall shall not be less than nine feet high and eighteen inches thick. That the cost of this wall from the points A to J on the annexed diagram shall fall upon the said John Garlick, but that the said wall shall, from the time of erection, be a party wall.

"That from the points J to B on the said diagram the said John Garlick shall also erect, but upon his own property being portion of the property hereby transferred, a wall to be considered a party wall, but towards the cost of this wall the said J. H. Gibbs shall contribute so much as it would cost to erect a 14-inch wall between these points to a height of eighteen inches above the roof of his present building and of ordinary red bricks."

Mr. Innes, Q.C., and Mr. Gardiner appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Howel Jones for the defendant.

Mr. Searle: The allegations in the declaration with regard to drainage are irrelevant, the summons making no mention of drainage.

De Villiers, C.J.: Why was leave to amend the summons not asked for?

Mr. Innes: I cannot say. The summons is for a *pro rata* share of the cost of the wall, and the drainage is a cognate matter arising out of the same dispute. I should have thought the objection would have been to evidence being led on that point.

Buchanan, J.: Suppose defendant had paid the £30 on the summons?

Mr. Innes: Then we could not have gone farther. That was the risk we took.

Ultimately, Mr. Innes applied for leave to amend the summons by including the drainage matter, and this was granted.

John Garlick, the plaintiff, deposed that in February, 1898, certain negotiations passed between him, a broker, and Mr. Gibbs, the defendant, as to the purchase price of the property in Selkirk-street. The price asked was £1,500, but witness ultimately purchased the property for £1,450. On the broker's note there was an agreement to the effect that witness was to erect a party wall not less than 9 feet high, while Mr. Gibbs was to cut a long, low shed across the boundary of the property in two by erecting a wall. Witness undertook to erect a higher and thicker wall, to the cost of which defendant was to contribute the cost of a 14-inch wall, such cost to be not more than £50. Witness undertook to build the wall because he found it was defendant's intention to build the wall of old bricks. Witness suggested to defendant that it would be to the advantage of both parties if he (witness) had the wall built, and defendant contributed to the cost, because witness was having a three-

story building erected, and as the 14-inch wall would only go up to the level of defendant's shed it would be no use to witness.

Continuing his examination. Mr. Innes asked if witness had referred to the water-pipes and drainage when in conversation with defendant.

Mr. Searle objected to evidence being led as to anything outside the written agreement.

Examination continued: Witness had nothing regarding the water-pipes and drains put into the transfer, because it never entered into his mind to do so. The dirty water was trickling out right along his ground, and the water-pipes also came out there. He pointed out that that would have to be put right and defendant said, "Certainly." Witness did not think for a moment that defendant could sell him ground and still allow his dirty water to go over that ground. At this time it was agreed that the water should run alongside the wall to Sidney-street. Defendant had never asked witness to put down a cement gutter; in fact, he had absolutely prohibited witness going on to his ground to do anything. The pipe which carried off the water was not sufficient for the purpose, and the water percolated through the soft earth and damaged the wall. When the wall was being erected there was no friction between witness and defendant, but there was between the builder and defendant, as the latter would give no facilities for the construction of the wall, and had prohibited a workman putting his foot over the trench for the foundations of the wall. There was considerable soakage, and damage had been caused by the drainage. Witness's attention was called to that by his tenant.

Cross-examined: When the wall was being built defendant had written to witness for his private benefit, and given him numerous instances in which he alleged that the architect's contractors and clerk of works were not doing their work properly, but on witness investigating, he was satisfied that was not so. If witness undertook to have a wall built in a certain way, and his contractor built it differently, he would take the responsibility. Proceeding, witness gave evidence as to construction of the wall. When the shed was divided for the purpose of erecting the wall, witness took up the position that he had nothing to do with making the roof watertight. At that time defendant would not allow the contractor to do that, but witness knew that months ago.

an engineer had reported on the matter for the defendant and called upon witness to do the work.

John Parker, an architect practising in Cape Town, said he had supervised the erection of the wall in dispute and of the warehouse generally. Mr. Greathead, the contractor, had gone to Australia, but Mr. Arnott, the clerk of works, was here. The amount of £30 17s. 9d., defendant's share of the cost of constructing the wall, was correctly calculated. The final certificate was given by the City Engineer after the building was completed. (The certificate was put in and stated that the buildings had been inspected and found fit for use as a factory and stable.) During the erection of the buildings the Municipal Inspector would, witness supposed, be there twice a week, and there was never any complaint from the Municipal office. He had never seen the Municipal Inspector there. Proceeding, witness gave evidence as to the damp-course and the materials of which the wall was built. With regard to the drainage, the water which percolated through the foundations would not damage the wall very much, but it would rot the flooring. The cost of a cement gutter would be about £10. Witness had once or twice spoken to defendant about the drainage, and the latter had told him distinctly that as soon as the wall was above the level of his roof he would construct the gutter leading into Sidney-street.

Cross-examined: He thought that the wall beyond the gable of the building would bear a couple of stories. Some of the brick used for the concrete were not the proper stuff to use. It was not proper hard-burned brick. Not much of the soft stuff had been used. For the foundations of the wall they had had to go two feet lower than would have been required for defendant's 14-inch wall. He had taken all the depth of the wall into consideration in his calculation of £30 17s. 9d.

Alfred Burnett, assistant to Mr. Parker, gave evidence as to the measurement of the foundations of certain sections being correct.

David Arnott, clerk of works to Mr. Parker, said the yard wall and gable wall were substantial and well built. The trench for the foundation of the yard wall was well on to 4 feet wide. There was a damp-course in the gable wall, but not in the yard wall. Defendant used to interfere with the contractor and his workmen.

Cross-examined: Witness was present at the building every other day, but he never saw a Municipal Inspector there.

Percy Whitmore said he was manager of the furniture department of M. Rosen, the tenant of plaintiff's building, of which the gable wall formed one end. A lot of water percolated through the gable wall. This had damaged the floor, and also some goods stored there. He had claimed £7 10s. from Mr. Garlick for damage done by the water on August 25.

Cross-examined: Witness had never told defendant that he was not to blame for the damage done by the water. He had not paid the £7 10s. as yet.

John Henry Gibbs, the defendant, said that there were no conditions upon the sale beyond those set forth in the deed of transfer. During the course of the construction of the wall in question, witness had on many occasions to complain of the manner in which the work was being done, and he had written many letters on the matter. He objected to the concrete that was being put in, and also to the footings. The trench was only two feet wide at parts where there was nothing on the bank to prevent it being made wider. A large number of soft bricks, such as that produced, had been used in the concrete. Those bricks came from the old walls which the contractor had pulled down. The trench was open from June until the end of August. During that time little work was done in it. The workmen put in a little concrete, and then left. Witness was greatly hampered in his business owing to the trench being left open for that time. There were heavy rains, and the trench was filled with water during the time it was left open. His furnace and iron lying alongside had slipped in after heavy rains, and had been damaged. He had also sustained a large proportion of his damage through the inner wall of his building being taken down, and the wind sweeping the dust in. His machinery was damaged, and he was inconvenienced through not being able to carry on his work. He had to do his work by hand, and keep the machinery covered up for fear the dust should get into the bearings. By September 29 the wall was finished up to the level of his roof. It would cost £5 or £6 to put the roof into its proper position and flashed with the wall. For the main length of the yard wall the damp-course was below the level of witness's ground. During the whole time witness was



there he saw no Municipal inspectors, although he had looked for them, and given instructions that he wanted to see them. He did not consider the wall safe to build upon.

Cross-examined: He had never intended to put up a 14-inch wall. He had never said anything to Mr. Garlick about draining the place. He had never said to anyone that he would put down a cement gutter. The water did not go near the wall. It was turned off by a natural watercourse, which had been there ever since witness had had the place.

Re-examined: The first that he heard about drainage was after he entered an appearance in the case. There were several springs on the ground.

William Thomas Olive, a civil engineer, said that for some time he was engineer to the Town Council of Cape Town. On March 29, at defendant's request, he examined the footings on the half of the wall on Gibbs's side, and found them much narrower than they ought to have been, according to the Municipal regulations. If the wall was in the centre as it ought to be, then the footings would be 1 foot 5 inches too narrow. Even if concrete had not to be used, the footings were not sufficient. Witness did not think it a wall that could be built upon. He could not find any damp course in the yard wall. The roof of defendant's shed had not been left in proper condition, there being a gap between it and the high wall.

Cross-examined: Witness did not consider the wall safe. A natural bed was a bed of rock. The wall was not built upon a natural bed.

Charles Henry Smith, an architect, practising in Cape Town, deposed that he inspected the footings at the wall in question at various places on Gibbs's side. They were not of sufficient width. The average projection was from three to four inches, instead of nine inches. Witness examined the concrete, and found it to be very poor stuff. For about one-third of the length of the upper wall there was a damp-course. To put the wall in proper condition it would have to be underpinned. That was if the parties wished to build on it. As a boundary wall it was all right.

Robert Kedon, a civil engineer and architect, practising in Cape Town, stated he had examined the wall in question. He saw the footings on Gibbs's side. They were not in accordance with the Municipal regulations. At the very best, at the top, they were an

inch and a half short, and they pinched in three or four inches. The concrete was apparently not of good quality.

Cross-examined: Witness only examined the footings at the one place.

Re-examined: The wall ought to be in the centre of the footings.

William Callanan, a carpenter and builder, deposed that while the building was going on he was often at the place. He saw the trench opened up and the concrete made. A couple of times he had seen the men short of stone for making concrete, and they then used sand and soft brick from the old building. Witness was present at the time one of the men knocked the supports away, and the roof dropped. It was still open at the end.

Cross-examined: He had also seen good stuff used for the concrete.

Charles Herbert Rhodes, a grocer, living opposite the property in question, said he saw the foundations put in. He saw stone, sand, and soft brick put in the concrete.

John Griesen, a blacksmith, in the employ of Mr. Gibbs, deposed that he had seen the concrete made of bricks from the old wall. He was present when Mr. Gibbs complained about that. Through the roof dropping, the machinery was stopped.

This closed the evidence.

After argument,

De Villiers, C.J.: The plaintiff's first claim is for £30 17s. 9d., being portion of the cost of constructing a party wall, and the second claim is for £50 as damages owing to defendant failing to carry out an agreement to provide drainage. I will deal with the second claim first, and say with regard to it that the evidence does not support it. I do not mean to infer that the plaintiff would have no action at all if the defendant collected all his drainage and allowed it to flow against the wall so as to cause damage, because in an action of that kind the Court might hold the defendant liable. However, that point is not raised at present, for the present case depends entirely upon a contract which has not been clearly proved. If there had been such a contract, I think it would have been incorporated in the document in which the rest of the agreement was mentioned. With regard to the first claim, the defendant does not deny that he is liable for his portion of the cost of the wall, but he alleges that the work was not properly done. It does appear that the defendant was

put to considerable inconvenience and also to annoyance from the workmen employed by the plaintiff, but ultimately the work was done. It is said that the work has not been done in accordance with the municipal regulations, but the Court has got *prima-facie* evidence that the regulations have been complied with, because the City Engineer has given a certificate that the building was inspected, and that it was fit for occupation as a factory and stables. Really the whole question hinges upon the point as to whose duty it was to "flash" the roof. My view is that according to the true construction of the contract, if the plaintiff did that work, he would be entitled to charge for it. The point is not very clear, but, in my opinion, that was intended, because the contribution was only for so much as it would cost to erect a 14-inch wall between these points. It was the intention of the defendant himself to build such a wall to a height of 18 inches above the roof, and it is clear that in that case the defendant himself would have had to put on the "flashing." If a higher wall, which had to be constructed by the plaintiff, was substituted, then the bare inference is that the cost at all events of the "flashing" would still fall upon defendant. If that is so then it is a very small matter whether plaintiff did the work and defendant paid him, or whether defendant did the work himself. If the defendant had made a tender of the extra cost of the "flashing" then plaintiff might have been liable, but no such tender was made. With regard to the claim in re-convention, there is hardly an item in the schedule of damages put in which falls within the terms of the defendant's declaration, and even if they do fall within the terms of that declaration I do not think there is sufficient proof of any damage having been sustained by the defendant beyond the inconvenience caused by the delay and by some petty annoyance at the hands of the contractor's workmen. Judgment will therefore be for the plaintiff for £30 17s. 9d. and costs.

Buchanan and Maasdorp, J.J., concurred.  
[Plaintiff's Attorneys, Messrs. Van Zyl & Buismanné; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

STEER AND CO. V. FALCONER. { 1899.  
Nov. 22nd.

This was an application for judgment on a declaration claiming the sum of £102 2s. 7d., as and for money lent by the plaintiff to the defendant. The case was set down for the 17th inst., but was then postponed on a paper being signed by the attorney for the defendant agreeing that should the claim not be settled by November 21, judgment should be given for the plaintiff with costs.

Mr. Close, for the plaintiffs, said that the claim had not been settled, and he accordingly asked for judgment in terms of the agreement.

Granted.

STREUBEN V. W. AND H. G. COLLETT. { 1899.  
Nov. 22nd.  
" 23rd.

Water-rights—Reasonable User.

*The proprietors of R. an upper farm upon a public perennial stream had for the period of prescription diverted all the water of the stream flowing on the farm. They were at the commencement of the period of prescription, and had been ever since, the proprietors also of the adjoining and lower riparian farm L. In deciding what was a fair and reasonable share of water to be allowed to flow down to a lower farm T., owned by a different proprietor, Held, that the water taken out on R. must be considered as taken out for the whole farm consisting of R. and L.*

*Held, further, that in deciding what is a reasonable use of water the river frontage, the extent of the land, the extent of the arable lands and all other circumstances should be taken into consideration.*

This was an action for a declaration of rights with regard to the water of a certain stream in the division of Middelburg.

The declaration alleged :

1. Plaintiff is the registered owner of Tafelberg, in the division of Middelburg.
2. Defendant, William Collett, is registered owner of Brakke Kuilen, adjoining.
3. The Little Brak River, a public perennial stream, flows in a defined channel over Brakke Kuilen, and thence over Tafelberg, and has done so from time immemorial.
4. The plaintiff, as riparian owner, is entitled to a reasonable share of the water of the stream at all seasons of the year for drinking and domestic use, for the use of his stock, and also for general purposes of irrigation, and the owners of Tafelberg have up to the date hereinafter mentioned enjoyed the use and benefit of the stream to the said extent.
5. Brakke Kuilen is occupied by both defendants; the first defendant cultivates the upper, the second defendant the lower portion.
6. Since 1892, and more especially during 1896, 1897, and 1898, the defendants have diverted and used more than a reasonable share of the water, and have thus deprived the plaintiff of his reasonable share. And the defendants contend that they are entitled to continue to divert upon the said farm the quantity of water aforesaid.

Plaintiff claimed £500 damages, an order that he was entitled to have flow down from defendants a reasonable share of the water of the river, and an order interdicting the defendants from diverting more than a reasonable share.

The plea denied paragraph 2 of the declaration, and said that W. Collett was the owner of the two farms Rietvlei and Legkraal, and that they did not adjoin Tafelberg; that the Little Brak River flowed in a defined channel across the said farm and thence over another farm, and then on to and over plaintiff's farm. It admitted that plaintiff was entitled to a reasonable share of the water at all seasons of the year when there was water in the river for drinking, domestic use, stock and irrigation. It said that W. Collett occupied and cultivated the upper farm Rietvlei, and the defendant, H. G. Collett, the lower farm Legkraal.

It said that W. Collett had upon the upper farm Rietvlei as of right and for the period of prescription diverted and used upon the said farm Rietvlei all the water flowing in the river upon the said farm, and that

during the periods complained of by the plaintiff the said defendant, W. Collett, diverted and used the water in the same manner and to the same extent as he had diverted and used it as aforesaid during the period of prescription aforesaid.

It said further that, notwithstanding the above, owing to the nature of the soil and the bed of the river, a certain quantity of the water soaked and percolated through and under the bed of the said river and broke out on to and upon the bed of the said river on the plaintiff's farm, and then flowed on the bed of the said river on to and over the plaintiff's farm. That this flow in the river, upon which the plaintiff is a riparian owner, was the fair and reasonable share of the water of the river to which the plaintiff would by law be entitled, and that the plaintiff had during the years set out in paragraph 6 of his declaration had a reasonable share of the water flowing in the said river for drinking and domestic use, and for the use of his ordinary stock, and also a fair and reasonable share of the said water for the purposes of irrigation.

The replication was general.

Mr. Innes, Q.C., and Mr. Gardiner for the plaintiff.

Sir H. Juta, Q.C. and Mr. Currey for the defendants.

Lovel William H. Wallace, a Government land surveyor practising at Middelburg, deposed as to the correctness of the diagrams of the farms prepared by him and put in. Every little soakage, fountain, and indication of water in the river was shown. Proceeding, witness gave evidence as to the dams on the Colletts' property and also on Mr. Struben's, and as to the furrows leading from them.

Cross-examined: The river at a certain part had what was known in this country as a false bottom. Tafelberg was originally two farms, and the part through which the river flowed was originally known as Landplaats.

Re-examined: The original grant was Tafelberg, and then Landplaats was cut off but afterwards rejoined.

James Cooper Rous deposed that he had resided at Tafelberg from 1892 until the beginning of this year. He was well acquainted with the dams in question. He first saw the upper dam about October, 1892, at which time it was very far from being watertight. It was not a masoned dam, and there was a very considerable quantity of water coming down. From 1893 onwards there was a considerable diminution in the

quantity of water coming down. Mr. Harry Collett's lands had been gradually increased since that date. In 1896 witness and another went to Mr. William Collett, and asked him to let the water flow down, but he would not do so. Mr. Collett had then apparently good crops, and he was irrigating veld. At that time those lower down were suffering from want of water. In 1897 the dam consisted of a thoroughly good masoned dam, and no water was then escaping. In the normal flow of the river the upper dam would take all the water. Low r down the amount of cultivation had been diminished year by year since 1892. If they had water they could cultivate much more. The farmer below Mr. Struben's land received his supply of water from a fountain below Mr. Struben's dam, but on his land. From the top dam Mr. Collett cultivated three times the amount, and from the lower dam twice the area of land that they did.

Cross-examined: Witness did not agree with Mr. Wallace with regard to the water being conspicuously strong at a certain point. The river was one in which there would be water for a space, then it would come up again, then disappear, again come up and so on. Witness did not know what the proprietor above Mr. Collett did. He did not go to any of the proprietors above Mr. Collett.

By the Court: Witness did not remember exactly the area of land cultivated in 1892 and 1893, and therefore could not compare it with the area cultivated in 1898. There were about twelve morgen cultivated in 1892. As far as witness knew the defendants increased their cultivation, as plaintiff's had to be decreased. He could not say exactly the difference in the area cultivated, but they had suffered through poorer crops. They had sometimes to cut the crops while they were green to save them.

Robert James Robinson, a farmer living on Tafelberg, and now cultivating the lands known as Landplaats, stated that he had been there since 1887, and then Mr. Collett had no lands cultivated where the lower dam was now. The dam had been made after witness came to the place, and since then the cultivation had been gradually increased. He first saw the upper dam in 1897. After the lower dam was finished witness began to feel the scarcity of water, and he had spoken to Mr. Rous and Mr. Struben about it. Witness only got about half the quantity of water he used to get.

Cross-examined: When he went to Mr. Collett's farm in 1897 he did not look at the crops there, and could not say whether they were just as poor as his own. He did not go because he considered Mr. Collett was using too much water. Several times witness had asked leave to open holes so that his dams might be filled. He would not be surprised to hear that he had had a larger crop last year than Mr. Collett.

Re-examined: They had rains last year, and could therefore do without the river water.

Christian Ludwig Flemmer, a farmer residing on the farm below plaintiffs' stated that he first knew the portion of Brakke Kuilen known as Logkraal in 1865 or 1866. There was then no dam there, although there was one at Mr. Struben's and one above at Rietvlei. The latter used to be washed away by freshets, and then had to be made again. It was evident from the area of land cultured that the Colletts in their two dams got more water than Mr. Struben did in his. Witness knew from his own observation that there had been less land cultivated on the Landplaats since the lower dam was made by Mr. Collett.

Cross-examined: Witness, nine miles lower down the river, got more water than Mr. Collett did at Rietvlei (the upper dam). The river soaked away in parts, and then reappeared. There was more cultivation now on Landplaats than there was in Vorster's time, but there was less by five or six morgen than when Robinson first went there.

William Distin, a farmer, said that his father owned Tafelberg for many years, and witness himself lived there from 1869 to 1888. When he first remembered the place there was no lower dam and no lands cultivated at the place. He could not remember whether the upper dam was a masoned dam or only sod and bush. Witness had afterwards hired a part of the land from his father, and he had made a dam at Landplaats.

H. R. Struben, father of the plaintiff, deposed that after seeing Mr. Collett, sen., the latter had agreed to let half the water run, but he afterwards wrote to the effect that he had nothing more to do with the matter, as he had seen his son (Harry). (Correspondence was read which had passed between the parties' agents, and in which the defendants had offered to go to arbitra-

tion; this offer had not been accepted.) Witness deposed that there was some land which could be irrigated from the river if he had the water.

Robert Henry Struben, the plaintiff in the case and the registered owner of Tafelberg, said he had been eighteen months on the farm, and during that time he had not had sufficient water in his dam to irrigate his farm, although the rain had enabled him to raise crops. But for a very heavy rain last year he would have lost the whole of his crops. As far as one could judge in passing by rail, Collett's crops were always good. Witness claimed half of the whole water. If he had the water he could cultivate much more land than he did.

Cross-examined: Witness admitted that the offer of Harry Collett, to have the fountain which supplied his dam gauged, and then the water gauged lower down, and if less to make up the quantity, was a fair offer.

This closed the case for the plaintiff.

For the defence,

Guy Barber, the owner of Droogfontein, a farm lying between Mr. Collett's and Mr. Struben's farms, said that he had been there since 1882 continuously. Where the river ran through his ground there was a soakage which was formerly used by him for watering his stock. If there was any difference between the water on witness's farm in 1882 and now, it was stronger now, considering the dry years. The water had not diminished since the Newlands (lower) dam had been built. There had been a period of dry years, culminating in 1897, when he lost his fruit, vegetables, &c. Witness had assisted in making certain measurements in January of this year; in the bed of the river, opposite the Rietvlei lands above the dam, a bath filled in 11 seconds, and 900 yards below Newlands dam it took 15½ seconds to fill. In the furrow, 60 or 70 yards above Mr. W. Collett's house, the bath took 20 seconds to fill, so that there was actually less water there than 900 yards below the dam. In November of this year witness measured the water on the boundary between Mr. Collett's and Mr. Struben's farms and the bath filled in 10 seconds, and in the same old place below the dam in 11 seconds. There were three others with him on the first occasion, and two others on the second occasion. Witness had noticed that the crops on H. Collett's land were suffering from want of water. The furrow ran through porous

soil almost parallel to the river, and the water which percolated through would return to the river.

Cross-examined: Witness did not use the water in the river, but if he wished he had a right to do so. He would have to pump out the water.

John Ford, living on the farm Buffelsvlei, above Mr. Collett's farm, stated that he had lived there since 1895. In dry seasons he took every drop of water he could get, and the proprietors above him did the same. Notwithstanding that, owing to the nature of the river-bed, the lower proprietors received a share of the water. Witness was present when the measurements were taken by the previous witness, and corroborated him with regard to them.

A. Vorster, who had lived on Landplaats in 1876, deposed that he used to get from forty muids in dry seasons to eighty muids of grain in good seasons, so that there must be a good deal more cultivation there now. Mr. Collett used to take all the water in the dry seasons when he required it.

Cross-examined: Witness did not always have the water he required when he was at Landplaats, otherwise he would always have had a crop of eighty muids.

Nicholaas van der Walt deposed that his father used to own Rietvlei and Legkraal, which were then one place. Witness came on the farm as a child, and remained there until it was sold to Mr. Odendaal, about 1864. Witness was now sixty years of age. While his father was alive in dry seasons he always diverted all the water. His father died in 1861, and then witness had the upper portion, Rietvlei, while his brother had the lower portion, Legkraal. Witness then diverted all the water he could, while his brother did the same at his portion. The river consisted of pools, with sandy bed and fountains here and there.

Cross-examined: In witness's time the dam consisted of sods and clay. It retained all the water, and there was no leakage. There was a large clump of bulrushes at the dam, and after this was washed away by a flood the dam was removed to a spot higher up.

Daniel Odendaal said he knew the farms Rietvlei and Legkraal. He had bought Rietvlei from the previous witness. In dry months he took all the water in the river. Witness made the lands on Legkraal, and directed the water there. Below Legkraal there used to be no water in the dry months. He had known Landplaats since 1844. There

were two fountains there, the one weak and the other very strong and permanent. The then owner used to irrigate from a fountain at the back of the river.

By the Court: Witness was seventy-two years of age.

Examination continued: He used to get 300 muids of wheat from Rietvlei before the water washed the lands away.

William Collett, one of the defendants, deposed that in 1872 he became the owner, by two transfers, of the two farms Rietvlei and Legkraal. He cultivated first on Legkraal, and in cultivating there he used all the water out of the river. Afterwards he cultivated the lands on Rietvlei, and took out all the water. So far as witness knew the upper and lower proprietors did the same. Robinson, the former owner of Landplaats, had asked permission to dig holes in the river, and witness had acceded to his request. Witness was present when the measurements were taken, and corroborated previous witnesses with regard to them. He had never agreed to give up half the water to Mr. Struben.

Cross-examined: He thought the dam increased the supply of water, because the river was a very rapid one, and if the dams were taken away the water in the wet season would just sweep a way to the sea, and then the river-bed would be left dry. He had fairly good crops, because he sowed early.

Harry Gray Collett, the other defendant, and son of the previous witness, deposed that in 1890 he made the Newlands dam. The springs lower down had doubled in strength instead of decreasing since he made the dam. They had had bad seasons culminating in 1897, and witness had suffered as well as Mr. Struben. Witness only got about the same value of stuff as Robinson got.

Cross-examined: It had been remarked that witness had considerably increased his land under cultivation, but the reason was that he kept land for a summer crop, and for that he entirely used flood-water.

Edward Reginald Bain, from the Deeds Office, produced the title deeds of the farms.

Mr. Innes: The only question is, what constitutes a reasonable share of the water in the Brak River? Plaintiff contends that one half share to him would be a fair division. The farms must be looked at and the extent of cultivation on them. Plaintiff irrigates one fourth of the land that is irrigated on Krakke Kullen,

[De Villiers, C.J.: The extent of the land is not an absolute test. There is no evidence as to the nature of the soil.]

All the circumstances must be taken into consideration.

[De Villiers, C.J.: Suppose there are two large farms, one with a very long river frontage and the other with only a yard of river frontage, could the owner of the latter farm irrigate thousands of acres of land though he had only a yard of river frontage?]

Is the river frontage so important a matter as the extent of actual arable land? The case put is a very extraordinary case.

[De Villiers, C.J.: That very case arises here.]

Plaintiff relies on the fact that Barber cannot take out his water though he has some river frontage. The extent of ground is not so important as the extent of arable land. *Jordaan v. Winkelman* (1879, p. 89). The extent of the farm and the extent of the arable land are both in plaintiff's favour: the only point against him is the extent of river frontage. Applying all the tests the plaintiff has less water than he ought to have. The plea of prescription does not hold, as Odendaal has not been on the farm since 1870, and does not know what has been done in the interval.

*Postea* (November 28rd.)

Lovel William H. Wallace, recalled by the Court, stated that he did not understand the taking of measurements of water. He had followed the course of the water-furrow from the lower dam. It ran parallel to the river for a considerable length, and diverged near the point in the river where the stream was marked conspicuously strong. The water could easily be turned from the furrow into the river at that point, the furrow being at a higher level. It could be diverted anywhere along its course to that point, but more particularly at the bend.

Sir H. Juta: There are several sources of supply below the Newlands dam. No idea has been given by the plaintiff of the amount of the land abandoned because he could not irrigate. He has not proved any damages. All the defendants' witnesses agree that there has been a series of very dry years, culminating in a drought in the year 1897, when Struben first wrote his letter complaining of the want of water. It is no evidence of unreasonable user of water that the water has grown weak, when there is evidence that there has been a drought for several years. In ascertaining what is a reasonable share

of the water the Court will take into consideration the distance the arable lands lie from the river. *Jordaan v. Winkelman* (Buch. 1879, p. 89.) Defendant's farm is much nearer to the river. There is also the extent of river frontage to be considered. Plaintiff has a small river frontage. The question of river frontage is a very important matter. The intervening riparian proprietor is also entitled to some share.

[De Villiers, C.J.: The fallacy in the defendant's case consists in this, that with regard to the upper dam, they plead prescription, and with regard to the lower dam, they say the plaintiff got a reasonable share.]

Where two riparian farms are granted, the mere fact that the farms afterwards come into one person's hands, does not give the right to claim a fresh supply of water to the lower proprietor. When the period of prescription began the two farms were in separate hands.

[De Villiers, C.J.: In estimating what is a reasonable share the Court must consider what is the extent of the owner's land.]

Such a decision will be very important and far-reaching, and should be carefully considered by the Court. The owner might add all his back lands, and then claim water for them.

There are two questions for the Court to consider: first, does the plaintiff get less water than he used to get; and, secondly, does he get less water in any way than the defendants? It is clear that plaintiff does not get less than before. Barber's evidence shows this; and his interests are identical with those of the plaintiff. He must have suffered through unreasonable use of the water. Vorster said that in his time not more than three to four morgen were cultivated. The reason was that there was not more water.

Mr. Innes in reply.

De Villiers, C.J. said: In reading over the correspondence in this case, I have noticed the fairness with which the defendants were prepared to meet the plaintiff's demand, but at the same time it appears to me that the defendants have all along been labouring under some misapprehension as to their real rights. They seemed to consider that they could claim by prescription to lead all the water out of the upper dam, and that when it came to a question of reasonable distribution of water between themselves and plaintiff then they had not to consider the upper dam at all, but only the lower dam, and then make a fair distribution between themselves and

the plaintiff only of the water after the upper dam is left out. In my opinion that is the initial mistake under which the defendants laboured. We cannot lose sight of the fact that although at one time the upper farm consisted of two separate farms, yet at the time the alleged prescription began to run the two farms were in the hands of the same person, and any water therefore taken out of the upper dam must be considered as taken out on behalf of the whole of the farm. Therefore in considering what is a reasonable use of the water, the Court must consider how much water is taken out for the farm from the upper dam. Coming down to the lower, the plaintiff's farm, there is no doubt that the river frontage is very much less than the river frontage of the two other parties' farms, but on the other hand there seems to be more arable land in the immediate vicinity, and upon the whole we have come to the conclusion that a reasonable distribution of water will be that the plaintiff's farm should have one-third of the quantity. That seems to us a fair distribution of the water. Now when we consider the area of arable land irrigated, we find that according to the plan prepared by Mr. Wallace, for the plaintiff, the arable land on the defendant's upper farm is 31½ morgen, and on the lower farm 23½ morgen, while there are only fourteen morgen of irrigated land on the plaintiff's farm, which gives the plaintiff very much less than one-third. It is said by Sir Henry Juta that a portion of the cultivated land on the defendant's farm is irrigated by storm-water. Well, the same would apply to a part of Mr. Struben's. In my opinion I think that in the absence of any really good scientific measurements of the water the only practical test the Court can apply is the actual extent of the land irrigated. Even if we take the rough and ready measurements which have been taken, I am by no means satisfied that Mr. Harry Collett does not really get more water than the plaintiff. There can be no doubt that ever since the lower dam was made and water led out there has been a steady diminution of the amount of water flowing down. Upon that point we have the evidence of Mr. Robinson, who has been cultivating land there since the days before the dam was made, and his positive statement is that there has been a diminution of the water to the extent of one-half since the lower dam was made. If this lower dam had been made thirty years ago, the Court

would have been inclined to put it on the same basis as the other; but the dam was only made nine years ago, and I do not think the Court can attach the same weight to it as it would to a dam of longer existence. We must therefore treat it in the same way as if the dam had only been made last year, and undoubtedly, if it had only been made then, the Court would check the leading out of more water. Upon the whole, I have come to the conclusion that the upper proprietors have been enjoying more than two-thirds of the water, although it is difficult to say the exact proportion. As proof that they were using more, there is the admission made by the elder Collett that, at all events, some portion of the water has been used for irrigating his veld. The fact that he had spare water to irrigate the veld goes far to show that he used more water than he ought to have done. The Court has laid down rules for the use of the water of perennial streams, and one of the first principles laid down as far back as the case of *Hough v. Van der Merwe* is that the water after being used for domestic purposes and the like may be used for the purpose of irrigation, that is irrigation for the purpose of cultivation, but certainly not for the purpose of watering veld, while the owners below have not sufficient water to irrigate their cultivated land, and even where cultivated land is irrigated the Court has laid it down that the water should be turned into the channel without any more waste than was necessary for the purpose. In the present case there certainly seems to have been waste on the part of the upper proprietors if they could use a portion of the water for the purpose of their veld. In coming, however, to a practical decision as to how the division should take place the Court is met by considerable difficulty. If we leave things as they are the defendants may hereafter claim the right to lay pipes along the water-furrow they have constructed, and in that case there would not be the leakage from this furrow into the stream which tends to feed the water going to the plaintiff's farm. The view we take of it is that alternate weeks would deprive the defendant of too much water, but if the defendants have the use of the water for two weeks and then the plaintiff has the use of it for one week, that will be the fairest distribution. I think the water should be led back into the stream at the lower bend of the furrow. The reason I take the lower bend is that for the defendants' own sake it would be

better to have a continual stream, so that there may not be too great a length of time lapsing before the water could be led for the purpose of irrigating. I think therefore the Court should grant an order directing that the water shall not be used in the lower furrow unless the defendants shall every fortnight allow a week's water to flow back into the river, at a point to be marked on the plan.

After consultation between counsel and their clients, the Court made an order simply that the plaintiff was entitled to a reasonable share of the water in the proportion of one-third to two-thirds of the stream leaving it to the parties to arrange how it should be distributed. The defendant to pay the costs.

Buchanan, J., said: On the facts of the case the parties are pretty well agreed. A great many cases have been decided on questions of water rights and the law on most points is now clearly defined. Every riparian owner on a public stream is entitled to a reasonable share in the use of that stream. In deciding what is a reasonable use, the Court will take into consideration all the circumstances of the properties in question. In this case the Court has taken into consideration the position of the farms, their extent, the extent of arable land, and the extent of user of water. The area alone does not decide it, nor the riparian area, that is, the river frontage; but all the circumstances are to be considered. Looking at all the circumstances, the Court comes to the conclusion that the fairest distribution will be one-third to the plaintiff, and two-thirds to the defendants.

Maasdorp, J.: I concur.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]



# SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.O., K.C.M.G. (Chief Justice) the Hon. Mr. Justice Buchanan, and the Hon. Mr. Justice MAASDORP ]

## PROVISIONAL ROLL.

LACANIERRE AND LAFAILLE V. } 1899.  
GRAHAM BROTHERS. } Nov. 23rd.

Mr. P. Jones moved for provisional sentence for £558 6s. 8d. on bills of exchange. Provisional sentence granted.

## GUARDIAN ASSURANCE COMPANY V. JEREMIAH FOXCROFT.

Mr. Uington moved for provisional sentence on a mortgage bond for £240, with interest thereon at the rate of 6 per cent. from January 1, 1898. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted, and the property specially hypothecated declared executable.

## DE VILLIERS V. HAUMANN.

Mr. Gardiner moved for a writ of civil imprisonment upon an unsatisfied judgment of the Circuit Court at Worcester for costs. Order granted.

DUSSEAU AND CO. V. PINOT. } 1899.  
 } Nov. 23rd.

This was an application for a writ of civil imprisonment on an unsatisfied judgment for £95 8s. 2d., with £10 3s. 9d. costs.

The defendant filed an affidavit in which he said that the original claim against him was £95 8s. 2d., but he had a counter claim for £30 odd, and on his attorney and plaintiffs' meeting and debating the account, the plaintiffs' claim was reduced to £56. Afterwards, however, the plaintiffs proceeded against defendant for the full amount, and obtained judgment in his absence. Defendant went on to detail the circumstances under which he came out to this country for plaintiffs, but afterwards left their service. He alleged that he had suffered damage owing to paragraphs plaintiffs had caused to be inserted in newspapers in Holland stating that a judgment had been obtained against him here for moneys received by him which he had not accounted

for, whereas the judgment was only for balance of account. Defendant stated that he was now employed as manager of the Huguenot Company and received a salary of £10 per month, of which £6 went for his board and lodging. He tendered payment at the rate of £1 per month.

Sir H. Juta, Q.C., appeared for the plaintiff. Mr. Graham, Q.C., for the defendant.

After an answering affidavit by the plaintiffs had been read the Court granted a decree of civil imprisonment, the decree to be suspended pending the payment of £2 per month by defendant, the first payment to be made on December 1, with leave to the plaintiffs to apply for an increase.

## ILLIQUID ROLL.

### CAPE TIMES LIMITED V. KAYSER.

Mr. Buchanan moved, under Rule 329, for judgment for the sum of £16 16s., being balance of account rendered for goods sold and delivered by plaintiffs to defendant, also for interest *a tempore morae* and costs of suit.

Granted.

### WATTS, HERBST AND CO V. HENRY SOESMAN.

Mr. Ward moved, under Rule 329D, for judgment for £365 3s. 3d., with interest *a tempore morae* and costs of suit.

Granted.

## TRIAL CAUSES.

WEINBERG V. JAMES SEARIGHT } 1899.  
AND CO. } Nov. 23rd.

This was an action to recover damages for injury to plaintiff's goods by water while in the custody of the defendant company in its bonded warehouse.

The declaration stated that in February and April, 1899, the defendants received into their bonded warehouse in Waterkant-street, Cape Town, twelve bales of soft goods and three cases of bicycles, the plaintiff's property, and that owing to the carelessness and negligence of the defendants, our of the bales and two of the cases of bicycles were so damaged that the defendants were unable to restore them to the plaintiff in their original good order and condition. The plaintiff claimed £309 6s. 11d. damages.

The plea admitted that the defendants agreed to store the plaintiff's goods in a store belonging to them in Strand-street, Cape Town.

It went on to allege that the defendants took due and proper care of the said goods, but that on or about August 2, 1899, through the misfeasance and negligence of the Cape Town Council a large volume of water collected and brought to the neighbourhood of the defendants' premises, flooded the said store, and the plaintiff's goods therein, as well as the defendants', were damaged thereby; but they did not admit that the amount of damage sustained by the plaintiff was £309 6s. 11d. That the defendants had commenced legal proceedings against the said Council for damages occasioned by the flooding, and prayed that the decision of this suit might be postponed until the claim against the Council had been determined, or else that this suit might be dismissed with costs. The replication was general, except that it denied all knowledge of the negligence, &c., of the Town Council.

The Court, on the 16th inst., held that the action could not be decided before the action against the Council had been heard, but that the plaintiff's evidence of damage should be heard to-day.

Mr. Graham, Q.C., and Mr. Howel Jones appeared for the plaintiff: Mr. Searle, Q.C., for the defendants.

John Weinberg, the plaintiff, said that on February 16, 1899, he received certain goods consigned by the Carisbrook Castle to Raabe, Dahle & Co., whom he represented. On his instructions these were taken by Messrs. A. B. McKenzie & Co. and stored in defendants' warehouse in Strand-street. The goods consisted of twelve cases of soft goods. Three cases of bicycles afterwards arrived and were also stored in defendants' warehouse. (Invoices and receipts for rent for storage of the goods were put in.) He had removed six of the bales of soft goods before August. On August 16 he received a letter which had been sent by the defendants to McKenzie & Co. expressing regret that the goods had been damaged by the flooding of the premises, and asking permission to have the bales and cases opened and the goods examined by surveyors, in view of an action for damages which the defendants intended to bring against the Town Council of Cape Town. The same afternoon witness went to see Mr. Watson, a partner of the firm of Messrs. Searight & Co. He saw the goods but did not

examine them. From the outside of the bales in 1 case, they appeared to have been damaged by water. On August 23, he again went to the warehouse and examined the goods. He found two of the bales of the soft goods in good order and condition, but the other four bales he refused to accept. He also examined the bicycles and took one case, but refused to take the other two. The total damage done was £309 6s. 11d.

Cross-examined: He had seen the surveyors at the warehouse. He did not know that the surveyors had reported that in one of the four bales which he had rejected, only four pieces of silk out of forty had been damaged. Witness had himself taken six pieces totally damaged out of the same bale. As far as witness could see, the bales were valueless. Witness knew the bicycles were surveyed by Messrs. Menzies, but he did not know that an offer had been made to have them put in proper order for £8.

Charles Thomas Breakey, a shipping clerk to Messrs. A. B. McKenzie & Co., gave evidence as to the goods having been taken to Messrs. Searight & Co.'s stores in Strand-street. The stores were below the level of the roadway there.

Cross-examined: So far as witness could say, the goods were properly stored. Witness had often stored goods on behalf of other clients in these stores.

The further hearing of the case was postponed until after the hearing of Messrs. Searight & Co.'s action against the Town Council, and it was subsequently withdrawn.

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## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

Re THE ESTATE OF THE LATE J. 1899.

BRIDGET PRESTWICH. (Nov. 24th.)

This was an application for leave to raise money on mortgage. It appeared from the petition, that the late Bridget Prestwich bequeathed a house in Wandel-street to her granddaughters, provided, however, that her daughter should during

her lifetime have the sole use and benefit, and could let the house and furniture, on condition that she paid the interest on mortgages thereon. At the time of the testatrix's death there was one mortgage bond for £600, and another for £200, on the said property, in favour of W. Marsh, as well as one for £200 in favour of J. C. Hofmeyr. With regard to the first mortgage, £100 had been paid off, and the same amount had been paid off the mortgage held by J. C. Hofmeyr. Owing to the non-payment of interests sale in execution had been threatened by W. Marsh. This would cause considerable hardship, and the only way it could be avoided was by raising a fresh mortgage to pay off the existing mortgages, and accordingly the Court was asked for leave to raise a loan of £925. A consent paper, signed by the granddaughters and the husbands of those who were married, was put in.

Mr. Searle, Q.C., for the petitioner pointed out that the only other persons who could possibly be interested were the residuary heirs in the case.

The Court granted an order authorising the raising of a loan to an amount to be approved of by the Master, but not exceeding £925.

RAYNER'S TRUSTEE V. RAYNER. { 1899.  
Nov. 24th.  
Insolvency—Undue preference.

This was an action for an order declaring as an undue preference and therefore null and void, the execution of a notarial bond passed by Alexander F. Rayner, formerly trading as Rayner & Co., tobaccoists and wine and spirit merchants, Plein-street, Cape Town, in favour of his father, William Rayner, on January 12, 1898. The estate was put under voluntary sequestration on May 9, 1898. The defendant lived at Hammer-smith, London, and was the father of the insolvent. On July 13, the bond was attached to found jurisdiction. The declaration alleged that on January 12, 1898, the liabilities of A. F. Rayner & Co., fairly calculated, exceeded the assets, and the amount of the general bond passed in defendant's favour was £759. The defendant had proved on the estate, and claimed preference. It was alleged that the bond was executed at a time when Rayner, jun., contemplated insolvency, and that he intended to defraud his creditors thereby. The plea denied that when the bond was passed the liabilities of himself exceeded his assets, and alleged that the bond was not passed at a time when he

contemplated sequestration. He had no intention to defraud. The insolvency was within four months of the passing of the bond.

Mr. Buchanan (with whom was Mr. Nightingale) appeared for the plaintiff.

Mr. Benjamin (with whom was Mr. Nathan) appeared for the defendant.

James Jackson Bolam, the trustee in the insolvent estate of Alexander Frederick Rayner, carrying on business in Plein-street as Rayner & Co., stated that the estate was voluntarily sequestrated on May 9, 1898. Witness had examined the books, which had been very meagrely kept. Insolvent carried on business as a tobaccoist, and also had a bottle-store in another part of the street. The liabilities, according to the schedules, were £1,774 19s. 10d., and the assets £1,625 11s. 6d., made up of stock £1,040 14s. 10d., and book debts £584 16s. 8d. Amongst the debts proved was the bond in question. According to the schedules, the deficiency was £150. Witness, after paying the preferent claim of £90 for rent, had only £283 in hand. Only about £400 would be realised. The difference between that and the £1,625 was owing to bad debts and the stock being over-valued. He had prepared a balance-sheet showing, as far as could be ascertained, the position of the insolvent on January 12, 1898. This showed liabilities, £1,674, and a deficiency, £848 8s. 3d. In these schedules witness brought up a wagon with two horses and stock at the bottle-store, none of which items were brought up by insolvent on his insolvency. Witness made up these schedules from information received, as the books did not give the information. At the auction sale the assets realised £1,658 8s. 5d. Some of the creditors had not proved. The books did not show how old the debts were, but some of them were very old. The £636 debts he brought up on January 12 had only realised between £60 and £70. In the January 12 account, witness had only allowed £175 for those debts. The stock fetched good prices in some instances at the sale, although no doubt in other instances it suffered from the forced sale. Cigars, which insolvent had sold at one penny each, realised 14s. the box of 100 at the auction sale. The debt to the defendant appeared to date from the time he commenced business. In August, 1893, the debt was £671, and the Bond passed in January, 1898, was for £759. All the other creditors, with the exception of the landlord, were concurrent creditors.

**Cross-examined :** Witness had always been on fairly friendly terms with insolvent. Witness was trustee in the insolvent estate of Winquist, a wine merchant, but did not advise insolvent to take over that business. He advised him strongly not to do so. Witness did not include in the schedules the goodwill of either the tobacco or the wine business. He did not consider there would be any goodwill for the wine business. Neither did he include any rebate from J. D. Logan & Co. on the wines and spirits. Up to January, 1897, it appeared that insolvent received goods from his father only. Witness had refused insolvent's assistance in collecting the debts. The stock had not greatly deteriorated when it was sold. (Papers were put in to show that the amount of debts proved in the estate was £1,717 17s. 5d.)

Robert Dixon, proprietor of the Standard Restaurant, Adderley-street, said that up to 1893 he was manager of J. D. Logan & Co. He gave evidence as to the manner in which insolvent came to deal with J. D. Logan & Co., who supported him in the bottle-store business. After the first three months, insolvent paid cash for all he got, because J. D. Logan & Co. would give him no more credit. They had proved on his estate for £790 odd. Witness never knew he was indebted to his father, otherwise the firm would have foreclosed its account with him long before. Insolvent told witness they were the only creditors, and said he had a stock in his tobacco business valued at £1,500 or £1,700. Witness gave a look round, and said that it was not worth more than £500 or £600. Insolvent would have been entitled to a rebate of 5 per cent. on his account with J. D. Logan & Co., if he had paid within the thirty days, but as he was always four or five months behind, he was not entitled to any rebate. The first notice which witness had of insolvent's intention to pass a bond was when it appeared in the "Gazette," but he left J. D. Logan's employment in January, 1898.

**Cross-examined :** Insolvent had never told him that he was in negotiation with Messrs. Sedgwick & Co. for their support before he entered into negotiation with J. D. Logan & Co. He could not say from memory whether insolvent received rebate on the goods for which he paid cash.

Edward H. Straker, Cape Town manager for Ernest Ebert & Co., deposed that he had transactions with insolvent for seven or eight years. He detailed insolvent's deal-

ings with Ebert & Co. Insolvent met his bills fairly well, and he paid certain amounts after the date of the bond.

William Wythe, a clerk in the Orange Tobacco Company, produced the books of that firm, which showed that they had had transactions with the insolvent from January 12, 1897. There was a balance of £15 odd still due.

Laurence Wright, a clerk to Wm. Gourlay & Co., deposed that his firm had had transactions with Rayner & Co. until April, 1897.

John Arthur Mennie, a clerk to White, Ryan & Co., deposed that his firm had had transactions with insolvent almost since he commenced business as a tobaccoist. On January 12, 1898, insolvent owed his firm £34 5s., part of which had since been paid off.

This closed the case for the plaintiff.

For the defence.

Alexander Frederick Rayner stated that he had been about ten years in the Colony, and after being here ten months he took over a tobaccoist's business in Plein-street. Afterwards in April, 1897, on Mr. Bolam's advice, he entered into negotiations for the lease of the bottle-store business, which had been carried on by Winquist. Ultimately, after approaching Sedgwick, he entered into an arrangement under which he was supported by J. D. Logan & Co., and was to receive the usual trade discounts (lease put in). He had bought about £1,300 worth of goods altogether from J. D. Logan & Co., and on that the rebate would come to about £150. He had a good tobaccoist's business, and the place was now let at a greatly increased rental, witness having paid £15 per month rent, while the present tenants, Messrs. Hermann & Canard, had to pay £32 10s. The goodwill he considered to be worth £250. Previous to taking over the bottle-store business, he was making from £300 to £500 per year. After passing the bond he tried to sell the bottle-store business, and had an offer of £150 for the goodwill from Mr. Weller, but J. D. Logan's outdoor manager afterwards came and said they were very much annoyed at witness saying the business was his, when he had only leased it from them. He tried to come to some arrangement with J. D. Logan & Co. as to his indebtedness, but they would accept nothing but cash, and ultimately they sued him, and obtained judgment. A writ of execution was taken out,

and thereupon he surrendered his estate. Before he passed the bond stock was taken, and the balance-sheet showed that he was solvent, if the rebate from J. D. Logan & Co. was taken into consideration. After Christmas witness did little or no business in the bottle-store, owing to his difficulty in obtaining stock, but the expenses went on all the same. With regard to the bond, he had always had the idea of securing his father, but had always put the matter off. At the end of the year, however, his wife returned from England and told him that his father was desirous of some arrangement being made. The bond was then passed. Witness did not at the time contemplate insolvency; in fact he did everything he could to avoid that. The stock in his insolvent estate had realised very bad prices. He had offered to help in the collection of the book debts, but his offer was refused.

Cross-examined: Before his insolvency he had done his best to collect the book debts, and had collected a few. Many of the debts were incurred in September, October, November, and December, 1897, and some in January and February, 1898. Some of the debts in the tobacco business were old. Witness would have got in a large percentage of the £184. When he said that he did everything to avoid insolvency, he did not mean that at the time of the passing of the bond he thought about insolvency. He did not tell any of his creditors that he had passed a bond to his father. He did not mean to give his father preference over the other creditors. In 1897, just after he took over the liquor store, his father wrote to him, saying that he must secure him, as he did not like the idea of witness going into that business. Witness did not remember Mr. Dixon saying that the stock which witness entered in his book as being of the value of £1,100 was only worth £700 or £600. He had not paid his father anything since 1896. He had no dummy boxes or show cases in the shop.

William Drummond stated that he had been all his life in the tobacco trade, and that he took stock for Rayner in 1897. He then valued the stock at £1,086. In May, 1898, witness again took stock, and his valuation was that annexed to the schedules. The stock was sold by auction very much below its value. Witness knew the premises and considered that the stock,

cigars and tobacco especially, would deteriorate very much if the shop was shut up for a couple of months.

Cross-examined; He made a careful examination of the stock, opening every box. He made an independent stock-taking each time.

Mrs. Violet Rayner the wife of the insolvent deposed that she had visited England in 1897. The furniture was then sold, and all the private letters, including those which the insolvent had received from his father, were burned. On her return from England on December 12, in consequence of a conversation she had had with insolvent's father, she asked the insolvent to make his father quite safe with regard to his indebtedness to him, but insolvent put the matter off for a time.

Cross-examined: The furniture was sold up because she intended to bring out new furniture with her. That furniture was bought with money she had saved out of her housekeeping allowance of £12 per month. Her husband's father asked her to see that the debt was secured.

Louis Akeradyke said he had been employed by insolvent, and had a fair idea of the value of the stock. Witness was present at the sale, and thought the things were quite given away.

Cross-examined: Witness could positively say there were not fifty penny cigars in the place at the time of the sale.

This closed the case for the defence.

After argument, the Court gave judgment in favour of the plaintiff.

De Villiers, C.J., in giving judgments, said: This bond was passed within six months of the sequestration of the insolvent's estate, and the Court must therefore presume that the insolvent contemplated sequestration unless proof be made to the contrary by the defendant. In my opinion the defendant has wholly failed in his proof of the contrary. He has given some evidence to show that he had been asked by his father to give this bond, and he says there has been correspondence with his father on the subject, but the correspondence is not produced, and the explanation as to why that correspondence is not forthcoming is in my opinion wholly unsatisfactory. The defendant may have had some faint hope that he could still avoid insolvency, but the existence of such a faint hope would not disprove the contemplation

of sequestration. He might have had a faint hope that he would avoid insolvency, and yet he might contemplate insolvency when he passed this bond in favour of his father. The Court has always looked with extreme suspicion upon transactions of this kind, wholly out of the ordinary course of business. There has in my opinion been no proof that the insolvent did not at this time contemplate insolvency. Then an important question arises, viz., as to whether at the time this bond was passed the insolvent's liabilities exceeded his assets. Now the best test is what the property realised after the insolvency. No doubt some allowance must be made for a forced sale, but even after making such an allowance a deficiency of £1,300, which appears to be the actual deficiency, is not easily explained. The insolvent himself on his surrender must have deemed himself insolvent, although he gave the deficiency as only £150, but still an insolvent is apt in most cases of sequestration to over-value his assets, and to rather under-value his liabilities. The account which has been made out by the trustee as to the insolvent's position on January 12, 1898, seems to place the whole matter beyond doubt. That account seems to have been fairly made out. The trustee has not taken exactly what he properly realised at the auction sale, for the property then realised £3 5s. 8d., but in this account £600 is placed as the value. With regard to the accounts, £636 14s. 8d. was owing, but from that amount bad debts were deducted, leaving £195 19s. 1d., but these debts realised only £50 or £70, so that according to this account, which, as I said before, seems very fairly made out, there was an actual deficiency in January, 1893, of £818 8s. 2d., which would be something like 10s. in the £. The only other question would be whether there was an intention to prefer, but there is no claim in the present case for forfeiture, although it seems very clear that the father of the defendant knew the insolvent was unable to pay his debts at the time, because it is said in the power of attorney as an inducement for the bond that the insolvent was unable to pay his debt, and that it was in consequence of this inability to pay that the father was secured by means of this general bond. I am of opinion, therefore, that undue preference has been proved, and there must be judgment for the plaintiff with costs.

Buchanan and Maaslorp, J.J., concurred,

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendant's Attorney, J. Ayliff.]

WATKIN'S ASSIGNEE V. KROMM. } 1899.  
Nov. 24th.

Executor — Personal liability —  
Damages—Exception — Striking  
out plea.

*A claim by an executor, as such,  
cannot be set off against a debt  
due by such executor in his per-  
sonal capacity.*

This was an argument on exceptions to the defendant's plea.

The declaration was as follows:

1. The plaintiff is E. W. Rice in his capacity as the assignee of the estate of W. J. Watkins of Beaufort West. The defendant is Pauline Kromm, widow of the late John Bernard Kromm of Cape Town.

2. The estate of the said W. J. Watkins was assigned to the plaintiff on or about the 4th September, 1896, as will appear from the deed of assignment to which the plaintiff craves leave to refer.

3. On the 27th June, 1894, J. B. Kromm, the late husband of the defendant leased, by written agreement to the said W. J. Watkins who hired from him certain premises situate at Beaufort West called the "Masonic Hotel," the lease to extend over a period of three years dating from the 9th July, 1894.

4. On the 26th August, 1897, the defendant purchased and by a written acknowledgment of debt marked A, hereunto annexed, acknowledged that she had purchased from the plaintiff, for the sum of £500, all the furniture, linen, cutlery, stock in trade, carts and horses in and about and connected with the business of the said hotel with the exception of such linen, furniture and cutlery as belonged to the defendant's late husband and was in and about the said hotel.

5. The defendant undertook by the above-mentioned agreement to pay to the plaintiff, in discharge of the purchase price aforesaid, monthly instalments of £25 together with interest thereon at the rate of six per cent. per annum but thereafter failed and refused to pay such amount, whereupon the plaintiff on the 10th August 1899, sued the defendant for provisional sentence for the sum of £500 together with interest and costs, which was then and is now due and payable under the

said agreement; this Honourable Court ordered the plaintiff to go into the principal case.

6. All things have happened, &c., to entitle the plaintiff to recover from the defendant the sum of £500 with interest, &c.

The plaintiff claimed £500 and interest.

For a plea to the declaration the defendant said:

1. She admits the allegations in paragraphs 1, 2 and 3.

2. In terms of the said contract of lease between the said parties and the said Kromm, it was agreed that should the lessee by himself or his servants commit any act which might jeopardise the interests of the lessor in the leased premises or in the licences belonging thereto, or which should cause the refusal of a renewal of the said licences then the said lessee should be forthwith compelled to pay the sum of £1,682 2s. 6d. as purchase money for the said leased property and should take transfer into his own name of the said property.

3. The said Watkins was thereafter guilty of conduct which jeopardised the interests of the lessor in the said premises, and the said licences within the meaning of the condition of the lease hereinbefore referred to, he did not by himself or his servants exercise due supervision in respect of the canteen attached to the said premises, and he conducted the said canteen in a manner which made it objectionable to those living in the neighbourhood and to the public. And the Licensing Court which sat at Beaufort West in the month of March, 1896, refused to renew the said canteen licence, which was one of the licences referred to in the lease, and reduced the hours of the hotel licences. The said refusal and reduction was due to the conduct of the said Watkins and his servants aforesaid.

4. The said Watkins thereupon became liable to pay the said sum of £1,682 2s. 6d. to the lessor and to take transfer of the said property, of all which the plaintiff was aware when the deed of assignment 4th September, 1896, was executed.

5. The defendant's husband died in June, 1895, and the defendant together with one J. Pooley in his capacity as Secretary of the Griqualand West Loan Trust and Agency Co are the duly appointed executors of his estate.

6. When the said lease terminated on or about the 9th July, 1897, the defendant agreed with the plaintiff to take back the

said leased premises without prejudice to the claim for damages on the part of her husband's estate in respect of the matters hereinbefore mentioned in the 2nd, 3rd and 4th paragraphs set forth, and it was agreed between the plaintiff and the defendant that she should take over the said hotel and the then existing licence and should also take over the stock-in-trade, furniture, &c., then in the hotel, but that the price of such stock-in-trade, furniture, &c., should go off against the damages claimable by the estate of her said husband, which damages the plaintiff undertook and agreed to assess by arrangement with the principal creditor of the said Watkins.

7. The document of which a copy is annexed to the declaration was thereupon drawn up and signed by the plaintiff and defendant, subject always to the agreement hereinbefore set forth.

8. The damages claimable by the estate of the defendant's late husband as aforesaid amount to the sum of £1,500 and have not been paid. The defendant is willing in terms of the said agreement with the plaintiff to reduce the said claim by the amount of £500 now sued upon and she undertakes to obtain the consent of her co-executors thereto.

9. Subject to the above the defendant admits the allegations in the 4th and 5th paragraphs of the declaration, but she denies the allegations in the 6th paragraph, save the statement that she has refused to pay any part of the amount claimed in this action.

The replication was as follows:

1. The plaintiff admits the allegations in paragraph 2, save that he craves leave to refer to the written agreement of lease for the full terms and effect thereof.

2. He denies the allegations in paragraph 3, and says that the said canteen was not ordered to be closed by the said Licensing Court on account of anything done or omitted to be done by the said Watkins, his servants or agents, but on account of the unsuitable position of the said canteen premises as abutting on the main street of the town of Beaufort West; and with respect to the reduction of hours referred to the said reduction was applied to all hotels in the said town.

3. He denies the allegations in paragraph 4, and says that neither the said Watkins nor the plaintiff was ever called upon to take transfer of the said premises.

4. He admits the allegations in paragraph 5, but denies those in paragraph 6 and says that plaintiff from time to time called upon defendant to pay the amount due by her.

5. He denies the allegations in paragraphs 7 and 8, and says that the claim by the estate of the defendant's husband cannot be set up in this action, and that the said claim in so far as the same is set up as a defence in this action is embarrassing, and bad in law, and should be expunged.

6. Save as above and save in so far as the plea admits any of the allegations in the declaration he denies all and singular the allegations of fact and conclusions of law in the said plea and joins issue thereupon and again prays for judgment with costs of suit. The defendant filed a general rejoinder.

Mr. Searle, Q.C. (with him Mr. P. Jones) for the plaintiff: This is really an application to strike out certain portions of the plea. A claim by a person as executor cannot be set up in answer to a claim for a debt for which he is personally liable. *Williams on Executors* (Libr., ed., p. 1816); *Bishop v. Church* (3 Atkyns, 691); *McDonald v. Curington* (4 C., 98).

[De Villiers, C.J.: There is no doubt about the point. The main question is as to the validity of the agreement between the widow and the assignee with regard to the set-off.]

Such an agreement is not valid or binding in law. The assignee merely represents the creditors. The agreement on the face of it is only inchoate. In order to set up such an agreement it should be shown that the estate of the deceased was a party to it.

Mr. Innes, Q.C., for the defendant: I admit that the damages cannot be set off. There is no defence of set-off here. If evidence can be given to prove a special agreement such as is set up in the plea that will be a good defence. The plaintiff has mistaken his remedy.

Mr. Searle: The two agreements are inconsistent.

De Villiers, C.J., said that he thought the action for damages should form the subject of a separate action. The defendant alone could not bring such an action, but must be joined with her co-executor in seeking to recover damages sustained by her late husband's estate. In his opinion, therefore, the objection was a good one, and part of paragraph 6, together with paragraphs 7 and 8 of the plea must be expunged, with costs.

Buchanan and Maasdorp, J.J., concurred.

Mr. Innes made a further application for a postponement of the trial until after the February term, but the Court made no order but intimated that when the action came on, although it was undefended, the defendant might apply for stay of execution.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

#### IN THE ESTATE OF THE LATE WILLEM BOTHA.

Mr. P. Jones moved for leave to the executrix testamentary in the estate to execute partition transfers and to raise the sum of £1,500 on mortgage to consolidate existing mortgages.

The major heirs had consented and the Master reported favourably.

The order was granted.

#### IN THE ESTATE OF THE LATE EDWARD BRUCE.

Mr. Gardiner moved in the matter of the petition of Andrew Barclay Shand, as executor dative of the estate of the late Edward Bruce, for a rule nisi granted under the Derelict Lands Act to be made absolute. Granted.

#### Re SCHOEMAN.

Mr. Bisset moved for the rehabilitation of the estate of Philip Kudolph Botha Schoeman.

Granted.

#### IN THE MATTER OF THE PETITION OF ALEXANDER MACINTOSH AND WIFE.

Mr. Joubert moved for the registration of an ante-nuptial agreement which had been embodied in a notarial contract between the parties subsequent to the marriage which took place in England in September last.

The usual order was granted.

In re STEPHENS. { 1899.  
Nov. 24th.  
" 27th.

Intestate succession—Representation  
—Collaterals—Next of kin.

*S., died intestate leaving no parents alive nor brothers nor sisters nor relatives on her father's side; on her mother's side she left (1) an uncle P., who subsequently died*



leaving children; (2) the grandchildren of an aunt, D., who had died leaving no children alive; (3) the daughter of an aunt, M., who had died leaving no other descendants alive, and (4) an aunt, E., still alive.

Held that the maternal relatives were entitled to only one half of the intestate estate.

Held, further, that the grandchildren of the aunt D. were not entitled to share in the succession, inasmuch as representation does not extend beyond the children of uncles and aunts.

Ordered, accordingly, that the half of the estate be divided into three equal portions, one being awarded to the children of P., another to the daughter of M., and the third to E.

This was an application for an order for the distribution of certain property in the intestate estate of Esther Stephens.

The petitioners were Elizabeth Jacoba Constable, the daughter, and Martha Maria Terhard, the granddaughter of Johannes Spangenberg, and E. R. Syfret, the executor dative in the joint estate of Esther Stephens and her husband Charles James Stephens.

It appeared from the petition and affidavits that Johannes Spangenberg and his wife died some years previously leaving the following issue surviving them:

1. Petrus Josephus Matthaeus Spangenberg, who had married, and died about eighteen years ago, leaving several children at Malmesbury.

2. Martha Diana, who married William Roberts. They had both died leaving a son John, who died unmarried, and a daughter Esther who married Charles James Stephens. Mr. and Mrs. Stephens were both drowned in the Drummond Castle in 1896, and left no children, and their estate being intestate E. R. Syfret, the third-named petitioner, had been appointed their executor dative.

3. Dorothea, who married Hopkins and had died, as also her husband, leaving a daughter who had since died unmarried, and a son named Piet. Piet had died leaving a son and three grandchildren, now at Kimberley.

4. Marw h o married one Heegers, and who as well as her husband had died, leaving a daughter Martha and a son John:

(a) Martha Heegers had married one Terhard and was the second-named petitioner.

(b) John Heegers had married, and he and his wife were both dead, but they had left a daughter named Maria, who had married Dreyer. Dreyer was dead and Maria was reported to have died in the Transvaal seven years ago without issue.

5. Elizabeth Jacoba, who had married Constable, and was the first-named petitioner.

6. Conrad, who died unmarried.

7. Frederick, who died unmarried.

It was alleged that William Roberts, the father of Esther Stephens, came to this colony in 1832, when he was sixteen years of age. That he then stated that he was an orphan, and came from an orphanage. That he had no relations in the Colony, and that the petitioners since his decease had never heard of any of his relations.

The executor dative of the estate of Esther and Charles James Stephens had advertised extensively with the object of getting their next of kin to send in claims to the estate. He had filed an account in which he had awarded £3,889 13s., being half of the joint estate, to a sister of Charles James Stephens and the remainder equally between the unknown heirs of William Roberts and the heirs and next of kin of Martha Diana Roberts. To the first-named petitioner £170 7s. 3d., and to the second-named petitioner £235 3s. 7d., had been awarded as being heirs on the maternal side. The £470 4s. 3d. awarded to the heirs of P. J. Spangenberg had been paid to his children. The second-named petitioner now claimed the £235 3s. 7d. awarded to the unknown heirs of John Heegers on the ground that she was his sole surviving sister, and aunt of his daughter Maria Dreyer. The executor dative, however, had refused to pay out the amount in the absence of any official record of the death of Maria Dreyer.

The petitioners further submitted that as there were no known heirs of the late William Roberts the sum of £1,881 8s. 10d. awarded to the unknown heirs of his estate should be paid out to the heirs of the late Esther Roberts on the maternal side in terms of the liquidation account as filed with the Court.

The petitioners prayed for an order authorising the Master to pay to the first and

second named petitioners and the heirs of the late P. J. M. Spangenberg respectively out of the said estates the various sums of money above-mentioned or such portions thereof as petitioners submitted they had established claim to or to authorise the third petitioner to distribute the said sum of £1,881 8s. 10d. amongst the heirs of Esther Stephens (born Roberts).

There was a further application that the amount of a draft for £470, which had been taken out by Charles James Stephens on the Standard Bank payable in London should be paid out to the executor dative, as it was believed that the draft had been destroyed at the foundering of the Drummond Castle.

The petition had been referred to the Master and he reported that the evidence was insufficient to establish the claims and that the petitioners were not the next of kin.

Sir H. Juta, for the petitioners: The right to succeed stops with the children of uncles and aunts. Grandchildren are not entitled to claim. *Raubenheimer v. Executors of Van Breda* (Foord, p. 111) decides that the grandchildren of brothers and sisters are entitled, but does not admit the claim of grandchildren of uncles and aunts. I cannot argue that the applicants are entitled to the half share belonging to W. Roberts' estate.

*Cur. adv. vult.*

*Postea* (November 17th).

De Villiers, C.J.: The law was clearly laid down in *Raubenheimer v. Executors of Van Breda* (Foord's Rep., p. 111), that "representation shall not be admitted among collaterals further than the grandchildren of brothers and sisters, and the children of uncles and aunts inclusively; and all other collaterals, being the next of kin of the deceased, and in equal degrees, shall take *per capita*, to the exclusion of all who are in a more remote degree of consanguinity, the nearest excluding those more remote." The deceased Mrs. Stephens, who perished with her husband in the wreck of the Drummond Castle in 1896, died intestate leaving no parents, nor brothers or sisters alive. On her mother's side, however, she left (1) an uncle (Peter) who has subsequently died leaving children alive; (2) the grandchildren of her aunt Dorothea, who had died leaving no children alive; (3) the daughter (Martha) of an aunt (Maria) who had died leaving no other descendants alive, and (4) the aunt Elizabeth Constable, who is still alive. On her father's side no relatives were left, but the maternal relatives can of course only share in the maternal half of the estate. The grand-

children of Dorothea cannot be admitted as next of kin, inasmuch as representation does not extend beyond the children of uncles or aunts. The order will therefore be that the half of the estate be divided into three equal parts, one of which is to devolve on the children of Peter, the second on Martha the daughter of Maria, and the third on Elizabeth Constable. With regard to the application for an order authorising the payment by the bank to the executor dative of the draft taken out by Stephens before he left Cape Town by the Drummond Castle, it has never been presented to the bank for payment, and considering the number of years since the wreck, it may be fairly presumed that the draft was lost with the wreck. The bank does not oppose the application, and the Court will therefore make the order as prayed.

Buchanan and Maasdorp, J.J., concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

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## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MOSS V. MENZIES AND CO. { 1899.  
Nov. 27th.

This was an application by the defendants upon notice calling upon respondent (the plaintiff) to show cause why this case, which had been set down for Thursday, November 30, should not be postponed owing to the absence of a material witness.

The affidavit of Mr. Menzies, one of the partners in the defendant firm, said that Ernest Boddington was the partner who had carried on the whole transaction out of which the action had arisen. The said Ernest Boddington was therefore a most material witness upon the claim in convention, and also with reference to the claim in reconvention, but the said Ernest Boddington was a member of the Duke of Edinburgh's Own Volunteer Rifles and had been called out for active service.

In an answering affidavit, J. H. Moss said that the claim in convention was for damages

for wrongful seizure, by which he had been deprived of his legitimate business. He maintained that he would be prejudiced by the postponement of the case, and besides, he submitted that Boddington could not be a very material witness in the matter in actual dispute. It was also contended that there had been delay on the part of the defendants.

Sir Henry Juta, Q.C., appeared for the applicants.

Mr. Benjamin for the respondent.

De Villiers, C.J., said the Court could only postpone the trial of the case on condition that the applicant paid any costs occasioned by the application.

Mr. Benjamin said that in that case he would leave the matter in the hands of the Court.

The Court made an order of postponement on condition that the costs occasioned by the postponement be paid by the applicant; costs of this application to be costs in the cause.

[Applicants' Attorney, O. Brady; Respondent's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

WETHERED V. WETHERED. { 1899.  
Nov. 27th.

This was an action for judicial separation brought by the wife against her husband on the ground of his continual ill-treatment of her. The defendant was in default, and had been duly barred. The declaration set forth that the defendant was a general dealer, residing at Claremont. The parties were married at Rotherhithe, Surrey, England, on June 7, 1879, and came to this colony in 1889. There were two children born of the marriage, the one a girl eighteen years of age, and the other a boy thirteen years of age. On October 23 last defendant cruelly assaulted plaintiff, striking her serious blows about the head and otherwise ill-treating her. Owing to this she had to leave the defendant. Since his marriage defendant had been repeatedly under the influence of liquor. Plaintiff asked for a decree of judicial separation, £5 per month for her aliment and maintenance, and £3 per month for the maintenance and education of the minor son until he attained the age of eighteen years.

Mr. McGregor appeared for the plaintiff; the defendant in default.

Mrs. Wethered, the plaintiff, gave evidence as to her marriage with defendant in 1879, and their coming out to South Africa

in 1889. Their marriage had not been a happy one, defendant having frequently ill-treated her when he was under the influence of liquor. He had struck her hard blows with his fists, and knocked her to the ground. He had also kicked her on one occasion, and the resulting bruise witness had shown to one of her neighbours. Witness also gave evidence as to the assault on October 23, as a consequence of which she had to leave the house. Defendant had struck witness on several occasions. It was twenty years ago since defendant struck her the first blow.

Emma Wethered, the daughter of the last witness, corroborated the evidence of her mother. She also gave evidence as to occasions on which her father had ill-treated her also.

The Court granted an order as prayed, with costs.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

HOOPER AND SON V. LEID. { 1899.  
Nov. 24th,  
Dec. 8th.

Architect—Quantity surveyor—Bills of quantities—Error in calculation.

*An architect who is also a quantity surveyor, and is paid by a builder for taking out quantities for the construction of a building, is liable for any loss caused to the builder owing to his negligence in taking out the quantities. But against any such loss he may set off any profit which has accrued to the builder through the miscalculations.*

*Where in the accounts drawn up by an architect and quantity surveyor, as between the builders and the building owner, the latter was made to pay for the errors in quantities made by the architect, Held, that the builder could not recover again from the architect.*

This was an action for damages in connection with a certain building contract.

The declaration was as follows:

1. The plaintiff is a builder, carrying on business in Cape Town; the defendant is an architect, practising as such in Cape Town.

2. In or about February, 1897, the defendant was employed by one George Lindsay to draw plans and specifications for the erection of certain two villa residences at Sea Point, and did so draw the said plans and specifications.

3. Thereafter, in consideration of the sum of £57 the defendant supplied the plaintiff with certain bills of quantities, which he represented were the correct quantities of work and material required for the erection and completion of the said buildings in accordance with the plans and specifications referred to in paragraph 2.

4. The plaintiff thereupon at the special instance and request of the defendant, and relying upon the bills of quantities supplied to him by the defendant, entered into a contract with the said Lindsay by which he undertook to erect the said buildings in accordance with the aforesaid plans and specifications for the sum of £2,400, and the said contract was duly performed by him.

5. The defendant so carelessly and negligently performed his work in and about the preparation of the said bills of quantities that the said bills of quantities were erroneous and not in accordance with the aforesaid specifications, and the plaintiff in the execution of his contract with Lindsay was compelled to do a larger amount of work and provide more material than the defendant by the said bills of quantities represented would be required of him. For further particulars of the discrepancies between the bills of quantities and the work and material so supplied by him, the plaintiff craves leave to refer to the schedule annexed to this declaration, and prays leave that it may be read as part hereof.

6. In consequence of the carelessness and negligence of the defendant and of the erroneous character of the said bills of quantities the plaintiff has suffered loss and damage in the sum of £148 9s. 6½d., for further particulars of which he craves leave to refer to the schedule aforesaid.

7. All things have been done, all times have elapsed, and all conditions have been performed to entitle the plaintiff to recover the said sum of £148 9s. 6½d. from the defendant, but the defendant refuses to pay the same or any part thereof.

Wherefore the plaintiff claims: (a) Payment of the sum of £148 9s. 6½d.; (b) alternative relief; (c) costs of suit.

For a plea to the declaration the defendant said as follows:

1. He admits the allegations in the first and second paragraphs.

2. As to the third paragraph, the defendant says that he was employed by the said Lindsay to prepare bills of quantities in connection with the said work, which bills were submitted to the plaintiff for the purposes of tender; he made no representations in connection with the said bills of quantities, and his charge of £56 for the same was paid by the said Lindsay; subject to the above, he denies the allegations in the said third paragraph.

3. He admits that the plaintiff contracted with the said Lindsay to erect the buildings in question in accordance with the plans and specifications for the sum of £2,400, but he denies the other allegations in the fourth paragraph.

4. The defendant was the architect duly appointed in connection with the construction of the said works under the said contract. In terms of the contract the proprietor, through the architect, had the right to make any additions to, or deductions from, the amount of work contained in the contract without in any way invalidating the same, and it was provided that the value thereof should be added to or deducted from the amount of the said contract, as the case might be.

5. During the progress of the said works certain extras were duly ordered and certain alterations were duly made. A dispute arose between the plaintiff and the defendant as to the value and quantity of the said extras and deductions, and as to the correct quantities of the entire work, and it was agreed between the plaintiff and the defendant, with the full knowledge and concurrence of the said Lindsay, that all the said disputes should be referred to one McCubbin and one Wood, who were quantity surveyors by profession, and who it was agreed should measure the entire work and should settle all disputes as to extras, alterations, and original quantities.

6. The said McCubbin and the said Wood duly investigated the said disputes and measurements, and they prepared final awards, which were duly incorporated by the defendant, in his capacity as architect, in a final statement, showing a total of £2544 2s. 11d. due and payable to the plaintiff—a copy of said statement is hereunto annexed marked A. The said amount has been duly paid to the plaintiff by the said Lindsay,

and the plaintiff has been fully satisfied for all work done by him in connection with the said contract.

7. Subject to the above, the defendant denies all the allegations in the 5th, 6th, and 7th paragraphs of the declaration, save that he admits his refusal to satisfy the plaintiff's present demands.

8. He says specially that he was not guilty of carelessness or negligence in preparing the said bills of quantities, and that all disputes in connection therewith and all items referred to in the annexure to the declaration were duly investigated and dealt with by the persons referred to in paragraph 5 hereof.

Wherefore he prays that the plaintiff's claim may be dismissed with costs. The plaintiff joined issue.

Mr. Graham, Q.C., and Mr. Howel Jones appeared for the plaintiff.

Mr. Innes, Q.C., and Mr. Close for the defendant.

Alfred John Hooper, a builder, carrying on business in Cape Town under the style of J. Hooper & Son, stated that he was the plaintiff in the case, and tendered for the erection of houses for defendant. He came to tender for the erection of those houses through Mr. Reid's clerk saying there were two houses they wanted him to tender for. He saw defendant, and the latter said the two were for Mr. Lindsay. Witness asked if the quantities were taken out fully, and was informed that they were. Witness paid defendant £57 by cheque for those quantities. That was the usual charge, 2½ per cent. on the bills of quantities. Witness started to work, and in July, 1897, found that the quantities were erroneous. Witness then wrote on the matter, pointing out that the bricks were short, and also that as he had to pay 20s. per 1,000 more for bricks, and he would expect to be paid the difference. He stated that he would go on with the work on that understanding, unless advised to the contrary. He received a reply stating that the work would be measured up on completion, and paid for according to schedule rates, and that he could get bricks at 40s. per 1,000 from the Harbour Board. Witness's contract was based on the bills of quantity. Mr. Wood and Mr. McCubbin were appointed by witness and Mr. Reid respectively to decide as to whether there had been any mistake, and these two then drew up an agreement

accepting Mr. Vixseboxse as umpire between them. Witness was further examined, and cross-examined at length as to the account.

Thomas Edward Lawton, an attorney of the Court, gave evidence as to the settlement in the action instituted by Hooper against Lindsay. It was a pure compromise.

Richard Edward Wool, quantity surveyor and clerk of works, said he was formerly employed by the London County Council, and since coming to this country had acted as clerk of works in the Castle Company's offices and the Mount Nelson Hotel. In May, 1898, he and Mr. McCubbin were appointed respectively by the plaintiff and the defendant, to ascertain if there were any errors in the quantities supplied in connection with these villas. They went over the buildings and measured up everything and compared the quantities with the plans and specifications. Witness found there were deficiencies, and Mr. McCubbin agreed with him on most items. Witness measured what completed work he found, and Mr. McCubbin measured as from the plan. Some foundation wall work was thicker than the plan required. The bills of quantities ought to have corresponded with the plans and specifications.

Cross-examined: There should not be any approximation of quantities unless it were specified beforehand. In regard to the items about fixing of baths and water supply, he and McCubbin agreed, but not as to the value of the work. There was a variation from the plan at the back of the building, which caused a slight alteration in the piping, and more slate would be used. If the builder got credit for the extra slate, he should be debited with the lesser quantity of iron. That was not a thing for which the architect could be held responsible. If there had been much variation in construction, he would have seen it from the plan. The excavation of ground, set forth in the quantities at 231 yards, came to 240 yards when finished; the quantities did not state the amount as approximate. Supposing the builder did more work than the quantities set out, the architect ought not to be liable. The earth from the site was deposited on a neighbour's ground, and as the neighbour objected the contractor removed it, and that led to expense. There was no room on the ground itself to deposit the earth, and its removal ought to have been allowed for, but if the builder removed it witness would not say the

architect should be made to pay. The builder would not be likely to put in larger stones in the foundation wall than were required by the plan. In measuring up the plaster work, witness allowed a difference of 255 yards internally and 3½ yards on the external walls. It was the custom to take the whole wall area, as if windows and openings did not exist; if these were allowed for, a charge was inserted for labour, and it came to about the same thing. There had been another variation from the plan in regard to a window band on the gable, but that was a small item.

Mr. J. E. Vixseboxse, architect, Cape Town, said he was called in as umpire by the two arbitrators, who had agreed on the first items making up the amount £135 13s. 4d. Thus there was no necessity for him to go into them. He had to decide on the disputed item of fifteen guineas; he went into that and decided that the amount was fair. He had seen the bills of quantities, and he did not consider they were clear and explicit enough for a job of this sort. It was hardly possible for five or six sheets of paper to hold everything that went to a building like this. The quantities were supposed to give in detail the whole of the work to be done; such things as finger-plates on doors, for example, he would always specify separately, with the price attached. The work at the house was well done.

Cross-examined: Witness was to settle disputes and questions of prices as well as differences of measurement. By saying these quantities were bad, he meant they were not fully descriptive. He supposed everything in them had been picked out and put into the schedule attached that could be possibly got, down to a few shillings. Excluding the brickwork admittedly in error, he could not put his finger on another item which arose from bad measurements. He did not agree that in every bill of quantities there must be a great deal of approximation. He never approximated.

Mr. J. A. Reid, attorney, Cape Town, said he was acting for the plaintiff in his action against Mr. Lindsay, which was subsequently compromised for £180 and taxed costs. Plaintiff sued for £236. The sum did not include any mistakes owing to errors in quantities. There was an account annexed to the declaration, but the case was not settled on the basis of that account. The account referred to contained this item: Balance of surveyors' account of sundry

extras, omissions, alterations, &c., £122 10s. 1d.—£98 14s. 2d., equal to £23 14s. 11d. The settlement was made after the surveyors had been appointed to settle disputes.

Mr. George Lindsay said he entered into a contract with Mr. Hooper for the erection of the houses, and appointed Mr. Reid as his architect, instructing him to obtain tenders. Witness did not know there were bills of quantities, but had heard they contained errors. Afterwards Mr. Hooper sent in a demand for part of the contract price, and as he did not care to be mixed up in a lawsuit, he agreed to pay £180 and taxed costs as a compromise. That settlement was arrived at on an account submitted by defendant, but there was no certificate. He looked upon the matter as urgent, and settled the claim without consulting the defendant, although the latter was his architect.

This was the plaintiff's case.

Mr. Walter Reid, the defendant, said he was in partnership with his brother, but in this case was acting separately. In February, 1897, Mr. Lindsay engaged him to get out plans and specifications for these buildings. He prepared the bills of quantities, on which tenders were invited, and Hooper secured the contract. He admitted that Hooper had paid for the quantities being taken out. The work began in April, and was to have been finished in August. In July Hooper complained that the brickwork was short, and on going over the items witness found that there had been an error, and acknowledged it. The houses were semi-detached, and he had taken out the item of brickwork for one house, doubled it, and overlooked the party wall. For that error he allowed £12 1s. 6d. Hooper did not finish the buildings; he went on at intervals for nine months after the expiration of his contract, and then the work was taken out of his hands, and finished by Messrs. Drake & Avery, with the approval of Mr. Lindsay. Then disputes arose, and witness agreed to have all questions of measurement and prices adjudicated on by Messrs. Wood and McCubbin, with Mr. Vixseboxse as umpire. He did not look upon himself as responsible in the least to Hooper; he had been paid everything due under the settlement with Mr. Lindsay, and if anything were owing to the latter, witness was quite prepared to deal with him. The arbitrators drew out an account showing a sum of £122, but Mr. McCubbin could not agree to £23 odd of that sum as being

due, and witness accepted £98 14s. 2d. as being the correct sum due for deductions and omissions. That represented work appearing in the bills of quantities, but not done by Hooper. The latter had charged for work not done, and had not credited witness in any way. He would not admit that there ought to be any deductions until he came into court, and then said they ought to be credited to Mr. Lindsay.

Mr. D. A. McCubbin, architect and quantity surveyor, said he had measured up the work done at these houses for the owner, Mr. Lindsay, at the request of Mr. Reid, and submitted a report showing on what items Hooper should be debited and Lindsay credited. Mr. Wood agreed with witness as to the measurements, but said he was instructed not to admit any deductions. They had, according to the agreement, to call in Mr. Vixseboxse as umpire, but witness never heard that Mr. Vixseboxse had made a report until the hearing of this case.

Mr. A. H. Reid, brother of the defendant, said the latter was in Johannesburg for a portion of the time the work was going on. Witness had seen the bills of quantities, and considered them made out in a perfectly correct way, but he had not checked the items as against the actual work done. Witness took the work out of Hooper's hands because he was causing trouble, and in the interests of Mr. Lindsay and defendant witness, after long delay, stopped his connection with the building, and handed it over to Drake & Avery.

Mr. E. J. Sherwood, quantity surveyor, said he had had a long experience in that work. He had gone into several of the chief items in the account now in dispute, and leaving out the admitted error of £42 in the brickwork, those items were correct, as per the schedule prices.

Mr. Vixseboxse (recalled) produced a report he made on the £98 account, which was submitted to him by Messrs. McCubbin and Wood in August, 1898. That report was sent in to Hooper's attorney on the 6th of August.

Cross-examined by Mr. Innes: He maintained that the two surveyors submitted the list of deductions to him, although McCubbin swore it was not so. Witness had not gone into the differences in measurement or valuation, because there was no necessity for such a course. He could not explain why Mr. Silberbauer wrote on October 12, asking for certain details, which were in

witness's report sent in in August. On reconsideration, he believed that report was sent in on December 20, 1898, but McCubbin was at his house with the account in August.

Mr. Graham: It is clear that the defendant was paid by the plaintiff for taking out the quantities and therefore the plaintiff was entitled to have accurate quantities. The building owner is not liable for errors in quantities unless he has employed the architect. *Bolt v. Thomas* cited in *Hudson on Building Contracts*, (vol. 2, p. 6). It is a simple matter to take out quantities. There is ample proof of negligence. McCubbin was appointed by the defendant and Wood was appointed by the plaintiff to examine into the errors and they appointed Vixseboxse to decide when they differed. They agreed upon the amount of £125 13s. 1½d. and he decided upon the £15 15s. Hooper had sued Lindsay for £236 and Lindsay said that only £120 was due. The compromise at which they arrived shows that it was only a compromise and that the loss through errors in quantities was not included.

Mr. Innes: If the plaintiff really employed the defendant, I admit that the latter is liable but I submit that Lindsay really employed him. *McCassie and Strahan's Law of Civil Engineers* (p. 102); *Priestley v. Stone* (*Hudson on Building Contracts*, vol. 2, p. 53). Where the architect is employed by the building owner the builder should check the quantities himself. Reid was paid directly by the plaintiff, but eventually by Lindsay inasmuch as the contract provided that 2½ per cent. should be added to the contract price for the quantities. An architect cannot be held responsible for small errors; he only calculates the quantities approximately. £12 18s. 6d. is the only item due to error. He cannot be assumed to know how much wheeling will be required. All matters of price or value were not left to McCubbin and Wood, but were reserved entirely for the decision of the defendant as architect. They were employed merely to look into the question of quantities. Vixseboxse therefore had no *locus standi*. The account as framed by McCubbin is almost exactly the same as the account which the plaintiff attached to his declaration against Lindsay and sued him upon. He settled with Lindsay therefore upon the basis of the architect's final account. He cannot be considered to have settled upon any other basis, since the architect is the

sole arbiter to decide how much is due. Having been paid by Lindsay he cannot recover from the defendant now.

Mr. Graham: It was believed originally that Lindsay had agreed to be responsible for the errors in quantities, and it was only upon suing him that it was discovered that he had not taken the responsibility; plaintiff had then to split his claim between the owner and the architect. The £98 due to Lindsay cannot be deducted from the £125 which is due by Reid to Hooper. The plaintiff understood the £98 to be for extras. The account attached to the plaintiff's declaration against Lindsay was not understood by plaintiff himself, it did not form the basis of the compromise. *Priestly v. Stone* was decided upon the ground that there was no priority between the parties.

De Villiers, C.J., said: The defendant is by profession an architect and a quantity surveyor, and is sued for damages for negligence in the performance of his duties as a quantity surveyor. In order to succeed in this action the plaintiff must clearly prove there was negligence on the part of the defendant, and he must with equal clearness establish the fact that he sustained damage. As far as negligence is concerned, I am inclined to think there was negligence on the part of the defendant in the performance of his duties, and that he owes some compensation. After all, the test as to who the person was who employed the defendant for the purpose of taking out the quantities is—who paid? And it is admitted the cheque was given by the plaintiff to the defendant in respect of his work in taking out the quantities. It was at the request of the plaintiff that the defendant performed the work, and if the plaintiff had clearly established that he had sustained damage through the negligence of the defendant, I am of opinion that the plaintiff ought to succeed in his action. The point upon which I have had great difficulty is as to whether the plaintiff has proved that he has sustained any damage. The onus of proving the damage lies on the plaintiff; where there is any doubt in the matter of course the defendant would have the benefit of such doubt. An account has been put in by the plaintiff himself according to which the errors made by the defendant would cause damage to the extent of £125 13s. 1½d., and in addition further sums of £15 15s. and 15s. 9d. With regard to the two latter items

I am clearly satisfied they should not come into the computation. As to the £125 13s. 1½d. there were two quantity surveyors employed, and this item is the amount fixed by one of them. The other makes the item £122 10s. 1d. We take that of Mr. McCubbin, which would amount to £122 10s. 1d., and the difference between that and £125 13s. 1½d. is really of no importance. We take it therefore that the sum of £122 10s. 1d. does really represent the damages, which, but for the counter-claim, the plaintiff would have sustained. Mr. Innes contends that the damages sustained only amount to £42, and I think it is clearly proved in the present case that that is the only amount which has been proved to be the error in calculation on the part of the defendant. If there were nothing else, that is the sum for which I would have been prepared to give judgment for the plaintiff against the defendant. But then comes the question as to whether the claim in the nature of a counterclaim, of £98 14s. 2d., ought to be allowed. It is quite obvious that if the defendant is to be held liable for any errors which he has made in the calculation, any profit which the plaintiff may have made by that miscalculation ought to be brought into the account, and only the balance ought to be sued for. Therefore the really important question in the case is whether this item of £98 14s. 2d. ought to be allowed in deduction from the £122 10s. 1d. I am quite satisfied that this point was not left to the final arbitration of Mr. Vixseboxse. His evidence therefore can only be taken as that of an expert giving general evidence. But against his evidence we have the evidence of Mr. Reid himself and Mr. McCubbin, and both of them are quite satisfied that this item of £98 14s. 2d. ought to have been allowed, as it was in respect of items for which the work actually done was less than appeared on the quantities. Therefore in my opinion, if the defendant is to be held liable for the £122 10s. 1d., he ought also to be entitled to deduct from that the sum of £98 14s. 2d. At the same time, I am bound to say that the manner in which the defendant made out his accounts does not meet with the approval of the Court. There has been negligence on his part, and in making up his accounts he threw the whole onus of the negligence on Mr. Lindsay, and he made Mr. Lindsay pay for his negligence. I do not think



that was quite fair to Mr. Lindsay, but we have not Mr. Lindsay before the Court now, and the question is, has the plaintiff received from Lindsay everything that he is entitled to? If he has, he has no claim as against the defendant, whatever claim Lindsay may have against the defendant. I have already said that considering the part Vixseboxee and Reid and McCubbin took, I am inclined to accept the evidence given by Reid and McCubbin. Then we have another circumstance that cannot be lost sight of, and that is the manner in which plaintiff's account was made up when he himself claimed the debt due to him by Lindsay. In that account he virtually incorporated the account which had been made up by the architect. The last item is "balance of surveyors' account, sundry extras, omissions, alterations, &c., £122 10s. 1d., minus £98 14s. 2d., balance, £23 14s. 11d." It is said he thought at the time that referred to extras. He may have thought so, and he may have considered that the difference between the quantities and what was actually done ought to be treated as extras, but it is clear he must have had in his mind—or whoever drew up this account must have had in his mind—the two accounts which had already been made up, £122 10s. 1d. and £98 14s. 2d. The person who drew up this account must have known what they referred to—that the one referred to the claim for damages for negligence, and that the other referred to such counter-claim as would be entitled to be set off as against that claim for damages. It is said these things never came to the knowledge of the plaintiff himself, but they must have come to the knowledge of his attorneys. Although to my mind this ought not to be conclusive as against the plaintiff, yet, taking the fact that he adopts the balance of £23 14s. 11d. and claims for that balance, in connection with the evidence given by Reid and McCubbin, it satisfies me that it would not be possible for the Court to hold there is anything further due. As I said, the burden of proof of damages being sustained lies on the plaintiff, and as he has not satisfied me that he has sustained any damage, after having been paid the full amount by Lindsay, I think there should be absolution from the instance.

Buchanan, J., said there was no doubt that defendant would have been answerable for damages which plaintiff might suffer through his negligence; but the

question was—had not the plaintiff been compensated for those damages in his settlement with Lindsay? Really, the plaintiff had been paid by Lindsay, though not in a regular way, for the damages he had suffered through the negligence of the defendant. He could not say that the latter had acted rightly in putting the whole thing on Lindsay's shoulders. He concurred with the Chief Justice.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. J. and H. Reid & Nephew; Defendant's Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.G., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

WHITE BROTHERS V. JACOBS, { 1899.  
Nov. 28th

Mr. Currey, for the defendant, applied for a postponement of this case, which had been set down for December 6.

Mr. Benjamin, for the respondents, said he was instructed that his clients were prepared to consent to a postponement on the same terms as the Court had granted in a case before it on Monday, viz.: That the costs occasioned by the postponement be paid by the applicant, and that the costs of the application be costs in the cause.

The case was postponed on these conditions.

WEBSTER'S EXECUTORS V. SOLOMON.

Mr. Searle, Q.C., for the defendant applied, on notice given to the other side, for leave to examine a certain witness on commission. The affidavit of Mr. D. Tennant set forth that the witness Joseph Smith, who was leaving by mail steamer for England that day, was the contractor and builder who actually did certain work in dispute and was a very material witness in this case.

The application was granted, and Mr. Howel Jones appointed commissioner.

VAN ZYL V. BURGER. { 1899.  
Nov. 28th.

Boundary—Agreement - Construction.

*The plaintiff ceded to the defendant a piece of his farm which was described in the following terms, viz., "a portion of the place F., from in the neighbourhood of beacon G., at Bulfontein, all ground which is situated under the mountain on the side that is to say from the beacon G., near Bulfontein to and in the northern line of the place between the beacons E. and D."*

*Held, that it was intended that the line of demarcation should be a line from G., to a point somewhere about the centre of the line E.D.*

This was an action for damages instituted by Dirk Jacobus Albertus van Zyl, M.L.A., farmer, of Frederiksdal Extension, against Petrus Josias Burger, farmer, of Duikerfontein Extension, Clanwilliam district. The declaration alleged that in accordance with a written agreement between the parties, made in April, 1895, the defendant became possessed of and was entitled to the free use of a certain piece of the plaintiff's farm, and the plaintiff obtained a similar concession in regard to a portion of the defendant's farm, Duikerfontein. The defendant, however, from time to time, and especially between January and April, 1898, trespassed on plaintiff's farm Frederiksdal beyond the portion lawfully possessed by him as per the agreement, cut down certain of the olive trees belonging to plaintiff and took away about 2,000 poles fashioned from the trees. These were reckoned to be of the value of £40 6s. 6d., and the plaintiff further claimed that he had, by reason of the defendant's trespass, suffered damage in the amount of £100. The land given by the plaintiff was enclosed with barbed wire, and each portion exchanged was to be for grazing purposes only. No death or sale on either side was to affect the agreement.

The material portion of the translation of the agreement attached to the declaration was as follows: "Mr. D. J. A. van Zyl consequently cedes to Mr. Petrus S. Burger that part of Frederiksdal Extension from or near beacon G at Bulfontein, all the land

situate below the mountain on the side of Knobvallei or Frederiksdal, from the beacon G, near Bulfontein, to the north of the farm between beacons E and D."

The plea admitted the agreement, but denied that the translation put in by the plaintiff was a correct one, and referred the Court to the original agreement, of which a copy was annexed. Defendant admitted cutting down trees, but alleged that they were only cut at places where he was lawfully entitled to do so. He denied the alleged trespass, and refused to pay the damages claimed.

The material portion of the agreement annexed by the defendant was as follows:

"Den heer D. J. A. van Zyl doet daarvoor afstand aan den heer Petrus S. Burger de gedeelte van de plaats Frederiksial Extension van en de nabijheid van baken G te Bulfontein al de grond die onder de berg gelegen is aan de kant van Knobvliet of Frederiksdal het is van den baken G nabij Bulfontein tot naar de noorde lijn van de plaats tusschen de bakens E en D."

Mr. Searle, Q.C. (with whom was Mr. Gardiner) appeared for the plaintiff.

Sir Henry Juta, Q.C. (with whom was Mr. Close), for the defendants.

Godfried Andries Watermeyer, a Government land surveyor, practising in Clanwilliam district, said he had put in the topography in a plan of the farm Frederiksdal Extension. He went to the beacons, which were pointed out to him by plaintiff and a Mr. Van Wyk. (Title deed and diagram put in.) He located the different spots he had marked from beacons G, A, B, C, and D. These spots indicated places where trees had been cut. In witness's opinion these spots were on the mountain. Witness found a fence running from the point G to the nearest krantz in the mountain. Ten days ago he saw some poles of olive wood lying about 100 yards to the west of this fence. Plaintiff and Van Wyk pointed out to witness the poles that had been cut. Witness saw dry branches which pointed to poles having been cut in these krantzes. Witness had also marked a fence at a point higher up the mountain. About 650 morgen of Frederiksdal Extension was under the mountain.

Cross-examined: What witness had put down roughly on the plan this morning as the base of the mountain was simply done from memory. Frederiksdal Extension was all on a slope, so that if the slopes were

taken to be on the mountain there would be no ground left on Jacobusdal under the mountain. The wood witness saw was all cut from steep slopes, but not on the top of the mountain.

By the Court: In witness's opinion cattle could not graze on the slopes where the wood was cut.

Dirk Jacobus Albertus van Zyl, M.L.A., the plaintiff, said that the agreement with the defendant was entered into in 1895. Witness was fencing in at the time, and wished to get a straight fence, and the arrangement was also suitable for defendant. The cattle could only go up the mountain by certain poorts marked on the plan. Defendant was well acquainted with the farm Frederiksdal, having lived there all his life. The fence was put up after the poles were cut, but witness told defendant that he was to fence along that line. Van Ryn, who cut the wood, went with witness and pointed out where he had cut the wood. Cattle could not graze on those spots. Even goats could not get there. Witness found poles lying about fifty yards to the west of the fence. Witness's charge for the poles was very reasonable. Beyond the value of the poles, witness had sustained damage through the trees being cut down. Witness had not brought the action before because it happened just before the 1898 session of Parliament, and as he knew an Arbitration Act would be introduced he was waiting for that. Afterwards he offered arbitration, but defendant would not accept it.

Cross-examined: The portion of land witness got in exchange he used for grazing ground. No trees on that ground had been stripped of their bark to witness's knowledge. He heard something about stripping of bark, and was told it was done before the exchange. Neither bark nor firewood had, to witness's knowledge, been taken from that land and sold. Although goats could not get to the spots where the wood was cut, people could climb there.

Re-examined: Witness had offered arbitration in April of this year.

Willem Jacobus van Wyk, a farmer, living on Knolvallei, also known as Frederiksdal, deposed that he knew the farms Frederiksdal Extension, &c. He had, along with others, gone to Kraaibosch, and found 49 poles there. Piet van Ryn, the man who cut the poles, pointed out the spot where the poles had been cut. Cattle could not graze at these spots. The same day witness met

defendant's sons going towards Kraaibosch, carting the poles. He gave one of the sons a letter from plaintiff's attorney, and the son opened it. Witness then went to Oudemuur, and saw 450 olivewood poles planted there as well as eighty lying at the end of the line. From there they went to Bulfontein, but defendant's son would not allow them to count the poles there. Witness considered that the poles were worth about one shilling each, and the trees had been damaged by the cutting of the poles. There was no wood from which poles could be cut below the mountain.

Cross-examined: There were places at Kraaibosch where cattle could graze by going round the spots where the trees were cut. Frederiksdal Extension was nearly all mountain. There were no olive-trees on defendant's farm.

Daniel van Ryn, a farmer, living at Duikerfontein, said he was present the day the exchanges were made of the two pieces of ground. Where the wood was cut was in the krantzee, and cattle could not graze there.

Petrus van Ryn, a son of the last witness, deposed that acting under instructions from defendant's son, he cut the poles at the spots marked on the plan. Witness had altogether cut over 1,800 poles, and some of them were used for making a fence at Oudemuur.

Cross-examined: Witness cut the poles on what he thought was the exchanged ground, according to what his father had told him. Defendant's cattle and stock always grazed up to the fence which witness had helped his father to make. The stock also passed through the fence. Witness had to cut up to the krantzee, but not on the upper krantzee.

Re-examined: Where witness cut the poles it was very steep, but cattle could graze at places there.

Theunis van Ryn, a brother of the last witness, deposed that he assisted his brother last year in gathering certain poles he had cut, and carrying them to Bulfontein.

Correspondence was put in, and the case for the plaintiff closed.

For the defence,

Petrus Josias Burger, the defendant, said the exchange of ground between witness and plaintiff was effected because the latter's horses grazed on witness's ground, and he could not keep them away. The mountain was a precipitous one. Plaintiff put up some fencing. In witness's presence he told Van Ryn to put up that fencing. Witness always

used the ground up to the fence which plaintiff made, and nobody objected. Hestill used the ground up to the fence. When plaintiff's cattle strayed on to that piece of ground witness told his servants to take them away, otherwise he would put them in the pound and they were always taken away. There were trees on the portion of land witness gave to plaintiff in exchange. The bark had been stripped off about 1,000 trees for tanning purposes, and as a consequence the trees had died. Some were also sold for firewood. Witness had written objecting to that. The value of olive poles was from a penny-half-penny to threepence. Olivier applied to witness to lease part of the ground, the piece cut off at G.

Willem Burger, defendant's son, said that at some places where the wood was cut it was possible to go up with a wagon. He corroborated as to there being grazing for cattle there.

Petrus Josias Burger, another son of the defendant, corroborated as to the ground being used by defendant right up to the fence. When plaintiff's cattle came there they were removed. There was grazing for cattle where the wood was cut. Witness knew nothing about poles being cut in a deep krantz. Van Ryn pointed out a spot above the line G K where seventeen poles were cut. The value of the poles was from a penny-halfpenny to threepence.

Cross-examined: Their cattle used the ground even before the agreement. Witness did not know of any fence on the south-east side before that. The olive wood grew on the soil under the krantzes.

Louis Greville Louis Pocock, a law agent, residing in Clanwilliam, stated that according to his observation the plan put in by defendant was correct. The poles witness saw were valueless where they were lying. They were more like bushes than poles. Proper thick poles were worth only 8d. and 4d.

Dirk van Ryn said he knew the wood growing on Frederiksdal Extension. He knew that Piet van Ryn cut some poles there about that time. Witness required some poles to fulfil an agreement, and he went to Frederiksdal to see if he could get poles there. Witness was to receive sixpence each for the poles, but for that he had to deliver them three hours' drive away. Witness went to see if he could get any poles at Frederiksdal, but the wood there would not suit, being too thin.

Cross-examined: Witness did not see where the wood was cut. The poles witness had to deliver were to be from 4 inches to 4½ inches in thickness.

This was all the evidence led by counsel, but during the course of Sir Henry Juta's argument, the Court decided to hear the evidence of one Olivier, who had come down as a witness, but had not been called.

Petrus Johannes Olivier, examined by the Court, deposed that he never hired a piece of land from plaintiff. He asked plaintiff for a piece of ground, but was informed that the land was exchanged. Afterwards, a little more than a year ago, plaintiff gave witness a small strip of ground, which he said was outside the agreement, and witness then fenced the ground in. Witness paid no rent, but only £3 for the wire.

Cross-examined by Mr. Searle: Witness never hired the farm Vondeling from the plaintiff, but he received permission to graze his cattle there for a time. He did pay a small price, but he could not remember how much, it was so many years ago. He had the right to take his cattle over the road marked and let them graze at the places marked as they trekked. That was in 1895, he thought, but his cattle had passed over there since then.

By Sir Henry Juta: The main road along which witness took his sheep went through that road, and his sheep grazed as they went along it. That was all witness meant by the grazing. When witness endeavoured to get a lease of the very piece of land now in dispute, plaintiff told him he had given it to defendant in exchange for another piece. Witness then asked defendant to give him a strip of land, and offered to allow defendant's cattle to water at his vlei in return for it.

After argument,

De Villiers, C.J., said: A great deal of evidence has been led, but really the question is, what is the true construction of the contract, which reads as follows: "Mr. D. J. A. van Zyl cedes to Mr. P. J. Burger a portion of the place Frederiksdal Extension from in the neighbourhood of beacon G at Bulfontein all ground which is situated under the mountain on the side that is to say from the beacon G near Bulfontein to and in the direction of the northern line of the place between the beacons E and D." Well by the words "between the beacons E and D" I should understand not down to the point near D, but to somewhere about the centre between E and D. It is contended on behalf of the plaintiff that the trees cut at the place

called Kraaibosch were on land which really did not form a portion of the land exchanged with defendant. Well, unless it can be shown that this place is not under the mountain in terms of the agreement, I think that defendant would be entitled to cut down trees at that point. Now the plaintiff has not at all satisfied me that these trees are not under the mountain. It may be that there are some krantzes about, but the evidence is extremely contradictory, and seeing that a line drawn to E D would go so near D as to be almost imperceptible, I think it could not be intended that that should be excluded. Therefore on that point the plaintiff is not entitled to succeed. To come to the other part; upon this point everything depends upon the meaning of the words "in the neighbourhood," and in a subsequent portion of the contract the meaning of the words "from the beacon G near Bulfontein." It is contended for the defendant that the line was really intended to be drawn from the point H, and that therefore the defendant is entitled to everything to the eastward of that. In my opinion H cannot in any way be considered as being in the neighbourhood of G. If it had been a matter of 50 or 60 feet it might have been considered in the neighbourhood, but, to take the scale, it is close upon 4,000 feet, about three-quarters of a mile distant, and that could hardly be considered as being in the neighbourhood so as to give the true meaning of this contract. What really was intended was that there should be a line from G in the direction of E D, and that everything within that should be occupied by defendant, but that nothing to the westward of that line should be taken as belonging to defendant, and it was just within the area beyond the line that these trees mentioned in the second part have been cut. As to the number of trees cut there is some contradictory evidence, but I am inclined to think that there was about the same number cut there as at the other point, and in estimating the damage, the Court must not only consider the value of the poles, but also the circumstances of the case as to the cutting of the trees. Therefore I think that £20 would not be at all an excessive estimate of the damage done. With reference to the evidence of Olivier, no doubt it contradicts that of the plaintiff in his assertion about there being an actual lease, but Olivier's evidence does not seem to be perfectly clear, because he afterwards admitted that there was some sort of a lease, and remembered

that there was a small rent paid. Then after the agreement there was still permission given to Olivier to graze his cattle along this road, and plaintiff would hardly have given that if he believed he had already parted with that land. As to the occupation of the land by defendant, there might have been that, but the plaintiff would not therefore be bound to allow him to continue to occupy without permission. I think it is perfectly clear from the terms of the contract that it was not intended to include that portion, and judgment will therefore be for the plaintiff for £20 for damages, with costs.

Buchanan, J. concurred, pointing out that the matter of user of the portion of land in question urged by Sir Henry Juta on behalf of the defendant might have been useful if it had not been that one of defendant's sons admitted that defendant's cattle used to run on that portion of land before there was any agreement.

Maasdorp, J., also concurred.

Plaintiff's witness expenses, and a sum not exceeding £10 towards the surveyor's expenses in making the topographical diagram, were also allowed.

[Plaintiff's Attorney, P. M. Brink; Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ESTATE OF SIGIDI V. MJOKOLO. { 1899.  
Nov. 29th

This was an action instituted by the executors of the late Sigidi, a native chief.

The declaration alleged that Sigidi died leaving a valid will, under which the plaintiffs were the duly appointed testamentary executors. At the death of the said Sigidi there were sixty cattle, four horses, eighty sheep, and nine goats, valued at £804 10s., belonging to the estate. It was contended that the defendant Mjokolo wrongfully and unlawfully took possession of these animals, and retained them and their progeny, refusing to give them up. The value of the animals with their pro-

geny was £900. Defendant had derived the benefit from those animals since that date, and thereby the estate had suffered damage to the extent of £100. The plaintiffs therefore prayed for the delivery up of the said animals or payment of £900, and also £100 damages. The plea admitted the death of Sigidi, the validity of the will and the appointment of the executors under the will, but denied all the other allegations. It said that the only cattle now in defendant's possession were five cows, five heifers, a bull, and a calf, which were not the property of the said Sigidi. At the death of the said Sigidi there were also in defendant's possession seven cattle from Sigidi's house, but these had died of rinderpest.

Sir Henry Juta, Q.C. (with whom was Mr. Upington), appeared for the plaintiffs.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), appeared for the defendant.

Before proceeding with the case,

Mr. Searle made an application, on notice given to the other side on Tuesday, for the appointment of a commission to examine certain witnesses on behalf of the defendant. The affidavit of his attorney set out the names of five persons who, it was alleged were material witnesses in the case, but were unable owing to old age to travel to Cape Town. It was asked that a commission be appointed to take their evidence, as also that of Mr. Liefeldt, a Resident Magistrate of the Transkei, who was unable to come to Cape Town on account of his official duties. It was stated that it would be impossible now to put the defendant's case properly before the Court without the evidence of these witnesses.

Sir Henry Juta, on behalf of the respondents (the plaintiffs), opposed the application, and said the action was a claim for certain cattle from defendant, and the plea set up differed entirely from the case of *Sigidi's Executors v. Matumbu* (p. 524), where the question of native customs came in. The present plea was that the defendant had not got any of the cattle claimed, and the simple issue was whether or not at the death of Sigidi these were the cattle claimed, and whether defendant had got them. Two of the witnesses, for the taking of whose evidence a commission was asked, gave evidence as to native customs in the last case, and he did not see how their evidence could be material to this case. As this was a question of fact, it was highly desirable that the witnesses should be seen by the

Court. If it was intended to set up the defence of Kafir laws and customs, then it might be decided at once whether or not this evidence should be given.

Mr. Searle said the case with regard to the twelve cattle which defendant had now got was that these cattle had belonged to Sigidi's wives as separate property, and under native law and custom never came to Sigidi at all.

The Court decided to hear the witnesses now present, and then it might be found whether it was necessary that other evidence should be led.

The principal case was then proceeded with.

Dinizulu, one of the executors in the estate of his late father Sigidi, stated that the right-hand wife of his father was Mamanti, but she was barren, and he took another wife named Sosanti, who was appointed to the right-hand house. She had a son named Mjokolo, the defendant. Sigidi in his lifetime allocated certain cattle to the house. At the time of his death there were assigned to Mamanti's house thirty-nine cattle, two horses, and fifty sheep, and to Sosanti's house twenty-one cattle, two horses, thirty sheep, and five goats. An ox was worth £10, and a cow at present was worth the same; a calf, £8; a sheep or goat, 10s. each. Before witness's father died inoculation of the cattle for rinderpest took place, Mr. Ainslie, the scab inspector, performing the inoculation. The cattle assigned to Mamanti and Sosanti were inoculated, although defendant at first raised objections. Of Sosanti's cattle one died, and of Mamanti's cattle nine died. Witness counted the cattle at Sigidi's death. Defendant took all the cattle, and would not give them up when witness demanded that he should do so. Sigidi, before his death, demanded the cattle, and the case was brought before the Magistrate, but was never settled, owing to Sigidi's death. There had been progeny of the cattle, sheep, and goats since then. Defendant had sold some and killed others. There were now twenty-six cattle, three horses, ten sheep, and eighteen goats. Defendant let out the cattle for ploughing, which was very profitable, £2 per day being earned by a span of six oxen. Since the rinderpest the cost of hiring cattle for ploughing had doubled. Defendant had had the use of all the sheep and cows. At the trial of the case between Sigidi's executors and Matumbu, witness heard defendant asked by the Court how many cattle he had.

Sir Henry Juta : And what did he say ?

Mr. Searle objected to this question, as there was nothing in the records of the previous trial as to the question and answer, the point not having been material to that case.

After argument,

Buchanan, J., said it would be straining the point a little, but the statement could be taken as an admission, and Mr. Searle's objection would be noted.

Examination continued : In the previous trial witness heard defendant ask how many cattle he had, and he said sixty-seven.

Cross-examined : Witness had seen seventeen of the cattle sold by defendant last month and two heifers at the beginning of this month. Defendant also gave a cow to the interpreter at the Magistrate's Court at Idutywa. Witness had himself seen that cow. Witness also knew of the disposal of other cattle by defendant. Sifuba, a young brother of defendant, looked after the cattle at Sosanti's place. Witness had had his home at Sigidi's kraal since he returned from the Lovedale Institute, long before Sigidi's death. For two years witness had been teaching at Ende, near Idutywa. "Ubulunga" cattle were cattle given by the father to his daughter when she married. Two cattle were given, of which one was killed and the other kept as "ubulunga." There were "ubulunga" cattle at Sosanti's kraal, but those at Mamanti's kraal had died. The plaintiffs claimed the "ubulunga" cattle.

Re-examined : At Sigidi's death, witness counted sixty cattle. After that they had young, and witness counted sixty-seven cattle. "Ubulunga" cattle belonged to the husband, and the wife could not deal with them or give them away.

Zulani, a son of the late Chief Sigidi, corroborated the previous witness as to the number of cattle, he having counted them, being anxious to know how many there were. After Sigidi's death witness went to Johannesburg.

Skotiani, another son of Sigidi, who was the herd to Sigidi's cattle, deposed as to the number of cattle there were after his father's death. He also gave evidence as to the manner in which Mjokolo had disposed of a number of them.

Mtomdeni, a herd boy who used to help Skotiani, said he knew defendant and his cattle. There were some cattle now running which used to be there when Sigidi died. Witness knew of three which had been sold. He knew of a good number which were at Mr. Whitfield's place, Cogman's, &c.

John Tule said that "ubulunga" cattle belonged to the husband, and the wife had no right to alienate them.

Cross-examined : Witness knew Kafir custom and law. Three cattle were given—one was for killing, one for the milk, and one as medicine ; that was for the tail, which was worn round the neck.

Sir Henry Juta said that, subject to the decision of the Court, that was all the evidence he intended calling, but of course if the question of Kafir custom was raised he might find it necessary to call further evidence.

Mr. Searle said he could not object, because he did not think that unreasonable. The defendant said that the only cattle he had got now were "ubulunga" cattle.

Mjokolo, the defendant, stated that he was the son of Sosanti, but was assigned to Mamanti's house twelve years ago during the last native war there, and had been there in charge of the cattle in Mamanti and Sosanti's kraal ever since. Witness had now seven cattle which belonged to Mamanti in his possession, and five belonging to Sosanti. He was told the cattle belonged to Mamanti and Sosanti, being the progeny of the "ubulunga" cattle. Witness's father, Sigidi, and the Councillors placed him in the house of Mamanti. At Sigidi's death there were seven cattle in addition to the "ubulunga" cattle, but these cattle had died of rinderpest. Just before Sigidi's death these cattle were inoculated and died within a month. Some of the "ubulunga" cattle also died. Sigidi had claimed the "ubulunga" cattle as his before he died. That was before the rinderpest, and he brought an action in the Magistrate's Court against witness, but this action was postponed owing to witness breaking his shoulder. Witness had sold no cattle to Hawk, Whitfield, Cogman, Makala, or Mawa. Witness had sold no cattle from Mamanti or Sosanti's kraal either before or since Sigidi's death, nor had he killed any of these cattle. Witness had not sold or killed a number of sheep from Mamanti or Sosanti's kraal since Sigidi's death. There was a horse there which belonged to witness. He used to have cattle of his own, but there were only three, the others having died of rinderpest. One of these cattle, with its calf, came with his wife from her place, and one was the progeny of a cow he bought with money he had earned. Witness did not claim these "ubulunga" cattle ; they belonged to his wife, as she was still

alive. He had neither killed nor sold goats belonging to Sigidi's estate. He had made no money by letting the cattle belonging to the estate out for ploughing.

Cross-examined: Witness did not say at the previous trial that he had sixty-seven cattle in his possession. He had never been disinherited by his father's will, because he had never at any time claimed the chieftainship. He had never at any time sold cattle to Hawk. He had never sold an ox to Whitfield directly. He had never at any time sold cattle to Whitfield or Cogman. He had never at any time sold or given cattle to Makala or to Mawa. Witness had only three cattle of his own. He denied that he had ever during the hearing of the previous case said he had sixty-seven head of cattle.

Re-examined: Witness had never seen any of the cattle in the possession of the parties named. If they got any it was not through him. With regard to the case before the Magistrate, the latter had told Sigidi that the cattle were not to be taken away from the kraal. The Magistrate admonished Sigidi, telling him he was making his children quarrel with each other, and told him he could not take oxen belonging to one house and transfer them to another house. Witness was present at the time the Magistrate said that.

Fundakubi said he was a brother of the defendant, his mother being Sosanti. He corroborated as to his brother being placed in charge of cattle of Mamanti and Sosanti. Defendant had fifteen cattle in his kraal. Seven belonged to Mamanti through "ubulunga" custom, and five belonged to Sosanti through the same custom. The cattle which had been assigned to the right-hand house had all died of the rinderpest not long after Sigidi's death. Mjokolo had some goats. He was a volunteer during the last war, and he bought the goats with the money he had received. Witness was in court in the last case, and heard Mjokolo give his evidence. Witness never heard him say that he had sixty-seven cattle in his possession at the death of Sigidi. According to native law, "ubulunga" cattle belonged to the woman.

Cross-examined: He did not hear Mjokolo say in the previous case that he had sixty-seven cattle, but he was sitting far back and could not hear.

Fonduza, a son of Sigidi's brother, gave evidence corroborating that of defendant and Fundakubi. Witness had herded the "ubulunga" cattle when he was a boy.

Cross-examined: When he herded the cattle there were a good many. He could not say how many cattle there were at Sigidi's death, because three months before that he went to Johannesburg. At that time there were thirty-five cattle belonging to Mamanti and Sosanti. Witness returned from Johannesburg within a week of Sigidi's death. He saw a good many of the cattle die of rinderpest.

Mr. Searle said that was all the oral evidence he had to call, and there only remained the evidence he wished to be taken on commission, including Mr. Nieuwveld's, as to the Kafir custom with regard to "ubulunga" cattle. If they had had the evidence of Mr. Stanford on the last point, they would not require Mr. Liefeldt's, but unfortunately, Mr. Stanford was in Queen's Town. Then there were two brothers of Sigidi and a councillor who was on the spot at the time who could give evidence.

Buchanan, J., said that in the opinion of the Court the application for a postponement of the case came too late, and that the defendants had had ample opportunity for bringing the evidence. As to the Kafir custom, the Court thought there was sufficient evidence before it. This was not a question so much of "ubulunga" cattle as of the cattle which belonged to the estate. Under the circumstances, considering the value of the estate, it was not desirable that further costs should be incurred, and the application would be refused.

Mr. Searle in argument upon the merits referred to *Maclean on Native Law and Custom* (pp. 92, 93) and the *Blue Book on Native Law and Custom* (p. 46).

Buchanan, J., said: In August, 1897, the man Sigidi died leaving a will. This Sigidi had been married according to native custom, and according to that custom he distributed amongst the houses of his different wives all his property. He died, however, after making his will, and by this will he disinherited two of the so-called houses, viz., that represented by Matumbu and that represented by the present defendant, Mjokolo, but when the plaintiffs in the present case took out letters of administration and applied to Matumbu for the stock which had been apportioned by Sigidi to his different wives, it was said by Matumbu, who was sued for the whole of the stock that the stock which had been apportioned was no longer Sigidi's, but according to native custom, passed from Sigidi to the



heirs of the houses. This question was fully investigated, evidence as to native custom was led, and it was held by the Court on the previous occasion that this stock passed under the will to the executors, and must be delivered to the executors to be administered by them. In that case, the records of which have been allowed, the defence set up against a portion of the claim was that all of the stock was not in the hands of the then defendant, but that some was in the hands of the present defendant, Mjokolo, who was himself called as a witness, and admitted that he had stock which had been assigned to his mother, Sosanti, and to-day an action is brought against Mjokolo for the recovery of this stock. Mjokolo, however, denies that he ever had any of the stock belonging to Sigidi in his possession, and says that the only cattle he had in his possession were five cattle belonging to the house of Sosanti and seven belonging to the house of Mamanti, and says these were not the property of Sigidi. Evidence has been called to-day to show that at the time of the assignment sixty head of cattle, eighty sheep, and nine goats were assigned to this kraal. After the assignment Sigidi attempted to recover possession of this stock, and before his death took out a summons for fifty head of cattle and sixty sheep. After Sigidi's death, no doubt, rinderpest broke out amongst the other cattle, and a certain number were lost. The defendant in this case has tried to show that all the cattle that were assigned by the father have died of rinderpest and that the only cattle surviving are the "ubulunga" cattle. So far as the evidence goes, I am inclined to hold that these "ubulunga" cattle would belong to the wife and not to the husband, but what we have to try is not whether these cattle are "ubulunga" cattle, but whether they are cattle which Sigidi had assigned to the kraals. It is difficult to form a correct estimate as to how many of these cattle are in the possession of the defendant, but there is certainly a considerable number. One witness, who gave evidence in the last case as well as in this, said there were twenty-three head of cattle, three horses, and thirty-nine sheep and goats in defendant's possession. The goats, sheep, and horses could certainly not be claimed as "ubulunga," and I have come to the conclusion that we will be acting very leniently with the defendant if we hold that he has

those twenty-three head of cattle, three horses, and thirty-nine sheep and goats. The Court will therefore order that the defendant deliver up these cattle, horses, sheep, and goats, which have nothing to do with "ubulunga," and do not belong to the house of Sosanti, or to pay as their value the sum of £200. Looking at the figures which we had in the previous case, this is as nearly as possible on the same scale, viz., £7 per head for the cattle, £8 per head for the horses, and 10s. per head for the sheep and goats, makes close upon £200. This judgment to carry costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendant's Attorney, Gus. Trollip.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

### ADMISSIONS.

*Ex parte* HEYDENRYCH. } 1899.  
} Nov. 30th.

Sir Henry Juta, Q.C., moved for the admission of Benjamin Godlieb Heydenrych as an advocate of the Supreme Court.

The order was granted, and the oaths administered.

*Ex parte* VAN COPPENHAGEN.

Gabriel Gideon L. van Coppenhagen was admitted as a sworn translator in the English and Dutch languages, and the oaths were administered.

*Ex parte* KOTZE.

Mr. Molteno moved that G. P. Kotze be admitted as an attorney and notary of the Supreme Court.

Mr. Searle, Q.C., appeared on behalf of the Incorporated Law Society.

The petition stated that petitioner had been duly admitted as an attorney and notary of the High Court of the South African

Republic. Annexed to the petition were papers setting forth that he had been practising at Vryheid, in the Transvaal, and was a matriculated student of the University of the Cape of Good Hope, having passed his examination in the month of June, 1894. His name had never been expunged from the roll of attorneys of the said Republic, nor had the petitioner ever been suspended.

Mr. Molteno said he had to point out that the third section of the Act 30 of 1892 had not been complied with, inasmuch as the petitioner had not obtained the required certificate from the Incorporated Law Society. He therefore only formally moved.

De Villiers, C.J.: But how can you succeed without that certificate?

Mr. Molteno said he did not see how he could, but the applicant was desirous of having his application put in.

Mr. Searle said that the petitioner had not passed the Law Examination.

No order was made.

#### PROVISIONAL ROLL.

THOMSON AND OTHERS V. } 1899.  
BENNETT. } Nov. 30th.

Practice—Service of notice.

*A decree of civil imprisonment had been granted against a debtor, but suspended upon condition of his paying certain instalments of his debt; upon renewal of the application owing to the cessation of payment of the instalments, there being no proof that the debtor had notice of the application, no order was made.*

Mr. Innes, Q.C., moved for a decree of civil imprisonment. In May, 1897, a judgment was obtained against defendant for £731 2s. 7d., with interest and costs of suit. In October of the same year an application was made for a decree of civil imprisonment. This was granted, but suspended upon condition of the payment of certain instalments. Defendant had since paid £162 3s. 6d. of the amount claimed, but had since failed to keep up the instalments, and consequently the present application was made. Counsel stated, however, that service of notice of the present application had only been made by letter, and there was no proof that the letter had been delivered. No order was made.

#### SCHWEITZER V. DE KOCK.

Mr. P. Jones moved for provisional judgment for £255 7s. 6d. on a promissory note, with interest and costs of suit.  
Granted.

#### ILLIQUID ROLL.

##### DUFFY V. SAUER AND ORSMOND.

Mr. Molteno moved for judgment in terms of the plaintiff's declaration. Defendant E. G. Orsmond was an attorney at Aliwal North, and it appeared that certain moneys were paid to him for the expenses of the witnesses in a certain case. He had recovered those expenses from the other side, and had not paid back to the plaintiff the money he had paid. The declaration prayed that defendant be ordered to render a full and true account, to debate such account, or, in default, to pay the sum of £58 10s.

The order was granted as prayed.

##### BEYERS V. BEYERS.

Mr. Molteno moved for judgment under Rule 329D for the sum of £58, for certain live-stock sold and delivered, with interest from August 26, 1899.

Granted.

##### PURCELL, YALLOP AND EVERETT V. BAUSE BROTHERS.

Mr. Close moved for judgment under Rule 329D for the sum of £254 11s. 11d., less £50 paid on account, for goods sold and delivered.

Granted.

##### PURCELL, YALLOP AND EVERETT V. HENRY C. POOL.

Mr. Close moved for judgment under Rule 329D for £93 7s., balance owing on account.  
Granted.

##### GUARDIAN ASSURANCE AND TRUST COMPANY V. JEREMIAH FOXCROFT.

Mr. Upington moved for judgment under Rule 329D for the sum of £10 10s., being for the water rates due under certain conditions of sale.

Granted.

##### W. AND G. SCOTT V. CORDES.

Mr. Bisset moved, under Rule 329D, for judgment for £64 18s. 3d., interest *a tempora morae*, and costs of suit.

Granted.

**STEER AND CO. V. LEFFLER AND ANOTHER.**

Mr. Close moved, under Rule 329D, for judgment on a promissory note for £24 14s. 7d., endorsed by defendant as guarantor, and dishonoured on presentation, and also for £4 7s. 2d., costs of presentation, &c.  
Granted.

**BARRY V. BARRY**

} 1899.  
} Nov. 30th.

This was an action for a decree of divorce instituted by William Barry, a member of the Cape Town Police Force, against his wife Sophia on the ground of her adultery.

Mr. Howel Jones appeared for the petitioner; the defendant was in default.

The evidence showed that the parties were married at the Dutch Reformed Church, Cape Town, in October, 1890. In October, 1897, the defendant suddenly left home, and they had not cohabited since. One Sunday she went for a drive with a man named Petersen. The petitioner, who was on duty, knew that she was going for a drive, but did not know with whom she was going. Subsequently his children told him something, whereupon he taxed his wife, who did not deny the statement, and offered no explanation. Petitioner said he could not put up with it and the defendant of her own accord left the house. A deed of separation was entered into, but in consequence of a circumstance coming to petitioner's knowledge in October last, he instituted the action. He had not cohabited with defendant since October, 1897.—A midwife gave evidence as to defendant having been delivered of a child in October last.

A decree of divorce was granted, petitioner to have custody of the three children (all girls) of the marriage.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret.]

**MELVILL AND OTHERS V. EXECUTORS OF DE VILLIERS AND OTHERS.**

} 1899.  
} Nov. 20th.

**Will—Testator's intention—Rectification of will—Undue influence.**

*A testator made a joint will in English with his second wife by which he left the bulk of his property to her children although there were several children by his first wife living. The will had been copied by an attorney's clerk*

*from a previous will in which the testator had made several alterations and after being so copied was in the testator's possession for some time before he asked his wife to join him in executing it. After the execution of the will it remained in the testator's possession and he made several codicils to it. After his death his wife informed the children of the testator's first wife that at the time of executing the last will she believed that such children were provided for equally with her own children and that the testator himself must have so understood it. In her evidence she did not support the latter statement.*

*Held that, in the absence of any fraud or undue influence on the part of the wife, her statements did not constitute sufficient proof that the will did not carry out the real intention of the testator, in the face of the above facts and of the further fact that the testator, who was a good man of business, understood English perfectly well.*

This was an action for a declaration setting aside a certain will or that the testator's residuary estate be distributed amongst the children of his first and second marriage jointly in accordance with his true intention and meaning.

The plaintiffs' declaration was as follows:

1. The plaintiffs are children of the late Daniel Gabriel de Villiers, of Beaufort West, and of the late Anna Susanna Meintjes, who was his first wife.

2. The defendants are (1) Elizabeth Maria de Villiers, widow of the late Daniel Gabriel de Villiers, and Charles Cornwallis Michell de Smidt, both of Beaufort West, and John Frederick Oliff, of Worcester, who are sued in their capacity as executors testamentary of the estate of the late Daniel Gabriel de Villiers; (2) the said Elizabeth Maria de Villiers individually; (3) Daniel Gabriel de Villiers, son of the late Daniel Gabriel de Villiers and of Elizabeth Maria de Villiers; (4) George William Steytler, secretary of the Colonial

Orphan Chamber and Trust Company of Cape Town, who is sued in his capacity as *curator ad litem* of the minor children of the said late Daniel Gabriel de Villiers and Elizabeth Maria de Villiers.

3. The said Daniel Gabriel de Villiers and his said widow, Elizabeth Maria de Villiers, on or about August 13, 1897, executed a joint will, and thereafter executed certain codicils thereto: a copy of the said will and codicils is hereunto annexed marked A, and the plaintiffs crave leave that the same may be considered as inserted herein.

4. By the said will and codicils the said Daniel Gabriel de Villiers disposed of his estate, and he purported in the said will to appoint the children of his second marriage, namely, the marriage with the said Elizabeth Maria de Villiers, who is the third defendant, and the minors represented by the fourth defendant—to be the sole and universal heirs of the rest and residue of his estate and effects.

5. The said clause dealing with the appointment of residuary heirs was erroneously worded, the appointment of the children of the first marriage as residuary heirs jointly with the children of the second marriage having been left out in error when the will was prepared for signature: the said will was not read over to the testator at the time when he signed it, nor was it read over to or by him at any time.

6. The said Daniel Gabriel de Villiers intended to appoint the children of his first marriage—namely, the plaintiffs and one Jane Treadwell Bain, married out of community of property to Charles A. O. Bain—as residuary heirs jointly with the children of the second marriage, and he signed the said will in error under the *bona fide* belief that it contained such appointment.

7. The said Daniel Gabriel de Villiers died on or about March 9, 1899, without having revoked the said will, and the first-named defendants have taken out letters of administration thereunder.

8. The plaintiffs are entitled to claim that it be declared that the joint will of the said late Daniel Gabriel de Villiers and his widow, the said Elizabeth Maria de Villiers, was signed in ignorance of the true contents thereof, and in error, and that it does not carry out the intention and meaning of the testator, and is null and void.

The plaintiffs claim (a) that the will of the late Daniel Gabriel de Villiers be declared null and void, as being signed in

error and in ignorance of the contents thereof, and that it be declared that the deceased died intestate. Or in the alternative (b) that the first-named defendants be ordered to distribute the residuary estate of the said testator amongst the children of the first and of the second marriage jointly, in accordance with the true intention and meaning of the testator. (c) Alternative relief. (d) Costs of suit to be paid out of the testator's estate.

The defendants in their plea admitted paragraphs 1, 2, 3 and 7. As to paragraph 4 they referred to the said will and codicil, and as to paragraphs 5, 6 and 8, they put the plaintiffs to proof thereof, and prayed that the claim might be dismissed with costs.

Mr. Searle, Q.C., and Mr. Gardiner for the plaintiffs.

Sir H. Juta, Q.C., and Mr. Graham, Q.C., for the defendant Mrs. D. G. de Villiers.

Mr. Innes, Q.C., and Mr. Upington for the remaining defendants.

For the Plaintiffs.

Mrs. Elizabeth Maria de Villiers, widow of the late D. G. de Villiers, and one of the defendants in the action, gave the following evidence:

My husband died on March 9, 1899, after an illness of two days. The will was in a safe at Beaufort West. It was opened and read on the 13th March. Some of the family were present. I spoke to Mr. Oliff and said I thought there was a mistake. I communicated with De Smidt and made the affidavit filed. I afterwards petitioned the Court. The mistake was in regard to the residuary heirs. I did not know at the time who had written the will. It was written in De Smidt's office. I once before wrote a will from a draft. I always thought there would be no difference between the children of the two marriages. It was a mutual will. I believed that the children of the first marriage were included. This will was actually signed in the house. Deceased prepared a will and in the morning he called me in his office. He gave me a will and said "Read this. I want it signed before we leave." We were going to Cape Town. We signed it later. De Smidt first drafted a will. I don't know if the executors were then named. I made my affidavit on the 14th March, while the facts were fresh in my mind. I made a copy of a will, I don't know if it was that will or a former will. It was after De Smidt made the draft that I made a copy. I don't remember what was in the draft. I don't

know what became of it. I don't know if the will signed was copied from my draft. My attention was not directed to the residue of the estate. We were not married in community. I made the draft long before the will was signed. It was seven years before that De Smidt made the first draft. We were leaving for the Transvaal and my husband wanted a will signed. The copy I made was signed as a will. I don't know what became of it. Under the will I copied I was appointed heir and executrix. That was signed. My actual copy was signed. I don't know when the second codicil was written. Meiring was not there the day I signed the will. I did not read it over when I signed. I am not quite sure if my husband signed in my presence. The will was not read out when signed. Only the witnesses were present when it was signed. The will was put away and only taken out to add the codicils. I never read it over again afterwards. I sent De Smidt a letter which plaintiff drafted. He came often to see me. David de Villiers read the affidavit over to me before I signed it. Having seen other documents I am not now of opinion I was right. I saw another will in July. De Smidt brought it to me. De Smidt has it. That was after I made the petition to the Court. I think I made a mistake in the affidavit by saying I thought my husband intended the children to share equally. I believe now I am wrong; that it referred to conversations after the former will. De Smidt was my husband's legal adviser. He came down with me when I made the application. He went with me to the attorney's office when the petition was drawn up.

Cross-examined by Mr. Innes: The only will I copied was the one made before my husband went to the Transvaal seven years ago. It is my firm belief I confused the two wills.

Cross-examined by Sir H. Juta: I was busy with my household duties when my husband called me into his office. I usually read his documents. I had every confidence in him. He was a very strict man of business, and very particular in never signing any documents without reading them. I read the will and left. Some time after the will was read in the house. The witnesses to the will I copied were different from this will. De Smidt read it to me and it came back to me. I knew there were two wills. Some of the children of the first marriage had shares advanced.

David had £4,000 advanced and that was cancelled. Another was indebted for more than £600. The children of the first marriage are grown up and all married except one. They all got advances. The children of the second marriage were young. He was fond of them.

Re-examined: He treated all his children alike and made no distinction between them.

The affidavit referred to by the witness was made in support of her application for the appointment of a *curator ad litem* to her minor children (see p. 365). In it she said that she must have made a mistake in copying the draft as regards the children of the first marriage, for if the draft had mentioned only the children of the second marriage she would have noticed it. That it was clearly understood by both herself and her husband that the children of both marriages were inserted in the institution of heirs. That after the signing of the will her husband repeatedly spoke about the provisions of the will, and referred with satisfaction to the fact that they had made no distinction between the children of the two marriages.

Charles C. M. de Smidt, an attorney-at-law, practising at Beaufort West, said he was one of the executors under the will, and previous to Mr. De Villiers's death he had acted as his attorney. The will in dispute was drawn up piece-meal. It was first written by Mrs. De Villiers herself, and there was also a previous will, which had been written by Mrs. De Villiers's brother-in-law. That will was made in 1887, and since then about half a dozen wills had been executed by Mr. De Villiers, who was always altering his will. Mrs. De Villiers made a draft of a will since the old will referred to. That draft was the one from which witness drew up the will. The will now in court was written by Dr. Wilson, who copied partly the draft of Mrs. De Villiers and partly from a scrap of paper containing certain alterations Mr. De Villiers wished to be made on the draft. Witness believed he had still got little scraps of paper which Mr. De Villiers used to give him containing alterations. The draft was made by Mrs. De Villiers and that was again altered as stated. Mr. De Villiers had given witness instructions with regard to the residue of the estate. The last will was taken from the will copied by Mrs. De Villiers. Witness had to the best of his ability acted up to the instructions of Mr. De Villiers.

Mr. Searle : What did the original will say as to the residuary estate ?

Sir H. Juta objected to the question being put.

Mr. Searle referred to *Jarman on Wills* (Vol. I., p. 388). There are many cases where evidence is admitted to show that a document admissible as a whole can be disputed as to some part of it *In the Goods of Donaine* (2 S. and T., p. 590); *In the Goods of Rae* (10 I.R., Eq., 266); *Taylor on Evidence*, section 1149.

The Court held that the question could not be put.

Witness, further examined, said he always understood that the children were to share equally as regarded the residuary estate.

James Wilson, called by the Court, said : I wrote two copies of the will, I copied it from a will. I recollect the witnesses' signature. I got it from De Smidt and gave it to him. I made the second copy because of an alteration made in the copy I first made. I can't remember if I made any mistake. As far as I know I made a correct copy. I made my first copy from the will and slips, and my second copy from my first copy. I believe the first copy had been submitted to Mr. De Villiers, and he found some fault with the provision for Mrs. De Villiers.

Cross-examined : I did not know De Villiers knew I had written it. My communications were entirely through De Smidt.

Mrs. De Villiers, recalled, said : I don't know which will Dr. Wilson copied and I don't remember which will I wrote. I copied from a draft of De Smidt's. I believe I copied it from that. I may have made a mistake in copying.

Mr. De Smidt, recalled, said that the testator De Villiers could not read English as well as Dutch, but could read it sufficiently well to understand it. Alterations were made in the will by witness from written drafts made by De Villiers. De Villiers had not the will before him at the time.

Mr. Searle : It is clear that Mrs. De Villiers must have made a mistake in her copy of the draft. She now says that she may have been thinking of an old will when she spoke of having made the mistake, but De Smidt's evidence appears to dispose of that. Either the will should be set aside or probate should be granted in the terms in which the testator originally intended the will to be.

Mr. Innes : If the will is to be corrected the Court will have to write into the will certain words which are not there. None

of the authorities show that that has ever been done. *Rhodes v. Rhodes* (7 App. Ca., 198) shows that if a clause has been inserted in a will which is severable from the rest the Court may take it out but the Court has never put in fresh words. If that be done the will will not be in accordance with the Wills Ordinance, which says that a will is a document signed by the testator in the presence of witnesses. Where the cutting out of words alters the sense of the words which remain the Court has expressed doubts whether it could cut them out. The only relief which the plaintiffs can ask for is that the will should be set aside altogether, but the Court will not do that inasmuch as it will be making the testator die intestate when he has made a valid will. Upon the facts proved I submit that there was no mistake : the fact that the testator was always making new wills shows that he was not a man who would be likely to make a mistake : it shows, on the contrary, how careful he was about his will.

Mr. Searle referred to *Foute v. Andrews* (7 L.R., Eng. and Ir. App. Ca., 448) : *Hackwood v. Damer* (3 Phil., 458).

De Villiers, C.J. : I confess that it is with great regret I have arrived at the conclusion that the will cannot be rectified or set aside, and that the judgment of the Court must be for the defendants. Beyond the fact that the children of the first wife had received their maternal portions, which were much less than the portions they would receive from the testator's estate if admitted as co-heirs with the children by the second wife, there seems no reason why the testator should have left the bulk of his property to the children by the second wife. She herself informed the children by the first wife shortly after the testator's death, that at the time of joining with him in the execution of the will, she believed that they were equally provided for with her own children, and that the testator must himself have so understood it. In the course of her evidence, however, she did not adhere to the latter statement, which was caused by a misapprehension on her part as to the contents of a previous joint will executed by herself and the testator. It appears that the will now in question had been copied by Dr. Wilson, at the request of the testator's attorney, from a previous will, in which the testator had made several interlineations and alterations. Dr. Wilson states that his copy was a true copy of the original draft handed to him. This copy was handed over

by the attorney to the testator in whose possession it remained until his death. At the time of executing it he called his wife into his office to join with him in making it and the witnesses duly attested it. Subsequently the testator made several codicils to the will. The will was in the English language, but the testator understood English very well and was in every respect a good man of business. Under such circumstances it would require very cogent evidence to justify the Court in finding that the will did not carry out the real intentions of the testator. It would be very dangerous to set aside the will on the ground that the wife, whose children benefited by it, made certain statements of her own belief after his death. Her belief that the testator intended to benefit the children of the former wife equally with her own is not conclusive in the face of the facts which I have already mentioned, and her evidence in court greatly weakens the effect of her statements. Her conduct before and after the testator's death was perfectly *bona fide*. She exercised no influence of any kind on the testator to induce him to benefit her children. After his death, when the will was read, she was surprised at its contents and at once communicated her surprise to Mr. De Smidt, who had been the testator's attorney. The Court has now to deal with the rights of her children, which cannot be affected by her misapprehension as to the contents of the will and as to the testator's intentions. The improbability that he would exclude the children of his first wife from the inheritance cannot weigh against the fact that he has done so, and that there is no legal evidence that he intended doing anything else. The judgment of the Court must be for the defendant, but under all the circumstances the costs, including costs between attorneys and clients, will be paid by the estate.

Buchanan, J. said: It is a dangerous thing to upset a will duly executed unless there is clear proof that there has been fraud, and in this case fraud is undoubtedly out of the question. The action has been brought to set aside this will because it is alleged that certain words were left out in the copying which it was intended should appear in the will. It might have been possible to prove that if we had got the original slips from which the will was drafted, but these have not been produced. There is a suggestion that the error had originated in the previous will from which the present will was drafted, but that would

be a very remote way of proving the error. If the documents from which Dr. Wilson had copied the will had been produced and showed that he had made an error, that might be something, but in this case, in the absence of any satisfactory proof at all, I do not see how it is possible to set aside or amend this will.

Maasdorp, J., also concurred, and said: The will before the Court is duly and properly signed according to law, and the testator who signed has been proved to have been a good business man, who could have read and understood it. He appears to have been very particular about the provisions of this will, and must have referred to it at times for the purpose of alterations. Under these circumstances it must be taken that the will contains his wishes, unless there is something calling for inquiry. The only things calling for inquiry are the representations made by the widow in this case, and it was under the impression that she had something to do with the drafting of this will, and that in doing so the contents were such as claimed by the plaintiffs, and that it certainly was the intention of the husband to provide for all the children, that she made those representations. The plaintiffs acted quite rightly under these circumstances in having an inquiry, but on coming before the Court all these grounds fall away, because now she says she must be mistaken, and must have been referring to another will.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE MATTER OF THE FRESH  
FISH AND FOOD SUPPLY  
COMPANY, LIMITED, IN } 1899.  
LIQUIDATION. } Nov. 30th.

Mr. Buchanan applied, on the petition of A. J. Chiappini, for an order authorising the Registrar to accept the resignation of Alfred Gerald Anderson, as co liquidator with petitioner in the above estate, and for the appointment of petitioner as sole liquidator. It was stated that A. G. Anderson was now in the Transvaal, and had conveyed his resignation by letter to the Registrar, but an order of Court was required.

Order granted as prayed.

ESTATE OF WATKINS V. KROMM.

This was an action for the payment of the sum of £500 in accordance with a certain written agreement.

Mr. Searle, Q.C. and Mr. P. Jones appeared for the plaintiff.

Mr. Innes for the defendant.

The matter was before the Court on the 24th November (see p. ) upon an argument on exception. Mr. Innes now said that he did not oppose judgment being granted, but only asked for a stay of execution until the decision of the action defendant was intending to bring as one of the executors in her late husband's estate against the plaintiff in the present action.

Judgment was given for the £50, but execution was stayed until March 15 on condition that security to the satisfaction of the Registrar of the Court be given for £600.

#### REHABILITATION.

Mr. Buchanan applied for the rehabilitation of the insolvent estate of Frederick Philip Hellig.

The application was refused, but leave was given to the insolvent to apply again in six months.

#### IN THE MATTER OF THE PETITION OF PATRICK WHELAN.

Mr. MacKenzie moved for a rule *nisi* granted under the Derelict Lands Act to be made absolute. Owing to a certain agreement having been entered into, only a portion of the prayer of the petition was now asked for.

Granted.

#### TRUSTEES OF VAN GASS V. VAN GASS AND OTHERS.

Mr. Searle, Q.C., applied for an amendment of an order of Court of the 25th November, 1897, by the substitution of the name of Pieter William Botha, instead of that of Theunis Botha, as the defendant to be exempted from costs of the suit then before the Court. It was alleged that the original name had been put in through a clerical error.

Ordered.

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

IN THE MATTER OF THE PETITION OF THE LATE DANIEL MATTHYS JOHANNES MATTHEE. } 1899.  
} Dec. 1st.

Act 19 of 1891—Deeds Office regulations.

*The rules of the Deeds Office framed under Act 19 of 1891 have the force of law.*

This was an application for an order authorising the Registrar of Deeds to pass transfer of certain property.

Mr. Buchanan appeared for the applicant, who stated in his petition that on August 1, 1896, his brother sold him a share in a certain piece of quitrent land in the division of Aberdeen for the sum of £200. The seller was now resident in the Transvaal, and had signed at Pietersburg, S.A.R., an authority to transfer to the petitioner, but the Registrar could not pass transfer on this authority, owing to its not having been authenticated by the signature of the Landdrost there, as required by Rule 48 of the Deeds Registration Rules. It was pointed out that if the authority had been given in the Colony the matter would have been a simple one, because the authentication by the two witnesses who had signed would have been sufficient. The Court was asked to suspend the rules referred to and give authority to the Registrar of Deeds to pass transfer.

Mr. Buchanan pointed out that at all events transfer could be arranged under Act 28 of 1861, which provided for cases where the transferor was absent from the Colony.

De Villiers, C.J.: The rules which have been framed under Act 19 of 1891 have been framed by the judges and approved by the Governor. These rules must be considered to have the force of law until they have been repealed in the same manner as that in which they have been made. I think it would be better to apply under the provisions of Act 28 of 1861.



UYS AND OTHERS V. EXECUTRIX { 1899.  
UYS. { Dec. 1st

This was an action for a declaration of rights under a certain codicil to a will, and for an amendment of the liquidation account of the estate.

The plaintiffs in the action were Pieter Gerhardus Uys, Joseph Lodewicus Uys, Nicolaas Johannes Uys, Johannes Lodewicus Joubert, married in community of property to Elizabeth Sophia Uys, Gerhardus J. Uys, Cornelis Janse Uys, H. son, married in community of property to Margaretha Susanna Uys, Matthys Johannes Uys, and Gert Johannes Wessel Coetzee, married in community of property to Susanna M. Uys, and the defendant was Sarah Catharina Uys (born Munnik), widow of the late Cornelis Janse Uys, and executrix testamentary of the estate of the said late Cornelis Janse Uys.

The plaintiffs' declaration set forth :

1. The first, second, third, fifth, and seventh plaintiffs are the sons of the late Cornelis Janse Uys (hereinafter called the testator) and of the late Susanna Barbara Magdalena Uys (hereinafter called the testatrix), and the fourth, sixth, and eighth plaintiffs are husbands married in community of property to daughters of the said testators. The defendant is the second and surviving spouse of the testator, and is his duly-appointed executrix. She is sued in that capacity, and also individually.

2. On or about the 18th October, 1858, the testators, who were married in community of property, made and executed a mutual will, in terms of which the survivor, together with the children of their marriage, were appointed heirs of the first dying, the survivor to pay out the portions of the said children upon their attaining majority respectively. The survivor was also appointed to be the executor or executrix of the first dying.

3. On or about the 15th April, 1887, the testators duly executed a codicil to their said will, in terms of which they directed that the survivor should enjoy the life usufruct of the entire joint estate, and that after his or her death such joint estate should be divided among the said children; and they specially bequeathed to the said children the farm Slang River in the district of Swellendam for the sum of £2,000, upon certain conditions not necessary to be here set forth. The plaintiffs annex hereto a copy of the said codicil marked A, which they pray may be considered as if inserted herein.

4. On or about the 22nd April, 1887, the testatrix died without having further altered or revoked the said will and the said codicil. There were nine children of the said marriage, all of whom are still alive, of whom one is still a minor.

5. Thereafter the testator adiated under the said will and codicil, and entered upon and continued till his death to enjoy the usufruct of the entire joint estate.

6. In and about the months of September and October, 1887, the testator, being the executor of the testatrix, framed and transmitted to the Master of this Honourable Court an inventory of the property in the joint estate, and also a liquidation and distribution account. Copies of the said inventory and the said account are hereunto annexed marked B and C.

7. In or about the month of October, 1888, the testator entered into a second marriage with the defendant, also in community of property, and on the 11th August, 1893, they executed a mutual will, in terms of which the testator appointed the defendant and the children of his marriage with her to be the sole heirs of all his property, including a half and a child's portion of the joint estate of himself and the testatrix. A copy of the said will is hereunto annexed marked D.

8. The testator died on or about the 4th August, 1898, and the defendant is his executrix testamentary; there are three minor children of the said second marriage, of whom the defendant is the guardian.

9. On or about the 28th February, 1899, the defendant framed and lodged with the Master of this Honourable Court an account in the joint estate of the testator and testatrix. A copy of the said account marked E is hereunto annexed.

10. The testator, after the death of the testatrix, mortgaged the said farm Slang River for the sum of £400, which was a debt of the joint estate. The plaintiffs say that at the death of the testatrix there were sufficient movable assets to have discharged all the debts of the joint estate, and they say that the testator acted wrongfully in passing the said mortgage.

11. The plaintiffs say that the inventory and account marked B and C are defective and illegal in the following, among other, respects: (a) All the movable property of the joint estate was not included therein—a number of sheep, cattle, and ostriches being omitted therefrom; (b) a sum of money of £300 or thereabouts,

which was owed by Mrs. Beukes to the said joint estate has not been brought up or accounted for; (c) the movable property has been valued and brought up at sums far below its real value; (d) the surviving spouse should not have been credited with the total net assets of the said estate, nor should the farm Slang River have been brought up at a valuation in the said account.

12. The plaintiffs further say that the children of the testators are entitled to the whole of their said joint estate, and that it was illegal for the testator to bequeath any part thereof to the defendant or to the children of his second marriage, and that his will dated 11th August, 1893, in so far as it purports so to deal with the said joint estate, is invalid and of no effect. They further say that the account marked E is bad and invalid in so far as any part of the said joint estate is thereby awarded to the defendant or to her children.

13. The defendant contends that the said will and the said inventory and account are valid and good.

The plaintiffs claim: (a) An order declaring that the children of the testators are entitled to the whole of the joint estate of the testators, including the farm Slang River; and that no part thereof can be dealt with under the will of the testator and the defendant, dated 11th August, 1893. (b) An order declaring that the said inventory and account marked B and C should be amended in manner indicated in paragraph 11 of this declaration. (c) An order compelling the defendant to pay the said bond on the farm Slang River out of the assets of the said joint estate, and to pass transfer of it to the children of the testators, subject to the conditions of the said codicil. (d) An order declaring that the account marked E is incorrect, and compelling the defendant to amend it. (e) Alternative relief. (f) Costs of suit.

The following is a certified translation of the codicil in question: *First*.—That the survivor of us shall remain in full and undisturbed possession of the estate, so long as he or she shall live, and the children shall only come into possession of the estate after the death of the survivor. *Second*.—We bequeath to our children born of this marriage (sons and daughters) our farm Slang River, situate in the division of Swellendam, for the price or sum of two thousand pounds sterling, upon the following conditions and stipulations, that no one

of them shall have the right to sell, let, or dispose of his or her share of the said ground to a stranger, but in case one or more of them shall wish to sell or let, he or she must do so to one or more of his brothers or sisters; further, that the children who shall remain living on the farm shall be obliged to pay rent annually to the others, such rent to be reckoned as the interest on two thousand pounds sterling, say one hundred and twenty pounds sterling.

#### B.

We, the undersigned, Marthinus Lotz and Gert R. Uys, do hereby certify that we repaired to the residence of the late Susanna Barbara M. Uys (born Beukes) and surviving spouse Cornelis Janse Uys, and then and there valued and appraised the property of the said estate, movable and immovable property, and the following is an inventory of the same with the respective valuation of each article set opposite, which we consider to be a fair valuation:

#### *Immovable Property.*

Slang Rivier, 2,400 morgen ...	£2,000 0 0
--------------------------------	------------

#### *Movable Property.*

1,000 Sheep at 6/- ...	300 0 0
40 Oxen, Cows and Heifers,	
at £2 ...	80 0 0
10 Mares at £2 ...	20 0 0
3 Horses ...	20 0 0
2 Carts and Harness ...	20 0 0
Household Furniture ...	50 0 0
Farming Implements ...	5 0 0
	<hr/>
	£2,495 0 0

M. LOTZ,  
G. R. UYS.

Heidelberg, September, 1887.

#### C.

Liquidation and distribution account in the estate of the late Susanna Barbara Magdalena Uys, framed by the surviving spouse, Cornelis Janse Uys, as per appointment dated 22nd of September, 1887.

	£ s. d.	£ s. d.
To paid for letters of		
administration and		
stamps ...	1 10 0	
„ paid for agent's		
charges ...	3 3 0	
	<hr/>	4 13 0

*Debits.*

" paid P. B. Oden-			
dal ... ..	500	0	0
" paid Wid. Benkes	450	0	0
" " Dr. Biggs ...	22	0	0
" " Dr. Shand ...	5	0	0
" " Kolten & Fri-			
berg .. ..	25	0	0
	1,002	0	0

*Executors' Fees.*

5 per cent. on £495—			
Loose property ...	24	15	0
2½ per cent. on £2,000			
—Immovable prop-			
erty ... ..	30	0	0
	54	15	0

*Master's Fees.*

5 per cent. Master's			
fees on £54 15s. ...	2	14	9
Stamps and filing ac-			
count ... ..	1	1	3
	3	16	0
Balance favour sur-			
viving spouse ...	1,429	16	0
	£2,495	0	0
By valuation of immovable pro-			
perty ... ..	2,000	0	0
" valuation of movable pro-			
perty ... ..	495	0	0
	£2,495	0	0

C. J. UYS, Executor Testamentary.

Heidelberg, 1st October, 1887.

*E.*

Account showing the liquidation and distribution account of the estate of the late Susanna Barbara Magdalena Uys, born Benkes (88 650) and her subsequent deceased spouse, Cornelis Janse Uys, rendered by the executrix testamentary, the now surviving spouse, Sarah Catharina Uys (born Munnik), in consequence of the death of her husband, the said Cornelis Janse Uys.

	£	s.	d.	£	s.	d.
To filing fee of this						
account ... ..	0	3	0			
" paid Reitz, Vers-						
feld and Lourens						
their account for						
opinion ... ..	5	5	0			
" Attorney for lodg-						
ing this account...	1	1	0			
				6	9	0

" One-half of the joint estate awarded to the estate of the late Cornelis Janse Uys, the surviving spouse, by virtue of the community of property ...  
The remaining half is equally divided between the said surviving spouse (as joint heir) and the children, viz.:

1. To Cornelis Janse			
Uys (survivor) ...	70	18	2
2. To Pieter Gerhar-			
dus Uys ... ..	70	18	2
3. To Joseph Lodewi-			
cus Uys ... ..	70	18	1
4. To Margaretha Su-			
sanna Uys, mar-			
ried in community			
of property to			
Cornelis Janse			
Uys... ..	70	18	1
5. To Matthys Johan-			
nes Uys ... ..	70	18	1
6. To Gerhardus Uys			
70 18 1			
7. To Elizabeth Sophia			
Uys, married in			
community of			
property to Johan-			
nes Louw Joubert			
70 18 1			
8. To Nicholas Johan-			
nes Uys ... ..	70	18	1
9. To Susanna Magda-			
lena Uys ... ..	70	18	1
10. To Anna Uys(only			
minor child) ...	70	18	1
	709	1	0

By balance shown in account			
rendered by the executor			
testamentary dated 1st Octo-			
ber, 1887 ... ..	1,429	16	0
	£1,429	16	0

I certify to the correctness of this account.

(Sgd.) SARAH C. UYS (born Munnik),  
Executrix Testamentary.

Heidelberg, 28th February, 1899.

The defendant in her plea admitted paragraphs 1 to 8 inclusive and paragraph 13, but referred to the will and codicil and said

that in paragraph 7, the year 1888 should be 1887, and in paragraph 8 the figure 13 should be 4.

She admitted the first sentence of paragraph 10 and denied the remainder.

She admitted sub-section (d) of paragraph 11 save as to the valuation, but said that it was immaterial. She denied the remainder of the paragraph and paragraph 12.

She admitted paragraph 9 save that she said E was not the account therein referred to.

2. She said that at the death of her husband's first wife the debts of the joint estate with fees and charges were £1,665 4s. and the movable assets were £495. The £2,000 due by the legatees on Slang River not having then been paid, that in order to pay one of the said debts due by the joint estate her husband mortgaged Slang River for £400 and personally paid the balance of debts, to wit £170 4s. That upon his death the legatees paid in account the £2,000, the defendant paid off the bond of £400 which was cancelled, and framed an account in the joint estate of her husband and his first wife, which she filed with the Master and is the account E annexed to the declaration. By the said account after payment of all debts due by the joint estate a balance of £1,429 16s. is shown which was the amount shown in the account marked C. The said amount had not been awarded or credited to her husband's estate but had been distributed in terms of the first mutual will, to wit one half and a child's portion to her husband's estate and the rest had been distributed and paid to the plaintiffs and heirs under that will.

3. She further said that she had tendered transfer of the farm Slang River and hereby again tendered transfer, but the plaintiffs, the legatees under the first will, had refused to accept the same.

Wherefore she prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general.

Mr. Innes, Q.C. (with whom was Mr. Searle, Q.C.), for the plaintiffs.

Sir Henry Juta, Q.C. (with whom was Mr. Searle, Q.C.), for the defendants.

Nicholas Johannes Uys, a brother of the late C. J. Uys, said that he and his brother together bought a half of the farm Slang River, and resided there sixteen years. Witness and his brother lived close together on the farm. Witness remembered the death of his brother's first wife. He was as well acquainted with his brother's affairs as he

was with his own. Witness knew of his own knowledge the stock his brother had at the time of his wife's death. He had 1,400 sheep, 60 head of cattle, 10 mares, 4 stable horses, between 30 and 40 ostriches, 2 carts, 2 wagons, household furniture, farming implements, &c. The sheep were worth about 10s. each, and the stock, large and small, £3 each, the mares £5 each, and the stable horses £10 each. The two carts were worth £35 and the wagons £48. Witness had no knowledge of the prices of the ostriches. Witness had a conversation with his brother before his second marriage, and he said that he had to make a statement to the Master regarding the estate, and as everything would come to the children, he would not have to pay so much if they took the property at a low valuation.

Cross-examined: Witness's brother was an honourable man, and would not commit a fraud, but the valuation put on the property was too low so far as witness could judge. The four horses were still alive six or seven years after the death of his brother's first wife. The year 1887 was very dry, and some people in the Swellendam division let their ostriches run loose, and in those days, when driving along the roads there, any number of ostriches without owners could be found. Cohen was among those who, in 1887, bought ostrich feathers from witness's brother, and was often on the farm.

Marthinus Johannes Uys, a son of the testator and testatrix, and one of the plaintiffs in the case, said that until a month after the death of his mother he remained in his father's house, afterwards removing to another homestead on the farm. Witness used at that time to assist his father in managing the farm. There were between 1,300 and 1,500 sheep, which were worth at least 10s. each. His father had sold sheep about that time, and never got less than 10s. each. He had sold 200 lamels at £1 each, and other sheep at prices varying from 10s. upwards. Witness could not give a correct account of the number of cattle on the farm at the time, but the stock was worth £3 per head. Witness had seen the inventory before the present dispute arose. His father had never consulted him about it, and he only saw a copy of the will a year after his mother's death. Witness corroborated the previous witness as to the number and value of the other stock, &c., on the farm. The ostriches were then valued at about £3 per head, taking them all round. The wagons together were

worth about £40. Old Mrs. Beukes was witness's grandmother. He lived in his father's house for about four years before his (witness's) mother's death. Her board and lodging was reckoned at £6 per month, and after her death his father had a claim of £357 against her estate in the liquidation account.

Cross-examined: Prices of stock were about the same now as in 1887. Witness knew that Mr. Lotz and P. Uys, witness's uncle, valued the movables after the death of witness's mother.

Cornelis Janse Uys said he married a daughter of the testator, and was one of the plaintiffs. He corroborated as to the £357 received from Mrs. Beukes' estate by the testator. The plaintiffs were willing to take over the farm, pay the debt, leave the movables to the widow, and not pay any money into the estate. Witness corroborated as to the number of some of the stock on the farm in 1887.

Gert Uys, a brother of the testator, and one of those who signed the inventory, said that he never made any proper inventory, but merely signed it as a formal matter.

Marthinus Lourens Lotz deposed that he knew of no M. Lotz in the district, and he had never signed any inventory.

In reply to a question put by the Court, it was pointed out that if the plaintiffs succeeded in their claim with regard to the construction of the codicil, the surviving widow and her children would only receive about £200, and Mr. Innes mentioned that the plaintiffs had been willing to make a compromise as they did not wish to be hard on the widow and her children.

For the defence,

Henry R. Uys, an agent-at-law, deposed that in 1887 Gert Uys and Lotz came to his office. Gert Uys dictated, and witness wrote out the inventory, which was signed both by Gert Uys and Lotz. The year 1887 was a very bad year, and the prices set down in the inventory opposite the stock were very fair. Witness was an auctioneer, and his vendue rolls of 1887 showed that the prices in the inventory were those then obtaining. The farm was worth about £4,500. Witness had himself three months ago offered £3,500 on behalf of a client. If the whole of the first estate went to the children of the first marriage there would be a balance of a little over £200.

Cross-examined: Witness would not positively swear that Mr. Lotz signed the inventory, but it was written out in his

presence. Witness believed both the signatures were written at the same time in witness's office. Witness had sold sheep in 1888 at from 12s. to 16s. each, but 1888 was a very good year. The only sheep witness sold in 1887 was for a bazaar. These were picked sheep, and sold at prices from 10s. upwards. He had sold no cattle in 1887.

Gerhardus Cornelius Reid, who had for many years carried on business as an auctioneer in Swellendam, stated that 1887 was a very dry year, and sheep at 6s. each would then be a fair price. The other prices in the inventory, with the exception of the £2 each for the mares, would be fair.

Sidney Albert Dickson, an auctioneer at Heidelberg, deposed that the prices in the inventory were very fair considering that 1887 was a dry year.

Cross-examined: There were very few sales in 1887, but witness believed he had sold some cattle in that year. He could not remember whether he had sold any sheep in that year.

Mrs. Sarah Catherina Uys, the surviving spouse of C. J. Uys and the defendant in the case, deposed that she married Mr. Uys in October, 1897, and lived on the farm with him until his death. When she married Mr. Uys he had about 1,000 sheep on the farm. Nicholas and Gert Uys also had sheep on the farm. There were about thirty head of cattle, ten mares, a couple of horses, and a pair of breeding ostriches on the farm at the time. The sons also had some ostriches running on the farm. Since her marriage the sheep on the farm had decreased.

At this stage counsel intimated that a compromise had been arrived at between the plaintiffs and the defendant, under which the defendant would give transfer of the farm to plaintiffs and return the £2,000 paid, less the portions already paid to the plaintiffs, as well as the £400 mortgage paid off and any succession duty already paid by defendant; each party to pay their own expenses.

The Court therefore made an order by consent that the defendant transfer the farm Slang River to the plaintiffs and also pay over to them the sum of £961 17s. 3d., less any succession duty already paid by defendant to the Master, each party to pay its own costs.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorney, C. W. Herold.]

IN THE ESTATE OF THE LATE JAMES  
FREDERICK JOHNSTON.

Mr. Benjamin moved for the cancellation of a certain mortgage bond for £57 passed by the late J. F. Johnson in favour of one Louw, and ceded by one Louw to one Keet. It was pointed out that neither Louw nor Keet could be communicated with, owing to their being in the Transvaal at present, but the bond was repayable by instalments, and receipts for £47 10s. for such repayments had already been found among deceased's papers. No payment on the bond had been claimed since February, 1888. The executor dative had sold the property mortgaged for £300 and had since discovered that this bond was open in the Debt Register.

The order was granted, but subject to security to the satisfaction of the Registrar being given for the repayment of the amount of the bond.

DREWITT V. FALCONER

This was an application for an order authorising the Sheriff to proceed with the sale of certain landed property.

Mr. Buchanan appeared for the applicant, and stated that on September 18 a stay of execution, in connection with certain property attached on account of a judgment obtained by the petitioner, was granted until a further order of the Court. Nothing had been done to satisfy the judgment, and therefore the present application was made.

Order granted.

IN THE MATTER OF THE MINORS FLUGGE.

Mr. Buchanan moved for an order authorising the raising of money on certain life policies settled by an ante-nuptial contract. It was pointed out that it was for the education of the children who would benefit under the life policies that the application was made. The Master's report was favourable, provided a trustee was appointed in place of the one mentioned in the ante-nuptial contract, who was deceased.

Order granted in terms of the Master's report, Mr. G. W. Steytler being appointed trustee.

IN THE MATTER OF THE MINORS STEEN-  
KAMP.

Mr. McGregor moved for leave to raise money on mortgage on property in which the minors were interested.

Order granted in terms of the Master's report.

IN THE MATTER OF THE MINORS  
TARDUGNO.

Mr. Close moved for leave to an executor to exchange with the Town Council certain land in the estate.

The Master's report was favourable.  
Order granted.

IN THE ESTATES OF THE LATE DAVID  
FREDERICK JOHANNES LOUW AND ANNA  
JACOMINA CHRISTINA LOUW.

Mr. Innes moved for leave to mortgage certain properties in this estate, and also to surrender to Government certain farm, a mortgage on which to double its value was held by Government.

The Master's report was favourable, and an order was granted in terms of his report.

IN THE MATTER OF THE PETITION OF EVA  
CATHRINA RIFFELL.

Mr. Molteno moved for leave to the petitioner to mortgage certain property without the assistance of her husband, whose whereabouts is unknown.

Granted.

## SUPREME COURT

[Before the Hon. Mr. JUSTICE BUCHANAN  
and the Hon. Mr. JUSTICE MAASDORP.]

HORN V. HORN. { 1889.  
{ Dec. 4th.

Divorce—Adultery—Evidence.

*H. sued her husband for divorce on the grounds of adultery.*

*The only evidence of the alleged adultery was given by S., a coloured servant of doubtful reputation, who swore that the defendant had committed adultery with her.*

*This charge was denied by the defendant.*

*Held, that the uncorroborated evidence of S. was not sufficient to justify the granting of a decree of divorce*

This was an action for divorce, on the ground of adultery, instituted by Maria Frederica Horn against her husband, Julius A. L. J. Horn.

Mr. Benjamin appeared for the plaintiff.

Mr. Buchanan appeared for the defendant.

Maria Frederica Horn, the plaintiff, deposed that she was married to defendant in Cape Town on March 28, 1888, and there was one child (a girl, now aged eleven years) born of the marriage. Their marriage was not a happy one, and she left defendant on August 2, 1888, owing to his ill-treatment of her. Defendant used to go out at night-time after witness had gone to bed. Witness believed that defendant, who had a second-hand clothes shop and imported goods, had some property. Witness had supported herself since she left defendant by giving music and German lessons.

Cross-examined: Witness first received sufficient proof of the adultery about June this year.

Sophia Smith, a coloured woman, deposed that she was in defendant's employ for six years. It was after his marriage, but Mrs. Horn was not living with him then. Witness deposed as to defendant having frequently misconducted himself with her.

Cross-examined: About six months before witness left defendant's place she brought up a coloured boy in the Magistrate's Court on a charge of seduction. Defendant had misconducted himself with witness long before then.

Re-examined: The action in the Magistrate's Court was for the maintenance of a child.

This closed the case for the plaintiff.

For the defence,

Julius A. L. J. Horn, the defendant, stated that he carried on business in Strand-street, and lived over the shop. His marriage with plaintiff was not a happy one, owing to disagreements about her parents. He never ill-treated his wife. He denied that he went out in the evenings and misconducted himself. Plaintiff left him a few weeks after marriage, but they made up the quarrel and lived together again for two and a half months, after which she again left him. Witness had not lived with her since. He had never committed adultery with the girl Sophia Smith. The girl used to come every Sunday to clean his room.

Cross-examined: The account produced, which was sent to the plaintiff, was only a joke. (This account

was for £35, being half the marriage expenses. It was dated August 30, 1888, which was shortly after plaintiff left defendant.)

Re-examined: He never expected that the account would be paid. He was excited at the time, and he thought it might lead her to reflect, and that the quarrel might be made up.

After hearing Mr. Benjamin, the Court gave absolution from the instance.

Buchanan, J., in giving judgment, said: The plaintiff in this action was married to defendant on March 28, 1888, and she says that between then and the present time, November of this year, he has committed adultery with Sophia Smith, and on divers other occasions with several other persons to the plaintiff unknown. The only evidence led in support of this declaration has been that of the girl Smith. The defendant has gone into the witness-box and in the most emphatic manner contradicted on oath the statement of the girl Smith. In the absence of any corroboration the Court is bound in a case of this kind to take the word of the man against that of a woman, who is of loose character, and who admits that she brought an action against a coloured man for seduction after her alleged intercourse with defendant. No corroboration of any kind has been laid before the Court to lead us to believe that her story is correct and that of the defendant wrong. It is said that the defendant himself supplied corroboration by not bringing any action against his wife. Well, she has not committed adultery. She has deserted him, but then he is willing to put up with the desertion, and has not brought any action before and does not do so now. In the absence of any evidence corroborating that of the girl, we are of opinion that the adultery has not been proved. Absolution from the instance will therefore be given.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, W. E. Moore & Son  
Defendant's Attorney, Gus Trollip.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.G., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

BRAUDE V. BRAUDE. { 1899.  
Dec. 5th.  
" 9th.

Husband and wife—Agreement for future separation—Ill-treatment.

*An action having been brought by a wife against her husband for judicial separation on the ground of ill-treatment the plaintiff withdrew it and returned to live with the defendant upon his entering into an agreement by which he undertook, in case he should again ill-treat her or necessitate her leaving him, to enter into a notarial deed of separation and pay her a certain sum in cash and certain further monthly payments in lieu of her share of the community.*

*Held, that such an undertaking for a future voluntary separation cannot be enforced and that pecuniary promises depending upon the validity of such an undertaking are not binding.*

*Qu. : Whether in consideration of the wife withdrawing the action and consenting to live with the husband his undertaking to pay a certain sum, in lieu of the wife's share in community, in case the Court should decree judicial separation by reason of his marital misconduct, would be enforced by the Court.*

This was an appeal from a decision of Mr. Justice Maasdorp in the Circuit Court of Oudtshoorn.

The plaintiff's declaration was as follows :  
1. The plaintiff is Nesche Braude (born Maltz), residing at Oudtshoorn; the defendant is Aaron Braude, of Matjes River, in the division of Oudtshoorn.

2. The plaintiff and defendant were married at Oudtshoorn on the 11th September, 1894, and the said marriage, which was in community of property, is still of full force and effect.

3. Thereafter and at Matjes River aforesaid the defendant cruelly ill-treated the plaintiff and in consequence of the said ill-treatment the plaintiff in or about February, 1897, commenced legal proceedings against the defendant for a divorce or judicial separation.

4. Thereafter at the request of the defendant and of one Leon Braude, his father, the plaintiff agreed to withdraw the said proceedings upon certain conditions which were embodied in a notarial agreement entered into between the parties on the 17th February, 1897.

5. It was provided in the said agreement that should the defendant thereafter ill-treat her, or should she (the plaintiff) find it from some other just and lawful cause necessary to leave him, or should they find it impossible any longer to live together, then and in that case they mutually agreed to appear before a notary public and enter into a deed of separation, he (the defendant) agreeing to pay the plaintiff in cash the sum of £300 as her share in the community existing between them, and the sum of £5 per month on the first day of each and every month during the time they live apart.

Thereafter the plaintiff again cohabited with the defendant, but in consequence of the continual ill-treatment of her by the defendant and his cruel conduct towards her, especially during the year 1898 and the commencement of the year 1899, it became impossible for her any longer to live with him, and she was obliged to leave him.

Thereafter in or about February, 1899, the plaintiff caused a letter to be addressed to the defendant calling upon him to enter into the deed of separation provided for in the agreement aforesaid.

The defendant has failed and neglected to enter into the said deed, or to pay the said sums of £300 and £5 per month, or any sum at all to the plaintiff for her maintenance.

The plaintiff claimed : (a) A decree of judicial separation *a mensa et thoro*; (b) that the defendant be ordered to pay to her the sum of £300, and the sum of £5 per month, in accordance with the agreement aforesaid.

The defendant pleaded in the following terms :



1. He admits the allegations contained in paragraphs 1, 2, 5, 7, and 8 of the declaration.

2. With reference to the allegations contained in paragraph 3, he admits that in or about the month of February, the plaintiff commenced legal proceedings against him, but he denies the remaining allegations in the said paragraph.

3. He admits that he entered into the agreement referred to in paragraph 4 of the declaration, and he admits that the plaintiff withdrew the proceedings; save as above he denies the allegations in paragraph 4.

4. He admits the cohabitation referred to in paragraph 6 of the declaration, but denies the remaining allegation in the said paragraph.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant, now plaintiff, says:

1. He craves leave to refer to the matters hereinbefore pleaded, and prays that they may be considered as inserted herein.

2. He says that in or about the month of January, 1899, the defendant in reconvention wrongfully and unlawfully and maliciously and without any cause on the part of the plaintiff in reconvention, deserted the plaintiff in reconvention, and since that date has lived apart from him, though the plaintiff in reconvention has at all times been ready and willing, and is still ready and willing, to receive the said defendant in reconvention.

3. At the date of the desertion as aforesaid, the defendant wrongfully and unlawfully removed certain property from the house of the plaintiff in reconvention, and belonging to him, of the value of £150.

The plaintiff in reconvention prays: (a) For an order compelling the defendant in reconvention to return and live with him and restore his conjugal rights, and failing compliance with such order for a decree of divorce; (b) for an order declaring the defendant in reconvention to have forfeited all benefits derived under the marriage in community of property; (c) for the cancellation of the agreement of 1st February, 1897, entered into between the plaintiff and defendant by reason of the defendant in reconvention's wrongful conduct as aforesaid; (d) for an order compelling the defendant in reconvention to restore the said goods referred to in paragraph 4 of this claim, or their value, the sum of £150.

The replication was general. As to the claim in reconvention, the plaintiff admitted

that she left the defendant in March, 1899, in consequence of his continuous cruelty and ill-usage, and that she took away articles of the value of about £5. The rest she denied.

The deed of agreement referred to in the declaration was as follows: That on this, the 17th day of February, in the year One Thousand Eight Hundred and Ninety-Seven, before me, Thomas John Kannemeyer, of Oudtshoorn, Cape of Good Hope, notary public, by lawful authority duly admitted and sworn, and in the presence of the subscribed witnesses, personally came and appeared Aaron Braude, of Matjes River, in the division of Oudtshoorn, of the one part, and his wife, Nesche Braude (born Maltz), to whom he is married in community of property, of the second part. And the appearers declared that the said Nesche Braude had commenced proceedings against her husband, the said Aaron Braude, either for a decree of divorce or, in the alternative, for a judicial separation, and the said Aaron Braude had requested her to withdraw the said proceedings, come together again and live as man and wife, to which the said Nesche Braude has consented on the following terms and conditions, to wit:

1. That should her husband, the said Aaron Braude, ill-treat her, or should she find it from some other just and lawful cause necessary to leave him, or should they find it impossible any longer to live together, then and in that case they mutually agree hereby to appear before a notary public and enter into a deed of separation, he, the said Aaron Braude, agreeing to pay the said Nesche Braude in cash £300 as her share in the community existing between them, and the sum of £5 per month on the first day of each and every month during the time they live apart.

2. That should any children be born of the marriage, then the said Aaron Braude shall, on the first day of each and every month, pay towards the support of each and every child an additional monthly payment.

3. That should the said Aaron Braude refuse to enter into the said notarial deed of separation, and the said Nesche Braude sue for a judicial separation, or she institute some other action or actions to have the marriage dissolved, and the Court grant a decree in her favour, then it shall be optional on the part of the said Nesche Braude either to claim the sum of three hundred pounds and the said monthly pay-

ments for maintenance and support as first aforesaid, or else a division of the property and maintenance.

4. That the said Aaron Braude shall give adequate security for the due and punctual payment of the said sum of three hundred pounds sterling and the said five pounds per month for maintenance as first aforesaid.

5. That all costs incurred, as well as the costs between attorney and client, shall be paid by the said Aaron Braude on first demand.

6. Upon which conditions and on the said sums of three hundred pounds and the said monthly payments being secured to the said Nesche Braude, she, the said Nesche Braude, agrees to withdraw the proceedings commenced by her and to return to the said Aaron Braude and again live together as man and wife.

Likewise personally came and appeared Leon Braude (otherwise Leon Broude), also of Matjes River, in this division, father of the said Aaron Braude, who declared that at his request the said proceedings commenced by the said Nesche Braude against the said Aaron Braude were withdrawn, and the said Nesche Braude and Aaron Braude agreed to live together again as man and wife, in consideration whereof he, the said Leon Braude, declared to have interposed and bound himself as surety *in solidum* and joint principal debtor to the said Nesche Braude for the due and punctual payments by the said Aaron Braude of the sum of £300 sterling and the said monthly payments as aforesaid, under the express renunciation of the benefit of the exception *ordinis seu excussionis*, with the meaning and effect of which he acknowledged himself to be well acquainted.

After hearing the evidence of the plaintiff as to the defendant's cruelty, and no evidence having been tendered on behalf of the defendant, Mr. Justice Maasdorp granted a decree of separation, and ordered that the joint estate be divided, and that the half therefrom be paid over to the plaintiff. By consent of parties, John Robert Bazett Edmeades was appointed to divide the estate between the plaintiff and the defendant. Defendant to pay the costs.

The following reasons for judgment were given: In this case I found that the ill-treatment experienced by the plaintiff at the hands of the defendant was such as to entitle her to a decree of separation, which was granted and the parties being married in community of property, an

order was made for the division of the property, and Mr. Edmeades was appointed to effect such division. There being no evidence to prove the means and income of the defendant at the time of the trial I made no order with respect to maintenance. If, after the division of the estate, it should appear that the plaintiff is in need of maintenance, and proof is given of the ability of plaintiff to support her, it will be open to her to move for alimony in proportion to her necessities and his ability to provide for her. *Foot* (24, 2, 18) says in the matter of alimony much is left to the discretion of the judge. *Bishop*, in his work on marriage and divorce, says (Vol. 2, sec. 445): "Alimony is a matter of discretion with the Court, yet this discretion is not an arbitrary one, but a judicial discretion to be exercised according to established principle of law and upon an equitable view of all the circumstances of the particular case." The circumstances here referred to are chiefly the position in life of the parties, the husband's income, and the wants of the wife. The wants of the wife can only be ascertained after the property has been divided, and proof of the husband's income has not been adduced. On the 17th February, 1897, the plaintiff and defendant entered into the agreement annexed to the declaration, and it was contended that the Court should necessarily, upon granting the decree of separation, give effect to this agreement by awarding to the plaintiff the sum of £300 and £5 per month for her maintenance. In my opinion a contract of this nature, even if there is in it nothing objectionable or contrary to the policy of the law, is merely one of the circumstances which the Court will take into consideration in using its discretion with respect to the provision which the husband should be ordered to make for the wife, and will not be enforced as a matter of course, and without further inquiry. Under the contract of marriage the husband is under certain obligations to the wife which determine her claim upon him when she obtains a decree of separation. These claims may to a certain extent be made the subject of an agreement, which the Court may sanction or not in its discretion. Where immediately before or at the time of the trial of a suit for separation the parties agree with reference to the division of the estate and alimony such agreement may be a fair guide in determining the matter, but it is quite a different thing when

the agreement has been made more than two and a half years before the trial of the suit. Notwithstanding such agreement the Court must in my opinion have proof of the approximate value of the estate, the present income of the husband, and the necessities of the wife. I shall upon this point again refer to the work of *Bishop* on the law in England and America, where in this respect the same principles obtain as with us. He says (Vol. 2, sec. 435): "The general doctrine is that a wife suing for divorce, even for divorce from the bond of matrimony, cannot make previous to the decree of divorce a valid agreement concerning alimony. Such an agreement to be effectual must at least have the express sanction of the Court preceded by an examination of the facts, because otherwise it would have a tendency to produce collusion between the parties with a view to the dissolution of marriage. An agreement of this nature might indeed under some circumstances be confirmed by the Court when affirmatively shown to be fair and proper." In section 235 he says: "The Court will not even sustain an agreement concerning the incidental matter of alimony made by the parties in the course of the proceedings until it is found on inquiry to be fair and equitable." There being no proof that the defendant is not in a position to perform the contract entered into more than two and a half years ago, it is not in my opinion an agreement which should be confirmed without such proof. The fact that security was provided in the contract for the payment of the stipulated amounts does not it seems to me affect the principles above laid down. It should be borne in mind that even after an order of Court for alimony it is in the discretion of the Court under altered circumstances upon application made to vary such order. Even if the agreement was in no way objectionable it was in my opinion necessary to satisfy the Court in the way indicated, but in this case I went further and held that the agreement was objectionable and contrary to the policy of the law. An agreement for the future voluntary separation of husband and wife, as the agreement in question is, and an agreement for the division of the estate and maintenance upon a decree of separation being obtained at some future time irrespective of the circumstances of the parties at the time of such decree is, in my opinion, repugnant to the law regulating the obligations of husband

and wife, and should not receive the sanction of the Court. Upon this point I may conveniently refer again to *Bishop's* work (Vol. 1, sec. 631). No agreement between husband and wife for separation can be valid in law. A court cannot countenance such an agreement, cannot wink at it, cannot permit it to avail even for a lawful purpose which may be found inseparably connected with the unlawful (section 637). Suppose on the other hand the deed provides for a future separation, not merely for support of the wife after separation has already taken place or been determined upon—in this case the promised provision being made to depend, as a condition upon the future doing of an act contrary to the policy of the law, the deed will be pronounced wholly void. That the wife should bargain, as a consideration for continued cohabitation, for special advantages beyond that allowed her by law under the contract of marriage, that she should secure to herself the payment of a fixed amount and the enjoyment of a certain fixed income to be derived from her husband at a time when altered circumstances may render him unable to meet such obligations, seems to me contrary to the principles of our law. The fact that the husband by his own conduct brings about the conditions under which the wife's claim is made, does not affect the question, because provision for the wife is not awarded as a penalty for the wrongful act of the husband. (See *Fraser*, "Law of Scotland on Husband and Wife," pages 855-860.) I was of opinion that the agreement was not such as should receive the sanction of the Court, that even if it were not otherwise objectionable it should not be confirmed without evidence as to the circumstances of the parties, and that with the evidence before me I could go no further than give an order for the division of the joint property of the spouses.

The plaintiff appealed.

Mr. McGregor for the appellant: The question is whether the agreement of 1897 was one which could be enforced in law. A *naturalis obligatio* is good against a surety even though it cannot be enforced against the principal. The English authorities are in support of the decision of the Circuit Court, but English law regards marriage as a sacrament, while there is nothing to show that that is the view taken by Roman-Dutch law. It is only within the last fifty years that the English Courts have allowed

a voluntary separation between husband and wife to hold good. *Voet* (24, 1, 8) and *Oak v. Lumsden* (J. 3, p. 148) show that husband and wife can freely contract with one another. *Pollock on Contracts* (5th ed., pp. 293, 295) is in support of the judgment of the Circuit Court. The notarial agreement was drawn up in order to make it possible for husband and wife once more to live together. At the moment when it was made she was entitled to live apart from him, but she went back as a result of that agreement. *Marquis of Westminster v. Marchioness of Westminster* (1 Don and Clark, p. 519) is against my contention, but it contains a statement of the law which is contrary to the practice of this Court and the later English cases. *Westmeath v. Salisbury* (5 Bligh, N.S., p. 339); *H—— v. W——* (3 K. and J., p. 857). Pollock says that some of the reasons for the judgment given in the case last cited would not be supported now. *Wilson v. Wilson* (1 H. L. Cas. 538). In *Hunt v. Hunt* (4 De G. F. and J. 221), an agreement that it should be lawful for the wife to live separate and apart from her husband, and that he would not compel her to cohabit with him by any legal proceedings was held enforceable in equity. That shows that greater latitude is nowadays given in England to husband and wife entering into an agreement tending to separation. We must be careful against importing into our civil law principles founded on the religious considerations of another country. In *Braant v. Wood* (12 Ch. D., 620), Jessel, M.R., said that for a great number of years it was thought "something very horrible and against public policy that the husband and wife should agree to separate. . . . But a change came over judicial opinion as to public policy." In *McGregor v. McGregor* (21 Q.B.D., p. 430) it was held that husband and wife might sign an agreement to compromise certain proceedings taken against each other. See *Bishop on Marriage and Divorce* (Vol. 2, section 435) for a summary of these cases. There are no authorities on the point in Roman-Dutch law. *Voet on Facts* (2, 14, 21); *Burg* (Vol. 1, p. 239) are not against my contention.

Mr. Currey (with him Mr. Upington) for the respondent: The agreement is invalid because (a) it is contrary to the policy of the law, (b) it provides for a future separation, and (c) provides for the payment of alimony, which is a matter for the discretion of the judge. *Bishop on Marriage and Divorce* (Vol. 1, section 367); *Jee v. Thurlow* (2 B. and C., 552).

[De Villiers, C.J.: Does not the agreement impose a penalty upon the husband for his ill-treatment?]

It goes further than that, because it says that the agreement shall be entered into if they find it impossible to live together.

[De Villiers, C.J.: But it may be bad in part and yet good in part.]

The whole agreement is bad as being contrary to public policy. As to the alimony it is entirely in the discretion of the judge.

[De Villiers, C.J.: That is so where there is no agreement. But has there not been consideration for the amount?]

An agreement of this kind would open the door to collusion.

*Postea* (9th December).

De Villiers, C.J.: The clause in the agreement upon which the declaration is founded reads as follows: "Should the said Aaron Braude (the defendant) ill-treat her (the plaintiff) or should she find it from some other just and lawful cause necessary to leave him, or should they find it impossible any longer to live together, then and in that case they mutually agree to appear before a notary public and enter into a deed of separation, he the said defendant agreeing to pay the plaintiff in cash £300 as her share of the community, and the sum of £5 per month during the time they live apart." I quite agree with the defendant and with the Court below that an agreement for a future voluntary separation ought not to be enforced by the Court, and that the defendant's pecuniary promises, depending as they do upon the validity of such an agreement, cannot be upheld as binding. It is unnecessary therefore to enter into a full discussion of the question, whether the plaintiff would have been entitled to claim the sum of £300 as her share of the community if she had relied upon the third clause of the agreement. That clause reads as follows: "Should the defendant refuse to enter into the notarial deed of separation and the plaintiff sue for a judicial separation or she institute some other action to have the marriage dissolved, and the Court grant a decree in her favour, then it shall be optional on the part of the plaintiff to claim the sum of £300 and the monthly payments of £5, or else a division of the property and maintenance." I am not prepared to say that this clause, read by the light of the previous proceedings, is necessarily illegal. The plaintiff had brought an action for judicial separation against the defendant by reason of his ill-treatment. He induced her to withdraw the action and live with him as

his wife by promises of good conduct in the future, and it was in consideration of her withdrawing the action and returning to live with him that he undertook to pay her £300 in cash and monthly payments of £5 in lieu of her share of the community in the event of the Court granting her a decree of judicial separation. The object of this stipulation was to prevent the necessity of a future separation, and if such a necessity arose by reason of the defendant's conduct the money was not to be payable to the plaintiff until the Court had decreed a judicial separation. When it is borne in mind that by our law a husband and wife may lawfully contract with each other, provided they do not make gifts to each other, there is much to be said in favour of the view that the 3rd clause of the agreement is not objectionable. But the plaintiff has founded her claim on the first clause, which is certainly open to the objection of being opposed to public policy, and I therefore agree that the appeal must be dismissed.

Buchanan, J., said: I am also of opinion that the appeal should be dismissed. All the cases that have been quoted show that the Court will not uphold any agreement in derogation of the future maintenance of the marriage contract. The authorities in our law show that with regard to the question of maintenance or alimony, it is a question for the discretion of the Court. The Court can not support one part of the contract with regard to the question of alimony and not the other part, the two being so mixed up, and dependant on each other. In this case the agreement would have been favourable to the wife. It is quite easy to conceive of other cases where the contract would not be to the benefit of the wife, and if the contract is enforceable, it must be enforceable when to her detriment as well as when to her advantage. In some cases, it might operate against the interests of the wife, as where the value of the estate was much increased after the agreement was entered into. There is no difference of opinion on the pleadings. I also concur in holding that the costs should come out of the joint estate.

Maasdorp, J., said: I will not add much to the opinion I have already given in my judgment at the trial. I form my opinion on what I thought was the general principle of the Roman-Dutch law. At the time I made no reference to the English law. Later on, when I inquired into the authorities, I found that the Roman-Dutch authorities afforded very little assistance, and I had

to refer to the English cases, which were all to the effect that such contracts were against public policy. One objectionable feature of this contract, made in contemplation of future separation is the provision made for the wife irrespective of the means of the husband at the time of separation. The husband might afterwards fall into poverty, and that would, or might, be an inducement to the wife to get rid of a pauper husband, when she would claim her rights under the contract. Such an agreement ought to be carefully scrutinised by the Court. A contract of marriage creates an important relationship, and the Court ought not to enforce any contract in derogation of it. The matter of alimony is wholly in the discretion of the Court. That discretion might be wrongly exercised, and then the decision of the Court could be reversed on appeal. I think I was justified in exercising my discretion as I did. Under all the circumstances, the costs should come out of the joint estate.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorney, Gus. Trollip.]

SALIE V. SCHOLTZ. { 1899.  
 { Dec. 5th.

#### Contract—Supply of bricks.

*The plaintiff contracted to supply the defendant with 200,000 bricks at 17s. per thousand, to be delivered at various times, and should the defendant require more than 200,000 to supply them at the same price. A clause in the contract provided that should the plaintiff fail to deliver bricks according to the contract, the defendant should procure bricks elsewhere at the plaintiff's cost and expense.*

*Held, that before this clause could be enforced as regards more bricks than 200,000 there must be a demand for them by the defendant and a refusal by the plaintiff to supply them.*

This was an action brought by Gamat Salie against W. Scholtz for a sum of £47 16s. 8d., being the balance alleged to be due to him for certain bricks made for the defendant under a certain contract in writing

dated January 10, 1898. The declaration set out that the plaintiff was a brickmaker carrying on business at Somerset Strand, in the division of Stellenbosch, and the defendant was a farmer residing at Somerset West. On January 10, 1898, plaintiff and defendant entered into an agreement for the supply of 200,000 bricks by the former to the latter at a price of 17s. per thousand, delivery to be taken by defendant at various times. Defendant accepted 180,000 bricks, and it was thereupon agreed that defendant should purchase the remaining 20,000 bricks at a cost of 25s. per thousand, and that plaintiff should be charged with £8, being the excess over the contract price. This left £145 due by defendant to plaintiff, who had from time to time been paid £97 3s. 4d., and he now claimed the balance of £47 16s. 8d., interest *a tempore morae*, and costs of suit.

In his plea defendant admitted that the agreement had been entered into, but denied that he received 180,000 bricks, his figures being 165,000, and he also denied the allegation as to the agreement regarding the purchase of 20,000 bricks at 25s., &c. He alleged out that according to clause 4 of the agreement, if more bricks than 200,000 were required, plaintiff had to supply them of the same quality and same price, while clause 6 provided that should plaintiff fail to deliver the bricks according to contract, the defendant should get the bricks at plaintiff's expense on giving due notice. It was alleged that such notice was given, but that as plaintiff could not supply the bricks, the defendant had to purchase them elsewhere and pay £212 15s. for the same, and a claim in reconviction for £70 7s. 10d. was made.

The following account was annexed:

Total cost of bricks purchased (116,800) ... ..	£212 15 0
2. Total cost of 116,800 bricks at 17s. per 1,000 ... ..	99 5 6
Excess for which defendant in reconviction is liable...	113 9 6
Defendant in reconviction supplied: 165,000 bricks at 17s. per 1,000 ... ..	£140 5 0
He was paid on account	97 3 4
Balance due ... ..	£43 1 8
Total balance due by defendant in reconviction ...	£70 7 10

Mr. Buchanan appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Upington), appeared for the defendant.

Gamat Salie, the plaintiff, deposed that he was a brickmaker at Somerset West. On January 10, 1898, he entered into a contract with defendant, by which he was to deliver to the defendant 200,000 bricks at various times. The bricks were to be made on the defendant's ground, and the clay and water was to be provided by defendant. Witness made and delivered more than 180,000 bricks, but he only claimed for 180,000. Witness had counted the bricks. In May one Lucke and defendant came to witness. At that time ten kilns of bricks had been delivered. When they came they said the weather was threatening, and as witness was a poor man they should conclude the contract. Afterwards it was agreed that defendant should purchase the 20,000 bricks at 25s. per thousand and conclude the contract, witness paying the difference between the 25s. and the contract price of 17s. Witness had some clay prepared for bricks, and after concluding the agreement witness was having that made into bricks for himself, but defendant stopped his workmen. He never gave witness notice in terms of his contract that he wanted more bricks, and never asked him for more. He had plenty of clay, and could have supplied more bricks. He had received £97 3s. 4d. on account of the bricks supplied. The last payment was on May 5, 1898, and was after the conversation referred to. Witness rendered an account on July 20, 1898. Witness first knew about the £70 claimed from him after Haupt, an agent, had made out his account, and defendant sent a letter in reply.

Cross-examined: Witness was behindhand in supplying the bricks, but the delay was due to defendant not giving him the necessary supply of water. Defendant had on several occasions told witness to hurry on with the bricks. There was a kiln of bricks there which defendant had at first refused to take, as the kiln had tumbled down before the bricks were properly burned, but witness had the kiln built up again, and the fire restarted, and the bricks were afterwards removed by defendant. Witness had offered the bricks in two kilns on his own ground, and these had been accepted by defendant. There were 20,000 bricks in those kilns. At that time witness had delivered 165,000 bricks. On a certain day witness was at defendant's house, and defendant told

witness that more than 200,000 bricks would be wanted, but he did not say how many more. Defendant said if the number of bricks were not there he would have to buy them elsewhere, and witness said he would make the bricks himself. Witness could have made the bricks, but defendant stopped him. Witness knew that many of his bricks were bad, but that was not his fault, because he told defendant that if he wanted he (witness) would burn the bricks over again.

Re-examined: Witness at the time had made for another party 40,000 bricks, which he could sell at 25s. per thousand.

Daniel Alphonso Barrett, the contractor for the building of the house for which the bricks were required, stated that at defendant's request he went to count some bricks in two kilns already made by plaintiff. Witness commenced work on the house on May 5, and this was before the foundations were in. In the two kilns there were 46,490 bricks. In five other kilns which witness checked later on there were 113,930 bricks, and at a subsequent date in two other kilns 31,424 bricks. There was another kiln, the bricks in which witness did not count, but he estimated that there must have been between 15,000 and 20,000 bricks in that. That was a total of about 206,000 bricks, but of these 6,000 or 7,000 being outside bricks and soft would be useless. These bricks were all brought to the building. A great many bricks were broken owing to the manner in which they were unloaded, being tipped from the cart. At least one-fifth of the bricks were broken in this way. The contract was altered, the height of the house being raised two feet, and this would require at least 20,000 additional bricks. Witness's contract had been cancelled, and he brought an action against defendant, which he won.

Cross-examined: Altogether about 280,000 bricks were used for the house and other buildings. The bricks were counted in the kiln, and would be accurate to a thousand in a kiln. Witness's estimate included all bricks in the kiln. He had, however, allowed for a deduction of 2,000 from each furnace mouth in the kilns. There was always a great waste of bricks in each kiln.

Koos Cyster, foreman to plaintiff in the making of bricks on defendant's land, deposed as to the number of bricks and their removal to the house defendant was building. He generally corroborated plaintiff's evidence. They went on making bricks until defendant stopped them.

Hendrik Russell, a labourer, who worked for the plaintiff in the making of bricks on defendant's farm, corroborated as to the number of bricks, &c.

This closed the case for the plaintiff.

For the defence,

Walter Adolf Scholtz, a farmer, residing on the farm Good Hope, at Somerset West, the defendant, stated that he entered into the contract in question for the building of a house and stable. Salie did not make sufficient bricks within the specified time, and witness told him he would not have enough bricks made. In March he reminded Salie of the terms of the contract, and told him he would require more than 200,000 bricks. Salie said he would make two kilns a week, and that the whole number would be ready before winter set in. Bricks could not be made after the end of April. They first built the stable, and while they were doing so the foundations of the house were put in. The first four kilns put in by Salie were very good, but the others were bad, and Salie was very slack at the work. Salie was hardly ever there himself. In May, 1898, witness saw Salie, and told him he had the refusal of 50,000 bricks from Bergsteedt, and if he (Salie) could not supply him with any more he must tell him. Salie said he could not supply the bricks, and witness had better close with the offer of 50,000. Witness closed with the offer at £1 12s. per thousand. These were the only bricks he could obtain. Proceeding, witness detailed the manner in which he received the bricks from Salie, and the steps he took to check the number. He calculated that 15,000 of Salie's bricks were spoilt and that made the difference between his figures (165,000) and Salie's (180,000). Witness afterwards bought bricks from Joubert for £1 10s. per thousand, and the cost of cartage, and he also bought 43,000 from Mr. Louw, of Stellenbosch, for which he paid £1 12s. per thousand, and had to pay railway carriage and cartage. As bricks could not be made in winter those who had ready-made bricks charged more for them. Witness never stopped Salie or his men from making bricks upon his ground. Salie made bricks for 17s., witness giving his own ground and water.

Cross-examined: Witness had brought an action against Mr. Lucke, the architect, but had settled it out of court. He had also brought an action against Mr. Barrett, the builder, but had lost it. He had never brought an action or had any dispute with

the man who took over Mr. Barrett's contract. Witness had been in court once or twice before. He was the defendant in the action *Van der Byl v. Scholtz*, and had then said that a certain will had been signed by his wife in her bedroom. Other witnesses said it had not been signed there. The Court apparently did not believe him, but he still maintained the will was signed in the bedroom. It was not true that Salie gave him leave to buy 20,000 bricks only. Witness counted the bricks from Salie's as they were off-loaded. Witness kept count in some book, but he had not the book in court. It was at home somewhere. He did not tell Salie how many bricks he would require over the 200,000.

John Peter de Villiers Louw, residing at Stellenbosch, deposed that he made and sold bricks. Last year he sold a number of bricks to defendant for £1 12s. per thousand, delivered in trucks at Stellenbosch Station. Witness had himself that winter sold bricks at 38s. per thousand.

Benjamin Bergsteedt, living at Somerset Strand, deposed that he sold a number of bricks to defendant at 32s. per thousand. Witness also gave evidence as to the bad condition of some of Salie's bricks, and also as to the collapse of one of the kilns, some of the bricks of which still remained on the ground.

Cross-examined: After selling defendant the bricks, witness had bought 17,000 for £18 or £19, and another lot of 13,000 for £14 or £5. He bought these bricks in the kiln.

Re-examined: There was not much waste in the kilns which witness bought. 500 or 600 were reckoned to be spoilt in a kiln of 20,000 bricks.

Mrs. Louisa Sophia Scholtz, defendant's wife, deposed that Salie came to their house one day in March and defendant told him he would run short with the bricks, and if he did he (defendant) would buy bricks on his account. Witness read over the contract and explained it. Salie in reply said he would try his best, but if prevented by unfavourable weather defendant would have to go and buy for himself. On another occasion defendant spoke to Salie about making more bricks. Witness knew of the kiln which had fallen down. A number of bricks were still lying there.

Henry Lahen, who described himself as a cultivator, stated that his ground adjoined defendant's. Witness had seen the kiln which collapsed. A number of bricks were still there.

After argument,

Buchanan, J., said: The plaintiff and the defendant entered into a written contract for the supply by plaintiff to defendant of 200,000 bricks at 17s. per 1,000. These bricks were to be paid for, according to the contract, from time to time, and on account of the work done the plaintiff has received £97 odd. The plaintiff says he delivered 180,000 bricks, while defendant, on the contrary, says that he only received 165,000 bricks, and this is the first question at issue. The evidence of the defendant's builder, Mr. Bartlett, who measured the ten kilns which it is common cause were made by plaintiff, is to the effect that the ten kilns contained nearly 207,000 bricks, but an allowance to the extent of 6,000 or 7,000 bricks had to be made for refuse. It has been shown that all the sound bricks in these kilns were delivered. The defendant himself admits in his evidence that that was so, but he says that from one kiln he only received 10,000 bricks and from another only 5,000 bricks. These two kilns were each supposed to contain 15,000 bricks. Taking the actual measurement of the kilns, that leaves no less than 27,000 bricks to be deducted for the bricks spoilt in these kilns, and yet leaves the number 180,000 alleged by plaintiff. From the whole of the evidence, and especially from the evidence of the builder, I am convinced that fully 180,000 bricks were delivered by the plaintiff to the defendant. The amount due for that number amounts to £153; but as I said before, he has received an amount of £97 3s. 4d., leaving a balance of £55 16s. 8d. It is clear that there were 20,000 bricks short on the original contract; and it is common cause that the plaintiff agreed that the defendant should buy those elsewhere and charge plaintiff with the difference in cost. The next question between the parties was as to the cost. Salie, the plaintiff, swears that the bricks were to be purchased for 25s. per thousand, while the defendant gave 30s. and 32s. So far there was a breach of contract on the part of the plaintiff in only supplying 180,000 bricks instead of 200,000, and I am inclined to give defendant the full amount he gave over the contract price for those bricks, viz., £15. There was a further clause in the contract, that should the defendant require more bricks than the 200,000, the plaintiff should supply them of the same quality and at the same price, and on this clause the defendant bases his claim in re-



convention for £113, being the difference between the contract price and the purchase price of nearly 117,000 additional bricks. Before this clause could be put into force there must be a demand for the making of those bricks, and a refusal on plaintiff's part to supply them. There are the two versions given of what took place, that of the plaintiff and that of the defendant, as to defendant's coming to the building with Mr. Lucke, the architect, and saying more bricks would be required. Mr. Lucke has not been called to corroborate defendant's evidence, and in the absence of any specific order for the making of more than 200,000 bricks, I am inclined to hold that the plaintiff's version of what took place is the correct one. I think the conversation which took place fully accounts for the reason why more bricks were not made. The defendant came to the plaintiff and required more bricks, and said that as he could not get them from plaintiff, but elsewhere, he should do so, and if the plaintiff would pay the difference on the 20,000 bricks the defendant would conclude the contract. Taking this view, and deducting the £15 charged extra for those 20,000 bricks, there remains a balance of £40 16s. 8d. still due to plaintiff. This disposes altogether of the claim in reconvention. This is our conclusion on the facts proved and I am glad to say that it falls in with the equity of the case, because otherwise the man would for his 180,000 bricks only get some £20. Judgment will therefore be for the plaintiff for £40 16s. 8d. and costs. Plaintiff's expenses as witness will also be allowed. This is a case that could well have been tried in the Magistrate's Court, but it was by defendant's action that it was removed from there to the Supreme Court.

Masendorp, J., concurred.

[Plaintiff's Attorney, C. W. Herold;  
Defendant's Attorneys, Messrs. Walker & Jacobsen.]

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN  
and the Hon. Mr. Justice MASENDORP.]

GARTON V. GARTON. { 1899.  
Dec. 6th.

Sir Henry Juta, Q.C., applied for leave to amend one of the paragraphs in the plaintiff's declaration. The action was for divorce and the paragraph in question contained allegations against the defendant of misconduct at Bulawayo, and it was sought to add to this an allegation of misconduct with one Taylor at Sea Point. It was stated that since the pleadings were closed, according to the affidavit of Mrs. Garton, the plaintiff, she had obtained information to show that he had misconducted himself with one Taylor. The defendant had also applied to amend his plea and claim in reconvention. He alleged that the plaintiff had committed misconduct at Caledon, but he withdrew that and asked leave to insert Gordon's Bay and Fish Hoek.

The defendant did not appear to oppose, and the Court made an order for the amendment of the declaration accordingly.

At a later stage, Mr. Molteno said that it was owing to a misunderstanding on the part of defendant's attorneys, who thought the application would be made later on, that the application had not been opposed.

The Court intimated that if it was then shown that the defendant would be prejudiced in his defence by the amendment, it would not be allowed.

WEGNER V. TWINE AND TWINE. { 1899.  
Dec. 6th.  
" 7th.

Building contract—Architect—Contractor.

This was an action for damages arising out of a contract for the building of certain cottages.

The plaintiff's declaration was as follows :

1. The plaintiff is Carl Willem Heinrich Wegner, of Zonnebloem; the first-named defendant is William Twine, sen., a builder, and the second-named defendant is William Twine, jun., an architect, and the defendants reside at Woodstock.

2. On October 29, 1898, the plaintiff entered into a contract with the first-named defendant, whereunder he undertook to erect five

cottages for the plaintiff, in accordance with certain plans and specifications and general drawings, for the sum of £1,360 sterling; the second-named defendant agreed with the plaintiff to prepare, and did prepare, the necessary plans, drawings, and specifications for the said buildings, and to supervise the said building works until the completion of the same, and the plaintiff agreed to pay him remuneration therefor at a tariff to be agreed upon.

3. It was provided in the said contract that the above sum should be paid by plaintiff on condition that the said work was carried out in accordance with the plans and specifications prepared as aforesaid, and to the satisfaction of the second-named defendant, and on certain other written conditions to which the plaintiff craves leave to refer at the trial; payment to be made according to the certificate of the second-named defendant or architect.

4. The first-named defendant thereafter proceeded to erect the said buildings, but did not do so in accordance with the plans and specifications. In particular, the foundations were not laid in accordance with the specifications, nor were they sufficient; the walls were so badly constructed that several of them shortly after the buildings were completed cracked seriously and began to give way: some of the steps also commenced to subside; the yard wall gave way; the roofs leaked, and the archways in the inside passages cracked. There were also other serious faults and deficiencies not necessary now to particularise.

5. The second-named defendant acted fraudulently and in collusion with the first-named defendant, or with gross negligence and in breach of his duty from time to time during the progress of the work granted certificates that the first-named defendant was entitled to receive payment of the sums due under the contract, although the value and quality of the work done did not entitle him, and the plaintiff has paid the full amount due to the first-named defendant under the contract, and in addition the sum of £133, and has also paid to the second-named defendant the remuneration agreed upon.

6. Thereafter the plaintiff discovered that the said cottages had not been completed according to the plans and specifications or in a proper or workmanlike manner, but that the same were in a defective, unstable, and dangerous condition on account of the bad and negligent workmanship of the first-

named defendant and his servants, and bad and defective material used in the construction thereof, and the plaintiff was warned by the municipal authorities that the same was dangerous, and unfit for habitation, and in consequence of the above the tenants placed in the said cottages by the plaintiff were compelled to leave the same.

7. When the plaintiff discovered the condition of the said buildings as aforesaid, he notified the same to the defendants and called upon them to have the said buildings placed in a due proper and safe condition, and to have the work completed according to contract. The defendants failed to comply with the above request, whereupon the plaintiff called for tenders for doing the necessary work, and has expended thereabout the sum of £320.

8. In consequence of the above wrongful conduct of the defendants, the said buildings have remained unoccupied for a considerable period, and plaintiff has lost the rent which he would otherwise have obtained therefrom, and has sustained damage in all amounting to the sum of £600.

9. All things have happened, all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to recover from the defendants the sum of £600 damages, but the defendants have refused to pay the said sum or any portion thereof.

The plaintiff claims: (a) the sum of £600 damages from the defendants jointly and severally, the one paying the other to be absolved; (b) alternative relief; (c) costs of suit.

The defendants' plea, which was a joint one, was as follows:

1. The defendants admit paragraphs 1, 2, 3, 4, save that as to paragraphs 2 and 4 they deny that there were any general drawings other than the plans agreed upon and filed with the Municipality, and that there were any other written conditions than those contained in the said contract.

2. The first-named defendant says that the final certificate was granted by the architect on March 10, 1899, and that by clause 9 of the conditions faults arising from improper or defective workmanship or materials two months after completion shall not be made good by the contractor; that delivery of the said cottages was made to the plaintiff, who took possession thereof in the month of March, and no such faults appeared two

months after the completion of the cottages, nor were any complaints thereof made within the said period.

3. They deny specifically the allegations in paragraph 5, save that they admit that they received the amounts due to them.

4. They deny paragraphs 7, 8, 9, save that they say that about six months after delivery of the cottages had been made to the plaintiff and the latter had possession thereof, the plaintiff made a verbal complaint of some of the matters now complained of.

5. They deny paragraphs 4 and 6; they say that the cottages were completed according to the plans and specifications, except where alterations were made therein at the special instance and request of the plaintiff, and were so completed in a proper and workmanlike manner; they deny that there was bad or negligent workmanship, and that bad and defective material was used, and that the cottages were in a defective, unstable, and dangerous condition. They say that if any of the matters complained of, such as cracking, subsidence, leaking, have happened to the cottages since the plaintiff took delivery and possession, it was owing to and through circumstances over which they had no control, and not through any fault or neglect in carrying out their contract.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

Mr. Searle, Q.C. (with whom was Mr. Benjamin), appeared for the plaintiff.

Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the defendants.

Carl Willem Heinrich Wegner, the plaintiff, at present farming at Zonnebloem, deposed that in October, 1898, he approached Mr. Twine, the architect requesting him to make plans and specifications for certain cottages on the Walmer Estate, Woodstock. This was done, and the architect called for tenders, that of the father of the architect being accepted by witness, who knew Mr. Twine, sen., before. The contract price was £1,360. The contract was signed on October 29, 1898, and the buildings commenced in Nov., 1898, and were completed about the middle of March last. The total amount paid by witness to the contractor was £1,493 9s., but a sum of £22 10s. had to be deducted as commission for raising a bond upon the property to pay a portion of the instalments, so that witness had only paid the

first defendant £119 19s. more than the contract price. Witness had also paid £68 to the architect as his commission. Witness made one payment of £100 on February 23. He paid that to Mr. Silberbauer upon receiving a demand, and had received no receipt for it. He paid the whole amount of the final instalment afterwards, and did not keep back £30 for two months, as he could have done under the contract. He paid the whole amount then because they puzzled him and sent him a lawyer's letter saying that if he did not pay the whole amount they would take him into court. That last payment was on a promissory note dated March 11, and payable in four days. Witness paid on March 17. Witness had never received any account of any extras, and the only thing pointed out to him as extras were the iron railings round the stoep. The architect pointed them out to him. Witness had not read the contract carefully, and did not know that the railings were included in it. The only alteration witness made in the contract was an agreement to leave out a fire-place, chimney, and grate in each of the houses on the understanding that the cost should be deducted from the contract price. Witness had asked both defendants what the extra charges were for, and they said it was for extra work. The buildings would be completed about March 11. On May 3 witness went to the architect's office, and then with him went to the cottages, where witness pointed out that the gable on the northern side of No. 1 cottage was cracked, and he also pointed out cracks on the stoep of the same cottage. He also pointed out cracks on the gable of No. 5, and cracks on all the arches inside the cottages, as well as all the cracks round the houses, there being cracks round every cottage. By that time there had also been leakages through the galvanised iron roofs. The architect said he would rectify matters, but he did not do so, and in August witness called in another architect. On August 3 witness again went to the architect's office, and received from him a note to give to Mr. Twine, sen. This note made arrangements for the two defendants to meet at the cottages and see what could be done. The father did not come, but the architect did, and there was another architect, Mr. Matchem, there. Mr. Twine, jun., said he had seen worse gables, and said that witness must buy timber and shore the place up, and then see what he could do. Witness said he could not, as he had not the money, and Mr. Twine, jun., then gave him

a note to his brother, saying that he must come and shore up the cottage immediately, as the place was not safe for another hour. Witness's tenant had to leave the cottage (No. 1) because on August 7 it was condemned by the Municipality. On August 12 the gable was shored up, but on August 16 a part of it gave way. Witness then consulted his attorneys, and the builder was called upon to put the house in proper order. In answer, the builder repudiated all liability. Afterwards witness called for tenders for the work, and the tender of Messrs. Bond & Bee for £320 was accepted. The work was done in October and was now completed and paid for. The cottage, the rent of which was £2 15s. per month, was vacant for four months, having been let again on December 1 last.

Cross-examined: When witness was about to build the houses he received four tenders. One was from a man named Storm, but witness did not close with him, as his tender was too high. (Witness was shown the tender, which was lower than Twine's.) Twine did not send in a written tender. Witness remembered going to the architect's office with Storm, and saying that they could not agree. Mr. Twine, sen., was there, but witness did not ask him to do the work. Mr. Twine, jun., asked witness to give it to his father, and the latter agreed to do the work for £1,360. The contract was not then drawn up. Except the £150 in the first instance witness had never paid anything directly to the builder, Mr. Myburgh and Mr. Silberbauer having paid the money. About the end of February, at witness's request, Mr. Parker's men examined the cottages. Four of the cottages were completed at the end of January, and tenants went into them at the beginning of February. The other two houses were completed in March and occupied in April. The houses were occupied by coloured people. Witness did not tell a Mr. Gall that No. 5 was not examined because it was in fair order.

David Matchem, a civil engineer, architect, and surveyor, deposed that in August, 1898, he was at the cottages, and made an examination of them. Mr. Twine, jun., and plaintiff were there at the time. Witness detailed the defects in the houses, the cracks, leaking, &c. Shortly afterwards cottage No. 1 was condemned, witness having informed the Municipal Building Inspector, because he considered the house dangerous. Afterwards part of the gable gave way. Out of 14,000 or 15,000

bricks in the gable there were only about 4,000 whole bricks, the rest being what were known as "bats." Some of these bricks were so soft a pencil could be pushed through them. Witness proceeded to give technical details as to the divergencies between the specifications and the work actually done, and also with regard to the work necessary to put the houses in proper order. The latter work was done under witness's supervision, and nothing was done but what was necessary. There were four tenders, one £7 below that of Messrs. Bond & Bee, one for the same amount, and the other two for more. Had there been proper inspection the condition of things witness saw could not have happened.

Cross-examined: The tenders witness called for were not to make good the house according to the original specifications but according to witness's. He had not been apprenticed to an architect, but he had been ten years in the Imperial service employed on Ordnance Survey. He was not a Government land surveyor. He had practised here for about three years as an architect, but had not been very successful, his estate having been compulsorily sequestrated.

William Thomas Olive, an engineer, surveyor, and architect, practising in Cape Town stated that he made an examination of the cottages on August 7. He only made a cursory examination. He found there were dilapidations, which ought not to have been there. The building ought not to have been passed by the architect. He had never found a building five months after completion in such a condition. There were cracks all over, caused by a settlement of the foundations. The gable wall and arch inside No. 1 were really dangerous, and witness recommended that the gable wall should come down. He detailed the other leading defects in the cottages. No architect exercising proper supervision would have passed such work.

Cross-examined: The natural fall of the water from the mountain would fall into the backyards of these houses. The walls would be very much affected if built of clay mortar. The wall which fell in cottage No. 1 would be very much affected. Witness thought most of the cracks were due to subsidence of the foundations. Witness did not build that sort of house himself.

Buchanan, J.: Taking into consideration the heavy rains in July and August and the

subsidence of the soil, you would still say that these houses should not have been passed?

Witness: The difficulty is that I only saw the houses in August, and they were built in March.

From what you saw in August, would you say that the houses should not have been passed in March?—I cannot say. They might have been much better in March.

George Bee, a partner in the firm of Bond & Bee, builders, Woodstock, deposed that on August 10 last year he inspected the cottages in question. Cottage No. 1 was in a very bad state, and the wall bulged out about 10 inches in the centre. The key was falling out of the semi-arch in the passage. He saw the foundations, and the stones appeared to cant over. The chimney breast was not tied to the main walls. He also deposed as to the faulty condition of the other houses. Witness at plaintiff's request sent men to shore up the gable wall of No. 1. Subsequently half the wall fell in. Witness tendered upon Mr. Matchem's specifications. In one of the gables, that of No. 3, witness put in anchors, although they were not in the specifications, because he could see that the wall bulged out. Proceeding, witness gave details as to the manner in which the house had been constructed, and also as to the work he had done to rectify matters. He had had twenty-nine years' experience as a practical bricklayer, and he had never before seen such bad work. The difference in the value of the work accordingly as seconds bricks or red hards were used, that was including bricks and labour, was £12s. per thousand, and he used about 14,000 bricks in the work. The lime, water, &c., would make a difference of about £15. The difference in the proportions of cement and sand would be £5. Witness thought that all the work done was necessary for the safety of the building.

Cross-examined: Witness did not agree with Mr. Olive's idea that the cracks were caused by subsidence. Witness attributed the cracks to bad workmanship. He had seen the foundations of the wall, and he saw no subsidence. He had built houses in Aberdeen-street at the same time in August, and the gables there had to be shored up, but that was owing to two pipes in the street stopping the water which rushed in upon them—an unforeseen occurrence—and had nothing to do with

bad workmanship. The gables did not fall and were still standing. The flood was severe.

Re-examined: There was a trench at plaintiff's place which carried away all the water, so that the water had nothing to do with the condition of the houses.

William Henry Bond, partner of the last witness, corroborated his evidence as to the condition of the property and the work which his firm had to do. Witness had had twenty-six years' experience in the building trade, and had never seen such work before. So far as he could see the damage to the walls could not have been due to water, but he had not seen any provision for carrying off the water.

Cross-examined: Witness had built one house for Mr. Twine, jun. It was a large house on the main road, Woodstock, costing over £1,000. He could not say whether or not the cracks were due to subsidences. Witness had built the same class of house, and he would like to build five for the same price as Mr. Twine got. He had built four of a little better class for £1,000.

This closed the case for the plaintiff.

For the defence,

William Twine, sen., one of the defendants, said he was a builder and contractor, and had carried on business for thirty years, ten years in Cape Town. He had built a great many houses and had never before had a dispute. Witness did not tender for Wegner's cottages until after others had tendered. The way witness came to do so was that one day he was at his son's office and heard his son, plaintiff, and Storm talking about the job. That was the first witness heard about the job. Mr. Armstrong introduced plaintiff to witness, and the former afterwards asked him for a price. Witness said he was not very busy at the time and he would undertake the job for £1,360. Plaintiff wanted it done cheaper, but witness would make no reduction. Ultimately the contract was signed. The houses were not built according to the plan, plaintiff having said he wanted the houses set back from the front. Witness accordingly shifted the houses back, and that caused more excavation and foundation work, owing to the ground sloping. There was also some alteration with regard to the passage. When the foundations were completed, towards the end of November, 1898, witness sent for Mr. Healey, the Municipal

Inspector, to come and see them; but witness could not say whether he came. Witness believed Mr. Healey died in December last. According to the specifications, witness had to build with seconds bricks. That was not a particularly good class of brick. When all the houses were finished witness sent for the Building Inspector and he came and examined them; but witness had no complaints about the houses, either then or before their completion. After the houses were completed, witness, on notice from the architect, attended to a tank which was leaking and damaging a wall, and also to a roof which was leaking. Until August 7, two days before he was leaving for England, he had no further complaint with regard to the house. He had great difficulty in getting his money, and he had not received more than the contract price, £1,360. He had to the best of his ability carried out the work according to the specifications. In his opinion the foundations were bonded.

Witness was then examined at length as to all the work which had been challenged in this case, and contended that the work had been properly done. There were only two inspection chambers instead of three as on the plan, because there was no room for the third. It was at plaintiff's wish that shelves were put in the houses instead of cupboards. As to the sinks in the kitchens, plaintiff always understood there were to be no sinks, because he wanted the water laid on in the yard. There was heavy weather in July and two storms in August, and naturally after the rain got into the walls the clay became soft and was washed out. Witness had made no money out of this contract, and would be sorry to take another job like it.

Cross-examined: Witness would swear he did not receive £10 from plaintiff on February 23. He did not know if Mr. Silberbauer received it from him. Whatever damage was done to the houses was done through the floods. He was not surprised to hear these houses had gone after the heavy rains they had had. He considered that after the two floods they had on August 2 and August 6, it was a wonder the houses were not washed away altogether. No other houses witness had built had fallen, but some of those built by other people had.

William Twine, jun., an architect, stated that he was a defendant in the case. He had had considerable practice, and had never

before had any complaint. He corroborated as to the manner in which his father came to undertake the contract, and also as to the building being set back nearer the boundary at plaintiff's request. During the building witness visited the place occasionally, and Mr. Austin, his clerk of works, visited the place every day. Witness never signed certificates for extra work, and had never told plaintiff that certain things would be extras. He had never seen any building inspector at the place, but it was the contractor, and not witness, who had to deal with the building inspector. Witness had a note in his diary to the effect that on February 7 the plaintiff expressed to him his complete satisfaction with the manner in which the work was being proceeded with. There had been complaints within two months after the building was completed as to the tank in the yard leaking, and also as to the roof leaking. Witness had attended to those, and told the contractor what he would require to be done. Nothing, however, had been said about the wall bulging until August. It was at plaintiff's wish that the shelvings replaced the cupboards, and it was understood that the sinks should not be put in, but that the water should be laid on to the yard. Witness did not see the principals fixed. The contractor acted under his instructions, and did the work to his satisfaction. Witness would swear that there was no collusion between him and the contractor, and no intention to defraud on his (witness's) part. Witness considered that the heavy rains in July and August caused the walls to collapse, the houses being built upon a slope, so that all the water poured down upon them. He had not been guilty of gross negligence, and had applied such skill and knowledge as he had to the work. Witness had given plaintiff notice to come and see the houses before he gave the final certificate. The houses were built quite up to the average of that class of work.

Cross-examined: Witness received £50 from plaintiff to look after the building of the house, but he only received £5, or five guineas, as architect. He had not received altogether £68. He had only certified for £1,360, the contract price, without any extras. Plaintiff did not ask him to go up to the building in May. The only time he had gone to the building was two or three weeks after the building was completed. On that occasion witness saw no cracks. He

only went there with reference to the tank and the leakage. He went round all the buildings and saw no cracks. Witness had seen buildings far worse than those and they were still standing.

James Henry Twine, a son of Mr. Twine, sen., said he was a builder by trade, his particular branch being carpentry. He had been sixteen or seventeen years at the trade, and generally worked under his father. Witness worked at the houses in question. The work was supervised occasionally by Mr. W. Twine, jun., and occasionally by his clerk of works. The timber used in the houses was of the best quality, and supplied by Messrs. Purcell, Yallop, & Everett. The principals in the house were put differently from the specifications, with the object of strengthening the gable by assisting in binding it to the building. It made no difference from a money point of view whether they put the principals in six feet away or nine feet away. Five bundles of hoop iron, containing about 120 feet each, were used in the building. Witness had seen plaintiff at the building with other parties, and as far as he could see, on one occasion they went round the building. The joists were not more than an inch or an inch and a half different from the Municipal regulations. After the house was finished there was a complaint with regard to the roof, and witness sent a carpenter to attend to it. After that he received no further complaint. Witness received his instructions from the architect and from the proprietor. The latter used to be there four or five times a week, having a stable in the neighbourhood. The houses were situated on a slope, and the water would naturally run towards them. The water would naturally fall towards the backyards of cottages 1, 2, and 3.

Cross-examined: It was not true that the joists were in some cases four feet, five feet, and 2½ feet apart, instead of 1½ feet, as provided by the Municipal regulations. Witness had recently seen a small slit in the clay for carrying off the water. There were heavy rains, but he would not have expected the building to fall in. The natural soil there was a black pot clay, of a slimy nature when wet.

By the Court: The gable wall and the main building were carried up as one wall, and naturally there would be a bond. The gables were properly tied to the main building.

George Austin stated that he served his apprenticeship as an architect in London,

and passed as an architect. He had had many years' experience as such. He was employed in Mr. Twine, jun.'s office, and as clerk of the works he visited these buildings every day. He did not often see plaintiff there. During the time he was clerk of the works he did not have many complaints. Witness had only to speak to the builder on small matters such as cropped up on any job, and the matters were rectified. The bricks used were ordinary seconds according to the specifications, and they were well laid. All the work was carried out as work of that class was usually done. There were never any instructions to witness that the work should be scamped so that the builder might make money. He would have been insulted if anything of the sort had been mentioned to him. The principals and joists were properly put in, although there might be a little difference from the specifications. After further evidence as to the building and material used, witness said he considered that the excessive wet weather was the cause of the wall collapsing, &c. Some of the houses were occupied in February, and witness had heard no complaints.

Cross-examined: It was generally understood that there were to be three principals in each house, and the reason they were not six feet apart was that one was put so as to strengthen the gable wall. Witness had been at the place after rain, and the water was soaking all round the back of the premises. Witness did not think £1,360 a good price, and would not care to take the work on at the same price.

William Stewart Armstrong said he was a clerk to Mr. Twine, jun., and in October last introduced Mr. Twine, sen., to Mr. Wegner.

Mr. Searle: The first defendant can only be made liable if he acted fraudulently and in collusion with the architect, or if damage resulted within two months after the completion of the building under section 9 of the agreement. As to the fraud and collusion, there is the very peculiar circumstance of a son being architect and his father the contractor. It is alleged that the work was done strictly according to specifications and plans but the evidence shows otherwise. It shows that the work was not properly done and not properly looked after. As to section 9 of the agreement, see *Hudson on Building Contracts* (Vol. I, p. 58).

The second defendant is liable if the first is absolved. If an architect in neglect of

his duty does not use due care in supervising he is liable. *Spondes peritiam artis Hudson on Building Contracts* (p. 329).

Sir H. Juta, as to the liability of the second defendant: It is not sufficient to prove small negligence: the negligence must be gross. No damage has resulted from the principals being placed in wrong position even if they were so placed. No fault was found by the plaintiff before August. An architect cannot be expected to be at the building all day, and to hold him guilty of negligence it must be shown that things which were badly done or omitted were so done with his knowledge. The collapse of the house may have been due to a bad design but the architect cannot be found negligent on that ground. But another cause for the collapse is found in the heavy rain and floods.

Mr. Searle: There was an implied warranty that the building should stand and the defendants should show sufficient reason why it did not. If the design was bad they should have been more careful in seeing that the walls were built with strength.

Buchanan, J., said: The plaintiff in this case entered into a contract with the elder defendant, Mr. Twine, sen., for the erection of certain cottages for the sum of £1,360. This contract was entered into in October, 1898, the work was commenced shortly afterwards, and three of the cottages were finished and delivered in January, 1899, and the other cottages towards the end of February or beginning of March. Thereafter, on March 10, the architect, who is the second defendant, wrote to the plaintiff stating that he had made a final inspection and found everything to his satisfaction. The accounts were then sent in, plaintiff took possession of the last of the cottages, and afterwards paid the whole amount. In August following the wall of one of the cottages began to bulge, and rendered it unsafe for residence. Notice was given by the inspector of the municipality, and the wall was shored up for a time but afterwards it was pulled down and repairs effected to the cottages. To make the cottage safe, and to remedy other defects then discovered, it was found necessary to expend the sum of £320, and for this sum the plaintiff now sues the defendants. The grounds upon which the plaintiff now seeks to recover this amount of £320 is, first, that there was fraudulent collusion between the two defendants, and secondly a liability

under section 9 of the contract, which says that all faults arising from improper or defective workmanship or material within two months after completion should be made good by the contractor, and in case of default the proprietor may recover from the builder. It is alleged by the plaintiff that he discovered these faults within two months after the completion of the cottages. It is common cause that certain complaints with regard to the water-tank and the leakage of the roof were made within the two months after completion, but these complaints were remedied. With regard to the other complaints, although the parties were at that time already at arm's length and letters had passed between attorneys, there was no mention of the complaints which now form the grounds of this action. I concur in the statement of law made by Mr. Searle that if these defects had occurred within two months after the completion of the building the fact that they were not remedied within the two months would not bar the plaintiff from recovering. It has, however, been proved that during July and August last excessively heavy rains fell in Table Valley, and that these cottages were on a slope, with extensive excavations at the back, and that the water came rushing down upon this wall, and it is alleged that these defects complained of might have arisen not from improper or defective workmanship, but from the heavy rains. Fraudulent collusion between the parties has been based mainly upon the fact that the two defendants stand in the relationship of father and son. The son, the architect, was employed by the plaintiff to draw up certain plans and specifications, and upon these tenders were called for. The other defendant, however, did not at first tender upon these plans and specifications, but afterwards did so at the instance of plaintiff himself, who had been introduced to him by Mr. Armstrong. The plaintiff was therefore fully aware of the relationship of father and son between the parties; he had employed the son as architect, and he had himself induced the second defendant to become the contractor. Therefore the mere fact of the relationship cannot be relied upon as evidence of fraudulent collusion between the parties. During the course of the work the architect and his clerk of works visited the work, and the son says that the work done was average work and that the materials were of a fairly good average. I must say there has been an amount of slovenliness on the part of the



builder and a certain amount of scamping of the work, and that there has also been an amount of carelessness on the part of the clerk of works in passing some things. These things were also passed by the architect in a slovenly, careless manner, but the great difficulty in this case is that these are not the faults complained of in this action. What is complained of is this wall coming down through alleged negligence in the foundation, and the bad material used in the wall. With regard to the foundations we have conflicting evidence. Mr. Twine's clerk says that he himself saw the foundations, and that they were properly built, while Mr. Bee and the others who made the alterations say that the foundations were not properly built. But here again section 9 of the agreement, as to the faults appearing within two months, comes in. As to the quality of the bricks, it is proved that the bricks were what is known as seconds, that is the bricks remaining in a kiln left after taking away the blue hards and red hards, that is, all the rest of the bricks. These cottages were to be built of second-class material and built in a cheap way, but still the workmanship ought to have been good, and if with better workmanship no section of the gable wall would have fallen, the defendant would be liable. However, taking into consideration the fact of the time the house was finished and the time the defects showed themselves, and the fact of the heavy and excessive rains in July and August, I think the plaintiff has not discharged the onus which lay upon him of proving that the damage done arose from the negligence of the defendants. There are sufficient grounds for holding that the specified damage resulted from the unusual rains of last season, and under these circumstances I am of opinion that the plaintiff has failed to prove his case. Judgment will be for the defendants with costs.

Masendorp, J. concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs. Silberbauer, Wahl & Fuller.]

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

GARTON V. GARTON. { 1899.  
Dec. 7th.  
" 13th.

Divorce - Venereal disease.

*Where the defendant had been suffering from venereal disease, contracted since his marriage to the defendant, and did not offer any evidence to show how he had contracted it,*

*The Court granted a decree of divorce.*

This was an action for divorce brought by the wife against the husband on the ground of his adultery. There was an alternative prayer for judicial separation on the ground of ill-treatment, intemperance, and the fact that defendant had been suffering at various times from venereal disease. The defendant denied the adultery, and put in a claim in reconvention for divorce on the ground of the plaintiff's adultery with one Richardson at Fish Hoek, Gordon's Bay.

Sir Henry Juta, Q.C. (with whom was Mr. Close), for the plaintiff.

Mr. Graham, Q.C. (with whom was Mr. Molteno), for the defendant.

An application was made on behalf of the plaintiff to amend the declaration to the effect that defendant had further committed adultery with one Taylor. It appeared from affidavits read that Tay or was now in England, and defendant stated that he would be prejudiced in his trial if the amendment was allowed.

The amendment was not allowed.

The plaintiff deposed that she was married in community of property to the defendant on June 7, 1890. They then had a small business in Adderley-street, which they carried on for some time. About a year after marriage she decided to take in boarders, and the Adderley-street business was liquidated. Subsequently witness leased shops in Adderley-street, and carried on business in her own name. Her husband never interfered with her business. There were two shops, and she subsequently sub-let them, as she could make a better thing out of it.

Witness then took over the management of Messrs. Duncan & Co.'s millinery business. Her husband started business in the Cigar Box in Adderley-street, but lost over £300 in it, and witness had had to pay a large amount on his behalf, all out of her own earnings. During the time her husband had the Cigar Box, witness carried on the boarding-house. Her husband drew £15 per month from his business, and, after paying for his clothing and personal expenses, he handed a small balance to her. She gradually increased her boarding-house business, and in 1895 took Weston Villa, Sea Point. The lease was in defendant's name, but witness always paid all the rent, and transacted all business. She had not had a farthing from defendant since 1895. She had now three boarding-houses, in addition to twelve rooms. Everything had been done out of money she earned herself. She had now 107 boarders. She spoke to defendant about his doing nothing while she was working hard, and in 1896 he went to Bulawayo, witness giving him £65 and an outfit, while from time to time she sent him money. He returned from Bulawayo on a visit, and remained here for about two months, during which time she supported him. She spoke to him about contributing towards the house. He refused, and she then said the least he could do was to return £50 she had lent him, in addition to the £65. He agreed, and eventually sent her £45 after he had returned to Bulawayo. Subsequently he came back to Cape Town. He was then destitute, had very little clothes, and complained that he was not in good health. At first he said he had come to manage Weston House, but witness said she had managed so long, and she absolutely declined to allow him to manage the boarding-house, which would simply have meant that he would do nothing. Ultimately defendant accepted a situation at £10 per month, and an arrangement was made by which he should help as far as he could in putting away money from his salary to go towards buying Weston House, but he contributed nothing. Defendant was still living at Weston House, and absolutely refused to leave. Since the time defendant had returned from Bulawayo they had had a most unhappy time, and since he had had to go out to a situation he was making it as unpleasant as possible for her. On several occasions defendant had used foul and abusive language towards her, and especially in connection with his sus-

picious regarding her and a Mr. Agg. Defendant could take about sixteen or seventeen glasses of whiskey and not show it. He had stated that himself. Witness had paid his whiskey bills for him. In consequence of the appearance of some of the underclothing belonging to her husband she sent it to Dr. Elliott and then to Dr. Marloth for examination. In consequence of her investigations into his conduct witness instructed her attorney to proceed against her husband. It was impossible for witness to live with defendant again.

Cross-examined: Witness had never been at Fishhook or Gordon's Bay with one Richardson. She went along with Richardson and several ladies and gentlemen on a bicycle ride to Somerset Strand on May 7 or 8, but she had never been with Richardson alone. She did not press defendant to go to Bulawayo. She did not tell him to do that rather than take a situation at £10 per month. She told him to take £5 per month if he could get it. Before he went to Bulawayo defendant did manage the boarding-house. He used to stay in bed until noon, and then get up just before witness came in from business and begin to boss the servants.

Dr. Rudolf Marloth, Ph.D., analytical chemist and bacteriologist, said he had analysed certain stains on the underclothing sent to him on the 26th May and 9th June. There were dark stains produced by nitrate of silver upon the first lot of linen sent, on the second lot he found in the stains the characteristic microbes of gonorrhoea. He had no doubt about the germs. It could not have been in an acute form.

Dr. Charles Elliott, a medical practitioner in Cape Town, said the underclothing had been brought to him and he advised an examination by Dr. Marloth; the articles were sent to Dr. Marloth. Subsequently on June 27 defendant came to him for examination. At that time there were no signs of gonorrhoea. Defendant said he had suffered from a certain parasite. Witness had never heard of nitrate of silver being used for the parasite. Mercurial ointment was the usual thing.

Cross-examined: There was no evidence one way or the other whether defendant had had the disease. There was nothing to indicate disease before or shortly before. It was possible he might have had disease a few days before.

Mrs. Laura Dunn, a sister to Mrs. Garton, deposed that she had lived at the boarding-

house, Weston House, for some time, and during the period at which Mrs. Garton carried on the millinery business witness managed the boarding-house. Defendant did not contribute to the support of the house. Witness corroborated the plaintiff's evidence as to the underclothing which was sent to Dr. Marloth. Until witness returned to Weston House at the beginning of this year she had thought that plaintiff and defendant lived happily together, but then she saw that they were not on such very good terms.

Cross-examined : Witness thought at one time that the defendant was a most affectionate husband to her sister, but she did not think so now. She had not seen him ill-treat her sister, but she had seen the latter very unhappy. She certainly did not know that defendant had made a great deal of the furniture in the house. He had made little odds and ends, but nothing to speak about.

William Henry Richardson, living in Cape Town, stated that it was not true that at Gordon's Bay he committed adultery with plaintiff.

Cross-examined : Witness did not commit adultery with plaintiff at Sea Point. Mr. Geddes was witness's friend, but had not gone at his suggestion to Mr. McIntyre. Witness had told him he thought he (witness) would be subpoenaed, and Geddes said he would go to Mr. McIntyre and find out whether or not that was so. Witness did not say to Geddes it was no use his denying that he had misconducted himself with plaintiff, nor did he ask Geddes to ask Mr. McIntyre to leave him out of the case as there were many others. Witness did not now live at the boarding-house. He now lived in the Gardens, and the night before the trial of this case had an interview with plaintiff, who came to see him. He could not remember exactly what was said, but there was nothing of importance. Witness had not told Ross or anybody else what occurred at that interview. He did not know how the defendant's attorney knew all about it. He would swear that Mrs. Garton did not threaten him that evening. Mrs. Garton came alone and told him that the case was coming on on the following day, and that his name would appear in it. He knew very well that if he appeared in court he could not say anything against her. At that time witness had been subpoenaed for the defence. Witness did not tell Geddes that it was no use his denying it, as he was guilty, and that the girl had caught them. Witness had never

admitted, and he could not possibly have said, that he had misconducted himself with plaintiff, because it would not have been true. If he had said so, he must have been out of his mind ; but he had never said so. He had been often in Mrs. Garton's room when he boarded there, but so had other people, because the room was practically an office. He had been in the room alone, but the door was always open. He had been for short walks with plaintiff, and had taken her to the theatre, but that was with the knowledge of her husband. He had taken her to the theatre during the time her husband was at Bulawayo. Witness had never had any row with Mr. Agg about the plaintiff.

Re-examined : Most of plaintiff's business was transacted in her bedroom, and she had a writing-desk there for convenience. People went there if they wanted to settle up at the end of the month.

Mrs. Cornish stated that she was a boarder at Weston Villa this year, and remembered a quarrel between Mr. and Mrs. Garton. It was at the time of the arrival of the Kinfauns Castle. Witness was in plaintiff's room at the time when the defendant rushed in, ordered witness out of the house, and called her very bad names indeed, for which he had to apologise in writing. He asserted that she was bringing a man to the house to see his wife. Witness did not know the man, as he had not been a boarder while witness had been there. Defendant also abused his wife, calling her foul names. Neither witness nor plaintiff gave any provocation. Plaintiff told witness that that was what often took place in her bedroom. Witness said plaintiff should leave the room, but plaintiff said she had done so on former occasions and he had come and lifted her back bodily into the room. Witness had shared the room with plaintiff for three months this year, beginning in September. She was at the boarding-house when defendant went to Bulawayo, and after that shared a room with plaintiff until her marriage.

Cross-examined : Witness's husband was at the front. The row between defendant and plaintiff was on October 17. Witness had on that evening happened to travel by the same tram as Mr. Agg, but she did not recognise him, having only seen him once before, and then only for a few minutes, he having called at her place of business in Johannesburg and handed her a small parcel from Cape Town. On the evening of 17th October witness was with plaintiff in her

room when defendant came in and ordered witness to leave the house, using abusive and insulting language towards her, for which he afterwards had to tender a written apology, which she accepted. On the same occasion defendant used insulting and abusive language towards his wife.

David Gill, the owner of Weston House and Beatrice Villa, occupied by plaintiff and defendant, said that all his transactions with regard to these properties had been through plaintiff, although the lease of Weston House was in defendant's name.

After further evidence the case for the plaintiff was closed.

Mr. Molteno asked for absolution from the instance upon the prayer for divorce. He said that the defendant was quite willing to consent to a judicial separation being ordered.

The Court refused absolution.

Evidence for the defence was then called.

The defendant deposed that before he married the plaintiff they agreed to enter into a joint millinery and drapery establishment in Adderley-street after their marriage. They did so, and after two years they liquidated the business and plaintiff started a millinery business. It was practically witness's money with which she started. He took over the "Cigar Box." They had kept boarders from the time of their marriage. The whole of witness's salary went to the house. Until quite recently he and his wife had been on the very best of terms. After he left the "Cigar Box," and before he went to Bulawayo, witness managed the boarding establishment, his wife being then in business in the establishment of Duncan & Co. Witness was always doing work for the house. He went to Bulawayo in 1895, and returned on a visit for about six weeks in 1897. When he was in Bulawayo he had sent his wife his power-of-attorney owing to their having obtained an appropriation in the Building Society and a renewal of the lease. When witness was in Bulawayo plaintiff wrote to him saying that if he saw anything good she could send him perhaps £50, and he later on wired for that amount, with which he purchased some shares offered to him. He had those shares still. He denied the charges of misconduct brought against him. He came back from Bulawayo about the end of October last year, and started work with Mr. Levin about a fortnight later. Witness paid his

salary into the Savings Bank, and plaintiff put in an equal amount each time. Afterwards the money was taken out and paid over towards the purchase of the boarding-house. With regard to the row on October 17, witness stated that on that night he saw Agg and Mrs. Cornish alight from the tram; Mrs. Cornish walked on and witness followed up Agg. He lost sight of him, but afterwards found him skulking under a bush with his hat over his eyes. Witness cleared him out, and he went without saying a word, although witness spoke strongly to him. Witness then went into the house, and finding his wife and Mrs. Cornish in the room, he ordered the latter to leave the house. He admitted he used strong words to Mrs. Cornish, being annoyed, and he afterwards tendered a written apology, which was accepted. On June 26, after a certain letter witness received through his wife from her attorneys, the plaintiff advised witness to go away and allow her to get a divorce and she would allow him £100 a year for five years. She further said he must go away and not defend the case.

Arthur J. McKenzie Ross stated that he had resided with his wife for a considerable time at Weston House. He was a friend of both plaintiff and defendant, and had never at any time seen the defendant ill-treat the plaintiff. Up to June they always appeared to be on affectionate terms. Witness had never seen Garton the worse for liquor, and did not consider him an intemperate man. He knew Richardson. Richardson and plaintiff were always friendly, but there was nothing beyond that. Witness had a conversation with Richardson at the last day of hearing of this case. Richardson did not say anything about his having misconducted himself with plaintiff.

Charles Ernest Wait said he knew the parties to the suit, having lived for nearly two years at Weston House, up to February, 1899. Defendant was a temperate man, and witness never saw him ill-treat plaintiff.

William Charlton gave evidence of a similar tenour.

After formal evidence by Mr. McIntyre as to letters put in, the case for the defendant was closed.

After argument upon the facts,

Sir Henry Juta: If there is not sufficient evidence for a decree of divorce, but a judicial separation is ordered the plaintiff is entitled to have the property which she has obtained by her earnings. She has been

acting as a public trader. *Wessels v. Wessels* (5 Shiel 42), is not an authority for forfeiture of all benefits upon judicial order for separation. The Court can order the community to cease and make such a distribution of the property as may seem right. The defendant has allowed the plaintiff to act as a public trader.

Mr. Molteno: The Court has never gone furthest than to order a forfeiture of benefits in the case of divorce on the ground of desertion: *Darson v. Darson* (J. 9, p. 446).

Buchanan, J., referred to *Hopkins v. Hopkins*. Where it was held by Lord Stowell that the existence of venereal disease was *prima facie* evidence of adultery.

After further argument,

Buchanan, J., said that in this case the plaintiff sued for a dissolution of the marriage on the ground of adultery, and alternatively for a decree of judicial separation. The circumstances disclosed in this case made it clear that there should at least be a decree of judicial separation. One fact alone was sufficient to justify this. It was that the defendant, in his claim in reconvention, had charged his wife with having committed adultery, and had not attempted to prove the allegation. The charge was that during the years 1887, 1898 and 1899 his wife had committed adultery at Sea Point and at Houw Hoek, Caledon, with William Henry Richardson. No evidence whatever had been led to substantiate this charge, and one would think that if this had been going on for three years in a large boarding-house, where there were many people, some evidence could have been forthcoming if adultery had really been committed. This charge against the wife fell to the ground. After such an unfounded charge the husband could not expect his wife to renew cohabitation. As the counter-charge had not been proved, the Court then came to deal with the charges against the defendant, which were that at Bulawayo he had committed adultery with one Liza or Lizette Pleasant, and also with one Agatha Schmidt. There was no proof that the defendant had actually committed adultery with those persons, but there was the defendant's admission that he and others had been in a bottle store together with a prostitute, who had invited them to her house. Then there was a further allegation that the defendant had been suffering from venereal disease, and that this must have been due to his having committed adultery with some person or persons unknown. Two questions arose in

connection with this charge. First, was the existence of the venereal disease proved? Second, did the existence of that fact taken with the other circumstances justify the Court in finding that adultery had been committed by the defendant? These were questions of fact. Evidence had been led to show the peculiar behaviour of the defendant during the months of May and June, when he was alleged to be suffering from disease, and it had been shown that his shirts, which bore certain marks on them, had been taken to Dr. Elliott, who recognised marks made by nitrate of silver, and that the other stains raised his suspicions. He suggested they should be submitted to analytical tests by Dr. Marloth. One link was missing in the case, and that was the messenger who carried the shirts from Dr. Elliott's to Dr. Marloth. However, it was proved that the stains on the shirts had been seen by the plaintiff and by her sister and Dr. Elliott before they were handed to the messenger, Agg, for conveyance to Dr. Marloth. The shirts were produced in Court, and were identified by the different parties. Dr. Marloth's analytical examination proved that the marks on the shirts were made by nitrate of silver, and that the stains contained the bacilli of a venereal disease. The defendant did not attempt to explain the stains, beyond saying that he had suffered from a parasite and not from venereal disease. On the facts the Court came to the conclusion that defendant was suffering from such a disease. This would not necessarily give ground for a divorce. It at any rate raised a presumption which might have been rebutted, as for instance if it had been proved that such a disease had been contracted anti-maritally or innocently. The medical evidence was that the disease must have been contracted by intercourse with some one; and the doctors' evidence was supported by the medical authorities on the subject to the effect that nitrate of silver was not one of the remedies used for the parasite, from which the defendant said he suffered. The defendant had not shown how he got the venereal disease. The Court, looking at the facts of the case as jurors, and at the length of time the marriage had subsisted, came to the conclusion that the disease had not been contracted before marriage. The evidence led it to the conclusion that the disease had been contracted since the marriage, through illicit intercourse with some person. There was one fact in defendant's

favour, that the doctor found no marks of disease when he examined the defendant. But the medical evidence showed that when the disease was chronic the signs of it frequently disappeared for a time, and then recurred again. The plaintiff had been away at Bulawayo for two years before he returned, and it was probable that the disease had been contracted by him before his return. The fact that the defendant suffered from this disease, coupled with his conduct and the other circumstances proved, was sufficient to justify the Court in holding that there had been adultery on the part of defendant. The plaintiff was entitled to a decree of divorce. The usual decree in such cases of a forfeiture of the benefits arising from the community would also be decreed. As the parties consented to such an arrangement instead of appointing a receiver to divide the joint estate the plaintiff would retain whatever property she had acquired since the marriage, and whatever property would be in defendant's possession he might be allowed to keep. The defendant must pay the costs of the action.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl & Fuller; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

## SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN  
and the Hon. Mr. Justice MAASDORP.]

REID V. PROCTOR. { 1899.  
Dec. 11th.  
" 12th.

This was an action for the recovery of certain money alleged to have been overpaid on a contract.

The declaration set forth that the plaintiff was an architect, residing at Kenilworth, and the defendant was a painter, &c., residing at Observatory-road. In May, 1897, the plaintiff entered into a contract with the defendant, in terms of which the defendant undertook certain works—painting, glazing, &c.—about the premises of plaintiff at Kenilworth. Defendant had received from the plaintiff £250 on account of this

contract for work which was alleged to be in accordance with the schedules of prices and specifications. The plaintiff alleged that thereafter he found that the defendant had wrongfully, falsely, and fraudulently misrepresented the value of the said work, and that he had over-valued the said work so that he had received £50 18s. over and above the amount lawfully due to him in terms of the said contract. Plaintiff had demanded repayment of this sum, which defendant had refused, and therefore plaintiff now prayed for the recovery of the said sum of £58 18s., or alternative relief, with costs of suit.

In his plea defendant stated that he drew up a schedule of prices for the work, which he forwarded to plaintiff on or about May 1, 1897. On May 7, 1897, the plaintiff accepted the offer of the defendant to execute the work at the prices specified in the schedule. Defendant denied that he signed or entered into any contract or specification, or that he agreed to execute the said work in accordance with specification or schedules annexed to any contract, and proceeding, stated that he executed the said work in accordance with the prices in the schedule. He denied any misrepresentation and said that the value of the work performed by him was £300 6s. 1d. and the balance due to him was £50 6s. 1d. In reconvention he claimed £50 6s. 1d., which was due by plaintiff on the said work, and which had not yet been paid.

Plaintiff's replication was general, and he denied defendant's allegations as to there being no contract, &c.

Mr. Graham, Q.C., and Mr. Upington for the plaintiff; Mr. Searle, Q.C., and Mr. Benjamin for the defendant.

Mr. Graham said that it appeared that the parties entered into the contract after the plaintiff had submitted to the defendant certain specifications of the work, general conditions, &c. These the defendant returned to the plaintiff with the prices attached, which were accepted by the plaintiff. There was one clause in the general conditions which provided that in the event of the parties having any dispute as to the work in connection with the contract it should be submitted to the arbitration of a third individual decided upon by both parties. Plaintiff alleged that after the work was completed he endeavoured to compel the defendant to go to arbitration in terms of this clause, and the matter went so far that the defendant was actually served with a notice of motion calling upon him to show cause why an

arbitrator should not be appointed, but the position taken up by the defendant was that he had never signed these general conditions, and he therefore refused to proceed to the appointment of an arbitrator. Afterwards it was actually agreed that the parties should go to arbitration, and a deed of submission to arbitration was drawn up, but at the last moment, for some unknown cause, the defendant declined to go to arbitration, and the first issue before the Court now was as to whether or not these general conditions were a part of the contract, and then the Court, instead of going into all the complicated technical details of the dispute, could order the matter to go to arbitration.

Mr. Searle pointed out that the reason the defendant would not sign the deed of submission to arbitration was that it was founded on the general conditions mentioned, which defendant alleged he had not signed. But for that appearing in the deed of submission, the defendant was perfectly willing to agree to the arbitration.

Mr. Justice Buchanan said there was no application before the Court to compel the defendant to go to arbitration.

An amendment of defendant's plea was allowed. This was an addition to the effect that certain items in the account rendered by defendant as aforesaid had been charged for in the account at a slightly higher rate than in the schedule of prices owing to material of a heavier and better quality than that indicated in the schedule having been used, involving greater labour and more workmanship, and owing further to certain other work having been charged for in the account as to which no prices had been set forth in the schedule.

Mr. Graham said that he had also to formally withdraw the words "falsely and fraudulently" in the plaintiff's declaration, as it was not contended that there had been fraud.

Evidence was then led as to the point whether or not the general conditions referred to formed part of the contract.

Arthur Henry Reid, the plaintiff and an architect, stated that in May, 1897, he was building a house, &c., and prepared a notice calling for tenders for certain work—painting, glazing, &c. The tenders were not published, but he submitted them to defendant. The papers included specifications, general terms, and conditions. He personally handed these papers to defendant, who returned them with the prices

filled in, and accompanied by a letter, saying, "Enclosed find schedules and specifications for painting, &c." The papers—schedule of prices, specifications, and general terms—put in were those witness received from defendant, and he had attached the letter when he received it along with the other papers. When witness received the final account he said he would give defendant a certain £100 in question when the whole matter had been adjusted by a surveyor appointed by him (plaintiff). Defendant did not say anything in reply, and no other payment was made. Efforts were afterwards made to induce the parties to go to arbitration. Witness did actually appoint Mr. McCubbin as surveyor. (Correspondence relating to the work and its progress was put in.) Witness had not, so far as he was aware, authorised defendant to do any work except what was covered by the schedule of prices.

Cross-examined: Witness was not aware of any extra work. Being an interested party he left everything to his surveyor. He had not seen the account which his surveyor prepared. Defendant undoubtedly saw these general terms. Witness knew that Mr. Sherwood had made measurements, but had no recollection of having received those measurements, either before or along with defendant's account. Witness was perfectly certain that defendant had the general terms and conditions along with the schedule. A point was made as to the employment of coloured labour on the work, and a letter was sent by witness saying that that was against the specifications. Defendant then came to witness about the matter, but coloured labour was still employed on the work. Defendant had, however, promised witness that that work would be gone over by white men. What witness wanted in the deed of submission was that defendant should be bound by the general terms.

James Proctor, the defendant, stated that he was a painter at Observatory-road, and had been here for nine years. With regard to the contract in question, plaintiff personally asked witness to give a tender at schedule prices for work proposed to be done in his house. That was in plaintiff's office. Witness went home and afterwards gave plaintiff the prices. In the letter he sent there was nothing enclosed except witness's schedule of prices. Witness now saw those general terms for the first

time. The schedule of prices produced was not that which he had handed to plaintiff. The figures might agree with witness's schedule, but those figures were not in his writing. Witness had verbally received from defendant his instructions as to what he had to tender for. He received no document whatever, and the only document he sent to plaintiff along with the letter was a copy of the rough note of prices he now produced, and which he had made out at the time. Witness had no written instructions whatever. During the course of the work no reference was ever made to these terms and conditions. Witness had personally supplied plaintiff with a complete copy of Mr. Sherwood's measurement. Before finally settling up plaintiff said there were one or two little things he wanted attention paid to, and witness said he was willing to do anything in reason. Plaintiff never at that time raised any objection to the account supplied. Afterwards plaintiff called upon witness to go to arbitration, but witness refused to do so upon the general terms and conditions, as they were not part of the contract and he had never seen them. That was the only reason witness objected to the arbitration, and but for that he was perfectly willing to go to arbitration.

Cross-examined: Witness never saw any specifications. He called his schedule "schedule and specifications." Witness had never before undertaken a job of this nature without specifications, and would never do so again. The detailed account was in witness's handwriting. He never saw the notice calling for tenders.

By the Court: Witness made no reply about the coloured labour, but he told plaintiff verbally that if he had been aware of such conditions he would have had nothing at all to do with the work.

Edmund James Sherwood, a quantity surveyor and valuer, carrying on business in Cape Town, stated that he made measurements of the work in dispute. He delivered them to the defendant about April. In order to make these measurements it was necessary to go over the house, and he saw plaintiff, who gave him every assistance and lent him the plans. Witness first saw these general terms and conditions when he met plaintiff's surveyor, Mr. McCubbin, in August.

This concluded the evidence on the point at issue.

Buchanan, J.: The Court refers the dispute to Mr. Parker under section 21 of the Arbitration Act.

The only question we would like to hear counsel upon is what should be referred to the arbitrator; that is whether the general terms and conditions should be referred to him along with the schedule of prices.

After argument upon this point,

Buchanan, J., said: The only satisfactory thing in this case is the withdrawal of all accusation of fraud on the part of the parties, and really, seeing how little is in dispute, it is surprising that the matter has not been referred to arbitration without coming into court. The Court will refer the whole matter to Mr. John Parker, to find the true state of accounts between the parties. The only question is as to what Mr. Parker should have before him; whether he is to have the so-called specifications, or only the schedule of prices. Looking at the correspondence, and the evidence of Mr. Reid and Mr. Proctor, I am of opinion that Mr. Proctor's memory must be at fault, because in his letter accompanying the documents sent to Mr. Reid he says, "Enclosed find schedules and specifications for painting," while if it had contained the schedule of prices only it would have read to that effect. I think that Mr. Proctor's memory must be at fault after the lapse of two years, and therefore the whole of the documents submitted to the Court to-day, as well as any other evidence which the parties have to produce, will be submitted to Mr. Parker, under section 21 of the Arbitration Act, to go into the whole matter in dispute and report to the Court as to the true state of accounts between the parties. When the report is made the Court will be in a position to give its judgment. I trust there will be as little delay as possible in drawing up this report.

Maasdorp, J., concurred.

*Postea* (December 28).

Upon reading the report of the special referee,

The Court gave judgment for the defendant for £26 7s. 9d., and costs, including the fees of the special referee.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, Messrs. J. and H. Reid & Nephews.]



# SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN  
and the Hon. Mr. Justice MAASDORP.]

## REHABILITATION.

*Ex parte* VAN RENSBURG. } 1899.  
Dec. 12th.

Mr. Buchanan moved for the rehabilitation of the estate of Marthinus Philippus Janse van Rensburg. The papers showed that Van Rensburg had been twice insolvent, his estate having been first surrendered in October, 1880, when the schedules showed liabilities £713, and assets £189. The assets realised £120 10s., and the costs of the administration came to £22, leaving a balance of £98 10s. for distribution among creditors. In his report the trustee stated that the insolvent had carried on large speculations, involving thousands of pounds, in ostriches, cattle, &c. and yet he kept no books and that he had incurred debts without reasonable prospect of satisfying other creditors. Without being rehabilitated Van Rensburg again surrendered his estate in June, 1895. The schedules then showed liabilities £245, and assets £55. The assets realised £21, and the costs of administration amounted to £18, so that there was a balance of £3 only for distribution among creditors whose debts proved amounted to the sum of £16. In this case the trustee again pointed out that no books had been kept, and in conclusion he said it was only right for the creditors that if an application for rehabilitation was made, the granting of such should be delayed as long as possible.

Buchanan, J., said the same complaint was made with regard to both insolvencies. The application would be refused, but leave given to apply again in twelve months.

## *En parte* WERDMULLER.

Mr. Buchanan moved, under section 117 of the Insolvent Ordinance, for the rehabilitation of the estate of Otto George Augustus Kolbe Werdmuller. The Master's certificate had been filed.

Granted.

## PROVISIONAL ROLL.

DEMPERS AND VAN RYNEVELD V. HAYNES.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £600, with interest at the rate of 6 per cent. from July 1, 1899, the bond having become due on notice duly given, and further, that the property specially hypothecated be declared executable.

Granted.

## ESTATE OF SIGIDI V. MATUMBU.

Mr. Buchanan moved for a decree of civil imprisonment against the defendant upon an unsatisfied judgment, in an action heard last September, for the delivery of certain live-stock, or £250, the value thereof. The costs in that case amounted to £237 8s. 5d. A writ of execution was subsequently taken out, but no goods or chattels were found. Defendant had, however, paid £250. Counsel, asked that the Court should suspend the decree of civil imprisonment until January 6, 1900, in accordance with an agreement between the attorneys of the parties, defendant having agreed to pay the amount due by the end of this year.

The Court granted decree as prayed, but suspended execution until January 12, 1900.

## SEYTLER'S ESTATE V. JEREMY.

Mr. Benjamin moved for provisional sentence on three mortgage bonds of £275, £125, and £250 respectively, with interest at the rate of 6 per cent. and applied that the property specially hypothecated be declared executable. The bonds had become due by reason of the non-payment of interest.

Granted.

## MUFF V. FROST.

Mr. Mackenzie moved for provisional sentence for the sum of £50 10s. on a promissory note, with interest due thereon and costs of suit.

Granted.

## MYBURGH V. BUCK.

Mr. Bisset moved for provisional sentence for £1,250, less £8 paid on account, on a mortgage bond, with interest thereon, and also asked that the property specially hypothecated be declared executable.

Granted.

## JOHNSON V. VISSER.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £25, with interest at the rate of 8 per cent. per annum, and also that the property specially hypothecated be declared executable. The bond had become due on notice given.

Granted.

ESTATE OF RICHARD BATE V. V. H.  
HIGHLAND.

Mr. Mackenzie moved for provisional sentence on a mortgage bond for £600, with interest at the rate of 6 per cent., and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Granted.

## ECKSTEIN V. KOCHMAN.

Mr. Buchanan moved for judgment for the sum of £250 on a mortgage bond, with interest from August 16, 1899, and also that the property specially hypothecated be declared executable. The bond had become due on notice given.

The defendant appeared in person and stated that when he purchased the property from the plaintiff he paid £200 down, and it was agreed that the remainder of the money should not become due until next year.

Buchanan, J., pointed out that that was not in the bond. In the bond it was stated that three months' notice should be given of the calling up of the mortgage, and that notice had been duly given. He suggested to the defendant that he should try and raise a fresh mortgage.

The defendant stated that he had tried to do so, but things were so depressed owing to the war that nobody would advance the money.

Ultimately the Court granted the order as prayed, but suspended execution for fourteen days, so that defendant should have an opportunity of raising the money.

## RATHFELDER V. CLASSENS.

Mr. Benjamin moved for provisional sentence for £62 10s., interest due on a certain mortgage bond.

Granted.

## ILLIQUID ROLL.

## JOHN DOE V. COHEN AND PHILIP.

Mr. Buchanan moved, under Rule 329D, for judgment for the sum of £145 4s. 11d., for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Granted.

## LINDENBERG V. MINNAAR.

Mr. Buchanan moved for judgment, under Rule 329D, for the sum of £2 10s., being 1 per cent. commission on a loan of £1,250 raised by him for the defendant on certain property belonging to the latter.

Granted.

## MILNE V. A. ABRAHAMS.

Mr. Molteno moved for judgment for £12 18d., being balance of account for goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Granted.

## RUDOLPH V. KAUMP AND WIENER.

Mr. Gardiner moved, under Rule 319, for judgment for a sum of £49 6s. 3d., less £2 4s. 6d. paid on account, for money advanced with interest *a tempore morae*, and costs of suit.

Granted.

## VOS V. FARMER AND ANOTHER.

Mr. Buchanan moved that the rule *nisi* granted for the sale of a certain life interest be made absolute.

Mr. McGregor appeared for the respondents, and asked that the matter be allowed to stand over. He put in an affidavit which showed that a telegram had been received from Mr. Louw, the agent in the case, in which it was stated that Mrs. Farmer had only received notice of the rule on December 1, and having no beasts of burden, it was impossible for her to go from the farm to the village in time to file an affidavit. It was stated that she had a good and sufficient defence, the life interest in question having already been sold or ceded in 1895 to her stepdaughter. Counsel therefore asked that the case might be allowed to stand over until January 12.

The Court granted the postponement until January 12, and indicated that it would be advisable for respondents' attorneys to give notice of the motion to the stepdaughter in question.

SWINTON (FORMERLY MEYER) } 1899.  
V. MEYER. } Dec. 12th.

Children — Custody — Reasonable access

*Where a decree of divorce had been granted with an order that the plaintiff should have the custody of the minors and that the defendant should have access to them at all reasonable times and places, the defendant subsequently applied for an order that the children should be allowed to visit her at her house twice a week for two hours at a time.*

The Court expressed the opinion that once a month was too infrequent for the visits, whilst twice a week for two hours was too frequent, and suggested that the defendant should be allowed to see the children once a week for two hours at a time at some suitable place.

This was an application by the defendant in an action for divorce heard on the 7th September last, for an order on the plaintiff in that action to allow the children of their marriage to visit her at her house at least twice a week for two hours each time.

The affidavit of the petitioner set forth that the respondent sued the petitioner, who had since married Frederick William Swinton, for divorce, and obtained a decree on September 7 last. Amongst other things the Court had ordered that the petitioner was to have access to the children of the marriage at all reasonable times and places. She alleged however that she had only been allowed to see the children three times since the divorce was granted, and then only after a great deal of trouble, owing to the opposition of the respondent. The petitioner was then living at Muizenberg, but was now at Plumstead, within five minutes' walk of the respondent's house. She stated that she had made application to be allowed to visit the children, but was refused. Petitioner added that the place (Mrs. Casey's house) where the respondent wished her to see the children was not a desirable one, and he only proposed to allow her to see them once a month for an hour.

In an answering affidavit filed by the respondent he stated that ever since the divorce was granted the petitioner had been annoying him by communicating surreptitiously with the children, suborning the servants, and sending the children sweets and cake and other unwholesome food. He stated that the petitioner wished to see the children at her house, but as her present husband was the man who had misconducted himself with her, and was living in the house, he objected. The petitioner stopped the children on their way to school, and in consequence of the disturbance of his domestic arrangements, he was compelled to decline to allow her to see the children for some time.

The petitioner replied to this in a further affidavit, in which she stated that on one specific occasion mentioned by respondent she only stopped the children to kiss them. She also stated her objection to the house at which the petitioner proposed that her meetings with the children should take place.

It appeared that there were three children, of whom the eldest and the youngest were girls. The ages of the children were eleven, eight, and four years respectively.

Mr. Benjamin appeared for the petitioner.

Mr. Currey for the respondent.

After hearing counsel,

Buchanan, J., said that once a month was too infrequent for the visits, whilst twice a week for two hours was too frequent. He suggested that an arrangement should be come to whereby petitioner should see the children once a week, for two hours each time, at some suitable place, and that the application should be withdrawn.

Mr. Currey said the respondent was anxious for some expression of opinion as to the surreptitious meetings.

Buchanan, J., said the Court could only say that such meetings were objectionable, but it could not make an order upon the matter.

The application was therefore withdrawn, no order being made as to costs.

DE BRUYN V. FLETCHER AND CO. IN THEIR CAPACITY AS THE ASSIGNEES OF THE ESTATE OF DANVEES AND CO. } 1899.  
} Dec. 12th.

Title deed — Detention -- Alleged pledge.

*The applicant in 1879 bought certain land through the agency of P., who was acting for the seller,*

and was also in the employment of D. The purchase price was paid but not the costs of transfer and the transfer deed came into the possession of D. D. subsequently assigned his estate to the respondents in whose possession it now was. The applicant applied to them for the deed, tendering the costs of transfer, but they refused delivery on the ground that they held it in pledge for a promissory note dated September, 1884, which had been given to D. by the applicant for the balance of the purchase price. Held, that, as there was no proof of any pledge and as the promissory note was prescribed, the applicant was entitled to delivery of the transfer deed.

Held, further, that an equitable mortgage is not created by the pledge of title deeds in this Colony.

*Kellar's Trustee v. Edmeades* (3 Juta 25), followed.

This was an application on notice to the respondents to show cause why they should not be ordered to deliver to the applicant a certain deed of transfer passed by Gasper Hermanus de Bruyn in his favour conveying certain erven being Lots 1, 2, 3, 4, 5, 6 and 7 in Block E, situate in the village of Stanford division of Caledon, upon payment of the costs of transfer and diagrams amounting to £6 1s. 6d. sterling, which had been tendered, and why they should not be ordered to pay the costs of the application.

It appeared from the affidavits that on the 6th December, 1879, the applicant bought from one Parminter, then in the employment of Danvers & Co., and acting for one Gasper Hermanus de Bruyn, the seven erven referred to for £26.

That one Frans Johannes du Toit, of Stanford, who bought certain other seven erven in Block E on the same day from Parminter, paid Parminter the purchase amount and cost of transfer payable by himself, and also the purchase amount of the applicant's seven erven, but as he had not sufficient money

with him to pay for the costs of applicant's transfer, the applicant still had to release the transfer.

That applicant subsequently settled the amount in account between Du Toit and himself and that the only amount still owing by him in connection with the purchase was the costs of transfer. The respondents refused to give up the deed of transfer unless a certain promissory note for £27 17s. 6d., dated 26th September, 1884, with six per cent interest from that date, making £53 13s. 9d. in all, were paid, which promissory note the respondents alleged had been given by the applicant in settlement of the purchase price of the erven.

The applicant stated that he could not recollect what the promissory note was given for, as he had had many other transactions with Danvers & Co., but that it certainly was not given for the purchase price of the erven, as that was paid by Du Toit (this statement was corroborated by Du Toit).

The applicant further alleged that he never pledged the deed of transfer to Danvers & Co. for any sum of money due by him to them, nor to any other person or persons.

Mr. John Danvers, a partner in the late firm of Danvers & Co., deposed *inter alia* that it was a recognised usage in many places in South Africa, and was the practice adopted by himself and others at Bredasdorp, to allow facilities and credit to customers upon the strength of their title deeds being pledged and that he adopted the same course in the present case.

That the applicant was treated in the same manner. He owed him (Danvers) the balance of the purchase price of the erven and his title deeds were held in pledge thereof.

That in 1886 Danvers assigned his estate to Fletcher & Co. and amongst other documents this promissory note was handed over for collection, but could not be recovered as the applicant was absent in the Transvaal.

Mr. Ward in support of the application: The question is whether a pledge of title deeds is of any effect by the law of this colony. In *Kellar's Trustee v. Edmeades* (3 Juta, 25) it was held to be against public policy. The next question is, whether there was any such a pledge at all? There should be clear proof of such a contract. Danvers refers to a recognised usage, but there is no explicit statement of an actual contract

of pledge. It is for the respondents to show that the document is retained by them under a valid contract of pledge.

Mr. Benjamin for the respondents: The presumption is that the title deed was retained in security for the payment of the purchase price of the property. It is alleged that the promissory note was given for a trading account, but it is curious that the amount is exactly the same as that of the balance of the purchase price. The fact that the title deed was found in the possession of Danvers also creates the presumption that it was pledged to him. The bare equity of the case entitles the respondents to succeed. The promissory note is barred by prescription, but the liability is not destroyed. This Court has never decided that title deeds, as chattels and apart from any interest in land, cannot be pledged. In *Queen's Town Insurance Co. v. Wood's Trustee* (J. 5, 327), it was expressly decided that an attorney has a lien upon them for any work which he has performed upon them. *Kellar's Trustee v. Edmeades* merely decided that a deposit of title deeds did not create an equitable mortgage. The regulations of the Deeds Office recognise such a pledge. See Rule 25. If an attorney can have such a lien, why not other persons. All the current of Colonial decisions has gone against the creation of a charge upon the property by the deposit of title deeds. But supposing that a purchaser has received transfer but has not paid the purchase price, and has then handed the transfer deed to the seller and subsequently applied to the Court for an order compelling the seller to return the deed to him, I submit that the Court would not grant such an order until the purchaser tendered the price.

The Court gave judgment in favour of the applicant.

Buchanan, J., said: In this case the applicant is the owner of certain property the title deeds to which were found in the possession of the respondents. These title deeds *prima facie* belong to the applicant, and he applied to the respondents for them, at the same time tendering the costs expended in passing transfer, which are admitted to be £6 ls. 6d. The respondents declined to give up these title deeds, on the ground that they were pledged to one Danvers, whose assignees the respondents were. It appears that the property to which the title deeds related was sold by H. C. de Bruyn to the applicant in 1879. Danvers, who was not the seller, says

that he gave the applicant credit in certain ways, according to the custom of the district, on the pledge of the deposit of the title deeds, but applicant denies this agreement, and there is no ground for holding that any pledge has been proved. With respect to the title deeds, Mr. Benjamin has insisted on the equity of the case, but there is no such thing as an equitable pledge of title deeds in this country as in England. The judgment in the case of *Kellar's Trustee v. Edmeades* (3 Juta, 25) is decisive on this point; according to English practice no doubt an equitable mortgage may be created by pledging title deeds, but that is not so in this country. However, on the facts no pledge has been established, and on this simple ground alone the applicant is entitled to delivery of the title deeds. The respondents say they hold a promissory note signed by the applicant, but the latter denies that he ever gave such a promissory note in connection with the purchase price of the land. The promissory note has long since become prescribed; the respondents have no claim against the applicant on it which they can substantiate in a court of law. The promissory note alleged to have been given by the applicant to Danvers in 1884 has long ago been barred, no payment having ever been demanded. Under all the circumstances, the title deeds must be delivered up to the applicant on his paying the costs of transfer, which he has tendered. The application must, therefore, be granted in terms of the notice of motion, with costs.

Maasdorp, J., concurred.

[Applicant's Attorney, Paul de Villiers; Respondents' Attorneys, Messrs. Van Zyl & Buiesinné.]

#### IN THE ESTATE OF THE LATE GEORGE CHARLES BRISLEY.

Mr. McGregor applied for the appointment of a trustee to control certain property donated and transferred by the late Mr. Brisley to his minor children during his lifetime. The trustee appointed originally was dead, and it appeared that the interests of the mother, who was testamentary co-guardian, but who had remarried, conflicted to some extent with those of the children with regard to the property in question.

The Court pointed out that it was desirable that the mother should have had notice of this application as she was both natural and testamentary co-guardian. No order

should be made at present, and the question whether the present applicant was the right person to apply should be considered.

IN THE MATTER OF THE PETITION OF  
JACOBUS CLOETE.

Mr. Bisset moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Granted.

STORMONT AND OTHERS V. MZIMBA AND  
OTHERS.

Mr. Buchanan appeared for the applicant Stormont, and asked that the rule granted be allowed to stand over until the 12th of next month.

Mr. McGregor appeared for the respondents.

The application was granted.

IN THE MATTER OF THE MINOR AGNES  
HUNTER.

Mr. Nightingale appeared for the petitioner, the father and natural guardian of the minor Agnes Hunter, and asked for leave to raise a sum of £120 on certain property bequeathed to the minor, to be expended on her education.

Granted.

*Ex parte* SCHOLTZ AND WIFE { 1899.  
Re VAN DER POEL'S WILL. { Nov. 16th.  
Dec. 12th.

Usufructuary—House—Repairs.

*A testator bequeathed certain property to his grandchildren, some of whom were still minors, subject to a life usufruct in favour of the parents of the grandchildren, the property including a house which was occupied by the usufructuaries and their family, and was in bad repair. The testator provided that the usufructuaries should keep the premises in good order and repair. The Court on the petition of the usufructuaries, the executors under the will and the major heirs consenting, granted an order authorising the executors to advance a certain sum of money*

*out of the inheritance of the grandchildren in order to put the house into a proper state of repair and effect certain necessary improvements.*

This was the petition of Daniel Louw Scholtz and his wife Magdalena Maria Scholtz (born Van der Poel) of Green Point, setting out the following facts:

By the will of the late Isaac Petrus Hendrikus van der Poel there was bequeathed to the petitioners' children a certain piece of ground with the buildings and also two certain erven and to the petitioners an annuity of £100 per annum.

The petitioners' children are seven in number, three majors and four minors.

The house in which the petitioners and their family live will on the death of the petitioners pass to their children in terms of the said will. The house is at present in bad repair.

That the proposed cost of putting the house into a state of thorough repair, including the building of an extra bedroom, would be, according to the architects' report, £1,100.

That more than this sum is to the credit of petitioner's children with the Board of Executors, as executors of the estate of the said Van der Poel, and the petitioners' major children and the said Board have agreed to this application.

The prayer was that the Court might be pleased to authorise the Board of Executors to advance the said sum of £1,100 out of the inheritance coming to petitioners' children from the estate of the said Van der Poel on the death of the petitioners, for the purpose of effecting the repairs and additions aforesaid, also for payment of the costs in and about this application.

On the 16th November, Mr. Innes, Q.C., presented the petition, and the application was ordered to stand over for the Master's report.

Mr. Benjamin now presented the Master's report, which was in the following terms:

In a deed of donation executed in his lifetime and annexed to his will, the testator sets forth the conditions upon which he gives to petitioners the usufruct for life of the property at Green Point, namely, "that the above property shall serve and remain as a residence for the said Daniel Louw Scholtz and his wife as long as they or either of them shall live, provided that the rates

and taxes are properly paid and the premises kept in good order and repair by the said Daniel Louw Scholtz and his wife."

In the will this request is confirmed subject, however, to all the conditions and stipulations named in the deed of donation. It is evident that it was the intention of the testator to make provision for his daughter for life, but he certainly expected the petitioners to do their duty and to keep the place in proper repair, for the testator died only two years ago, and the building must have been in as bad a condition then, but no provision is made (in the will) for repairs.

In the concluding paragraph the testator states "the above is a donation in favour of my grand-children."

The grand-children, of whom there are seven, are the residuary legatees, and as such each will receive £883 8s. 3d.; they are also entitled to a sum of £2,500 at the death of the surviving spouse, who has the usufruct of the money. Of this sum of £883 8s. 3d. the grandchildren are entitled to receive half when they attain majority and three of them have already received their shares.

The other half, amounting to £3,092, is made payable at the death of the petitioners, presumably to provide for these or the longest liver an annuity of £100 for life.

This amount will on the death of the surviving spouse be increased by the half of the £2,500 to £1,342, and it is from this sum that the petitioners pray that the money may be advanced to them to particularly rebuild a house, which the first petitioner has allowed to fall into such a neglected condition that it requires immediate alteration. The property is valuable and a new house will greatly enhance its value, and it is but natural to assume that the object of the testator underlying the bequest was to make the best provision for the daughter. Considered from this point of view, and as the major heirs and the Board of Executors, who stand in the position of curators nominate to the minors, have given their consent, I would respectfully suggest that the expenditure of £900 according to the estimate annexed be authorised only for the necessary repairs and proposed improvements, but that the administrators be directed to see that the property is kept in proper repair and to that purpose to apply if necessary the annuity to which petitioners are entitled.

This estimate does not make provision for the building of additional rooms.

The Court made an order in terms of the Master's report except with regard to the clause recommending that the administrators be given power to apply the usufructuary's annuity to repairs.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

GREFF'S TRUSTEE V. FOURIE'S } 1899.  
EXECUTOR AND GREFF. } Dec. 12th.

Insolvency—Ordinance 6, 1843, section 127 Community—Wife's Inheritance.

*The Court has a discretion as to the amount for which it may order a writ of execution to issue under section 127 of Ordinance 6 of 1843.*

*Where an inheritance under her father's will became due to the wife of an unrehabilitated insolvent, married in community of property,*

*The Court, upon the application of the trustee in insolvency, granted an interdict restraining the executor of the testator's estate from disposing of the assets, pending a further order, the applicant to satisfy the Court as to the value of the insolvent's share in the said estate.*

This was an application on notice calling upon the respondents to show cause why an order should not be granted for the attachment of a certain inheritance devolving upon Catharina Elizabeth Fourie (daughter of the late Johannes Petrus Fourie, to whom the second-named respondent is married in community of property), out of the estate of the late Johannes Petrus Fourie, and for leave to issue execution against the above-named insolvent for the deficiency in his said insolvent estate amounting to £715 or thereabout, and the costs of this application.

The applicant, Christian Michael Linde of Oudtshoorn, deposed that he was the sole trustee in the insolvent estate of Gerhardus Johannes Greeff (second-named respondent), and was also a creditor in the said estate.

That the estate was voluntarily surrendered on or about the 15th February, 1897, and deponent was elected sole trustee,

That deponent in due course framed a first and final liquidation account showing the plan of distribution, which account was confirmed by the Supreme Court on the 12th October, 1898. The account showed a deficiency of £715 0s. 9d.

That the insolvent is married in community of property to Catharina Elizabeth Fourie, a daughter of the late Johannes Petrus Fourie, who died on the 30th October, 1899, and by virtue of such marriage a certain share would be claimable out of the said estate.

That the executor testamentary in the estate of the said late Johannes Petrus Fourie, the first-named respondent, has advertised the sale of the assets of the estate for the 13th December, 1899.

That at the request of certain of the creditors deponent addressed a letter to the first-named respondent, laying claim on behalf of the insolvent estate to any inheritance that may accrue to the insolvent by virtue of his marriage aforesaid.

That after some correspondence deponent's claim was not entertained.

That deponent has no means of ascertaining at present what the inheritance coming to the insolvent's wife would amount to, but believes it would yield an appreciable dividend to creditors.

That the insolvent has not been rehabilitated nor has he obtained a certificate from deponent for leave to trade.

That the deponent is apprehensive that the aforesaid insolvent will alienate or dispose of the share of the inheritance coming to his spouse.

Wherefore in the interest of the creditors the deponent prayed as follows:

(a) For an interdict restraining the first-named respondent from parting with any moneys or inheritance that may be found due to the insolvent by virtue of his marriage as aforesaid, except it be to deponent as representing the aforesaid insolvent estate.

(b) For an order compelling the aforesaid respondent in the fullness of time to pay over to deponent all moneys or inheritance coming to the insolvent as aforesaid.

(c) For an interdict restraining the respondent from disposing of or in any way alienating the share of inheritance or any moneys accruing to him out of the estate of the said late J. P. Fourie by virtue of his marriage as aforesaid.

(d) Such further or other relief as to the Court might seem meet.

A letter from the insolvent addressed to the Registrar of the Court alleged that the value of the inheritance was only £15.

Mr. Close for the applicant: The application is made under section 127 of Ordinance 6 of 1843. The property vested in 1899 after the confirmation of the account. Section 127 is peremptory. *Smith v. Kotze* (1-74, p. 137.)

[Buchanan, J.: That case shows that the Court is not bound to allow attachment in execution for the whole amount. I remember that the Court took time to consider for what amount the execution should issue.]

The statement that the inheritance is only worth £15 is not on oath; we have other information.

The Court interdicted the respondent Greeff from disposing of his share of the property, and the executor from disposing of the assets pending the further order of the Court. The applicant to satisfy the Court of the value of the insolvent's share in the estate.

Buchanan, J.: In the case of *Smith v. Kotze* where the insolvent had a claim for £2,000, attachment to the extent of £250 was ordered. It is a matter wholly within the discretion of the Court. The Court should have some information as to the value of the estate. One affidavit states that it is only £15, and it would be useless to issue execution against such an amount in this case, as it would not give any appreciable dividend to creditors. As it is pressed for, for the present an interdict will be granted, preventing the disposal of his share in the estate by respondent, and interdicting the executor from paying over the proceeds of any sale to respondent. A further application can be made later on if necessary.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

MC DONALD V. LOWIES—*Re* DU PLESSIS' ESTATE. 1899.  
Dec. 12th.  
1900.  
Jan. 12th.

Executor—Co-executor—Refusal to sign account.

*Upon the application of an executrix who had prepared and signed a liquidation and distribution account which her co-executrix refused to sign, a rule nisi was granted calling upon the co-*



*executrix to show cause why she should not sign the said account or be removed from her office as executrix, and the rule was subsequently made absolute.*

This was an application by Felida Hermina Christina McDonald (born Volkwyn), formerly widow of the late David du Plessis, in her capacity as one of the executrices of his estate, married to and assisted as far as need be by James McDonald, calling upon the respondent Maria Lowies (born Du Plessis) married to and assisted as far as need be by Jafta Lowies in her capacity as the other executrix of the estate of the late David du Plessis, to show cause why an order should not issue compelling her to sign the necessary liquidation and distribution account in the estate of the late David du Plessis and all other documents and papers, and to do all such acts and things as may be necessary for her to do as co-executrix of the said estate for the liquidation and administration thereof, or otherwise to show cause why she should not be removed from her office as co-executrix and for the infliction of all such penalties as by law she was liable to by reason of her defaults, and why she should not be ordered to pay the costs of the application.

The petitioner alleged that she was the surviving spouse of the late David du Plessis, and one of the executors of the estate, and that the respondent was the other executor.

That she (applicant) had prepared the liquidation and distribution account of the property found in the estate, that she had signed the same on the 21st November, 1899, and that she had requested the respondent to sign the account, but that the latter refused to do so or to have the account explained to her.

That the respondent had no just and feasible grounds for refusing to sign the said account, which is duly supported by vouchers.

Mr. Close appeared for the petitioner.

Upon hearing the petition the Court granted a rule *nisi* calling upon the respondent to show cause on 12th January why she should not sign the account, or in the alternative, why she should not be removed from her office as executrix.

*Pos ca* (12th January).

The rule was made absolute.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

BEER V. WESTERMAN. { 1899.  
Dec. 12th.

This was an application for an order calling upon the respondent to deliver up possession of certain premises situated in Longmarket-street, Cape Town, known as the Black Horse Hotel, in terms of a certain deed of sale dated 9th October, 1899.

The applicant alleged the purchase of the premises, goodwill, &c, from the respondent on the 9th October, 1899, possession to be given on the 1st November in terms of a certain sale note. That the respondent was subsequently allowed to retain possession until the 15th November upon his agreeing to sign a further note of sale. That possession had been demanded and the purchase price tendered, but the respondent refused to deliver possession of the premises.

The respondent filed an affidavit in which he alleged that there was a distinct understanding that as the Black Horse Hotel was tied to Messrs. Wm. Gourlay & Co. for the supply of foreign wines, stout, ales, beer, &c, for a fixed period, that the said Beer was to take over this contract and to stand in the stead of the respondent for the remainder of the contract; that the said Gourlay agreed to accept the applicant in the stead of the respondent under the contract and to credit him to the extent of £50 upon certain security. Furthermore, that the respondent agreed to accept £400 in bills as part of the purchase amount for the said hotel, providing a good endorser could be obtained by the applicant: that one Ritter was agreed upon as the endorser.

That these conditions were to be carried out by the applicant before taking possession of the premises, but he now declined to sign any contract with the said Gourlay or to obtain the endorsement of a substantial person on the £400 bills.

The applicant denied these allegations, and various affidavits were filed in support of both parties in which there was considerable conflict as to the agreement.

Mr. Upington appeared for the applicant; Mr. Buchanan for the respondent.

The Court decided that it was impossible to decide the facts upon a motion. Therefore no order was made, and it was decided that the question of costs should also stand

over. The Court also decided to allow the notice of motion to stand as a summons in the case.

[Applicant's Attorney, Gus. Trollip ; Respondent's Attorney, J. Ayliff.]

LANGBOOI V. GOTHE. { 1899.  
{ Dec. 12th.

Master and servant—Payment by the month—Construction of contract.

G, a railway sub-contractor, entered into a verbal agreement with L. and other natives to employ them as labourers in the construction of a line of railway.

The agreement provided that each labourer's wages should be 3s. per diem payable monthly on pay day.

Held, affirming a Magistrate's judgment, that L. could only claim his wages on pay day as provided by the contract.

— — —  
This was an appeal from a decision of the Acting Assistant Resident Magistrate of Somerset West, in an action in which the present appellant, plaintiff in the Court below, sued the defendant, the present respondent (1st) for the sum of £2 11s. for work and labour performed by the plaintiff for defendant, viz., 17 days at 3s. *per diem* on the railway extension from Sir Lowry's Pass in the month of September last; (2nd) for the sum of £1 1 s. as and for damages sustained by the plaintiff in that the defendant has wrongfully and negligently refused to pay to him the aforesaid wages.

The defendant pleaded (1st) that the plaintiff was engaged as a monthly servant, rated at 3s. *per diem*, payable when pay day comes round on the Sir Lowry's Pass construction according to the contract of service entered into by him and all men on the railway works.

That on or about the 28th September he was arrested for refusing his work and using insolent language towards his master, for which offence he was convicted on the 29th September last.

At the time of his arrest the sum of £2 11s., less for stores and doctor's account amounting to 11s. 2d. altogether, that is, £1 19s. 10d. was due to him.

That thereafter on the 30th September last, when he applied for his wages he was told that he had to adhere to his service contract and wait for his pay until pay day came round, or otherwise work up till pay day when the full amount due to him would be paid.

That plaintiff has already once received a monthly payment on or about the 8th September last, and no payments are made to any of the men employed on the line until the time when pay day comes round once every month. This is in strict adherence to their contract with their masters.

That on the 6th October when the defendant received the demand dated the 4th October the defendant caused a letter to be written to the plaintiff's agent admitting the amount of £1 19s. 10d. due, which would be paid in terms of the said verbal contract and stating *inter alia* that pay day would come round on the 13th October.

On the same day the demand was received the defendant also received the summons.

Defendant therefore tenders the sum of £1 19s. 10d., which would have been paid to plaintiff on Monday the 9th October had he come for his money as it was pay day, and defendant now asks that judgment may be entered against him for the sum of £1 19s. 10d. and that plaintiff be ordered to pay all the costs.

(2) In regard to the second count, defendant denies his liability.

The Acting Assistant Resident Magistrate gave judgment in favour of the plaintiff for £1 19s. 10d. (the amount tendered) and ordered him to pay the costs.

The facts appear sufficiently from the Magistrate's reasons, which were as follows:

"Held in this case that there was a distinct stipulation attached to the contract of service, viz., that wages were payable only once a month when pay day arrived (that is on the arrival of the pay train usual in railway transactions).

"The question of the nature of the service, whether daily or monthly, did not affect the case. The plaintiff acknowledged that he was to be paid once a month. The contractors evidently make this perfectly plain to the men since they themselves (the contractors) do not receive their pay until pay day arrives. The defendant brought a Kafir witness, the interpreter, to corroborate his statement as to the stipulation regarding the monthly payment.

"As plaintiff had agreed to this he was not entitled to claim his pay until pay day

came round, and under such circumstances no damage was sustained, and since he insisted on bringing this action into court he was ordered to pay the costs."

From this judgment the plaintiff now appealed.

Mr. Buchanan in support of the appeal: The first question is, what was the contract? The plaintiff said he was paid by the month, therefore he must have been engaged by the month. Defendant wished the Court to infer that he made a distinct contract with the plaintiff that he should be paid by the day, but that he should be paid once a month; he also says that it was stipulated that the plaintiff should pay the doctor's account. On the facts found by the Magistrate the amount of 11s. 2d. should not have been deducted. The account was not verified. The Magistrate was wrong also in making the plaintiff pay the costs, because as soon as the contract was broken the defendant should have paid the plaintiff and not made him wait about, especially as he came from a distance.

Mr. McGregor for the respondent.

The appeal was dismissed.

Buchanan, J., after referring to the evidence and the Magistrate's findings thereon, said this was an appeal on the facts, which were in dispute. If the Magistrate had found the other way, he would not have been prepared to object to such a decision. But the Magistrate had found for the defendant, and there was evidence to support that finding, and this Court, as a Court of Appeal, should not now interfere. As to the contention that the plaintiff was not obliged to wait till pay day, that might have been so, had it been proved that the defendant had terminated the contract and dismissed the plaintiff. But the defendant's evidence was to the effect that he had not dismissed the plaintiff, but on the contrary that he needed his services and had told plaintiff to continue working to the end of the month. This evidence was believed by the Magistrate. The appeal must be dismissed with costs. As to the defendant's personal expenses awarded by the Magistrate, that of course must be limited to his necessary witness's expenses.

Maasdorp, J., concurred.

[Appellant's Attorney, J. Ayliff; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

## SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MICHAU V. THE QUEEN AND  
THE OFFICER IN CHARGE OF  
THE NEW MILITARY HOSPI-  
TAL, BREAKWATER, CAPE } 1899.  
TOWN. } Dec. 27th.

This was an application on notice to the Attorney-General and to the officer in charge of the New Military Hospital Breakwater, Cape Town, that the latter would be called upon to produce the petitioner, Jan Johan Michau, now a prisoner in his charge. He was also required to show the cause of, and the authority for the detention of the said prisoner.

A letter had been written by the second named respondent, in reply to the notice of motion, stating that the petitioner was no longer under his charge, having been removed on the 22nd December to De Aar by order of the Staff Officer for Prisoners of War.

Mr. McGregor, for the petitioner, applied for a postponement of the hearing.

Mr. Sheil, Q.C., for the Crown, consented.

The hearing was accordingly postponed until the 12th January, in order that notice might be given to the military authorities at De Aar.

[Applicant's Attorney, C. W. Herold.]

## APPENDIX.

COOK BROTHERS V. THE COLONIAL GOVERNMENT.

Crown — Liability — Annexation —  
Concession — Act 37 of 1888.

*The grantee of a concession made by a native paramount chief, can not after the annexation of the territory of the chief by the Crown, enforce against the Crown the rights conferred by the concession. Act 37 of 1888, which gives a power to sue, does not empower the*

*Court to make a declaration of right as against the Crown in such a case.*

*Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Thomas Cook and James Charles Cook v. Sir John Gordon Sprigg, from the Supreme Court of the Cape of Good Hope; delivered the 1st August, 1899.*

Present at the hearing :

THE LORD CHANCELLOR.  
LORD WATSON.  
LORD HOBHOUSE.  
LORD MACNAGHTEN.  
LORD MORRIS.

*[Delivered by the Lord Chancellor.]*

This is an appeal from the Supreme Court of the Cape of Good Hope, wherein judgment was given for the defendant.

The action is brought against the Prime Minister of the Colony, in his official capacity, under the powers of an Act of the Parliament of the Cape of Good Hope intitled "The Crown Liabilities Act, 1888," which permits such an action to be brought in terms hereafter to be referred to.

The case made on behalf of the plaintiffs was that certain agreements or concessions were made by a native chief described as "Paramount Chief" of Pondoland, granting certain privileges and rights to the appellants.

It appeared to be established by proof that the appellants never in fact obtained possession of the lands or exercised the rights which these documents purported to convey, but it is argued that some effort was made to search for "graphite" in pursuance of these documents.

A considerable amount of evidence appears to have been given with the object of showing that the rights purported to be granted were contrary to the native laws and customs prevailing in Pondoland at the time when they purported to be granted; that Sigcau was a lawless despot, and that any rights purported to be granted by him were subject to his arbitrary power to recall them at any moment. And further, that Sigcau did not understand the meaning or object of the documents which he was supposed to execute.

Their lordships do not differ with the finding in fact by the Chief Justice that at the time that Sigcau executed the instruments in question, he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed professed to convey.

Their lordships do not think it material to enter into such questions, inasmuch as they are of opinion that the statute which gives a power to sue the Prime Minister does not involve the power of making any declaration of right in such a case. And as mere matter of form, it does not contain any clause empowering the Court to make a declaration of right as against the Crown; but there is a more complete answer to any claim arising from these instruments. The taking possession by Her Majesty whether by cession or by any other means by which sovereignty can be acquired was an act of State, and treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him—it is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.

It is no answer to say that by the ordinary principles of international law private property is respected by the Sovereign which accepts the cession and assumes the duties and legal obligations of the former Sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of sovereignty by cession *ought* not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by Sovereign against Sovereign in the ordinary course of diplomatic pressure.

In this case it certainly cannot be said that there was any bargain by the British Government that Sigcau's supposed concessions should be recognised. Indeed, the only intelligible sense in which the allegations in the declaration can be understood is that the breach of duty complained of consists in the refusal of the Cape Government to recognise the plaintiffs' concessions.

To quote the language of this Board used by Lord Kingsdown in the case of *The Secretary of State for India in Council v. Kamachoe Boye Sahaba* 13, *Moore's Privy Council Cases* 22 at p. 86 and cited in *Doss v. The Secretary of State for India in Council* (L.R., 19 Eq., p. 534) :

"Of the propriety or justice of that Act" (here the refusal to recognise) "neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected.

These are considerations into which their lordships cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

At the same time their lordships are by no means prepared to differ from the observations of the Chief Justice that the appellants "have strong claims to the favourable consideration of the Government and Parliament of the country."

Their lordships will therefore humbly advise Her Majesty that this appeal should be dismissed, the parties on each side to pay their own costs.













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